NOTES

CONSTRUCTION OF INTENT IN LIMITATIONS TO GRANTOR’S HEIRS

A transferor of property, wishing to anticipate the possible failure of a limitation because his beneficiaries may die prior to becoming entitled to their interests, may often designate his own heirs or those of a grantee as his ultimate beneficiaries. “Heirs” is a particularly suitable term for this ultimate limitation be-
cause the class is not likely to fail for want of persons complying with the
description. Nevertheless, the draftsman of such an instrument may be treading
on dangerous ground. While he is perhaps wary of the pitfalls of the rule in
Shelley's Case, its companion doctrine, the rule of "worthier title," has not at-
tained comparable notoriety. Unless the latter is also considered, his grant may
constitute an invitation to litigation.

At common law an ultimate limitation to a grantor's heirs after an estate tail
or a lease for life resulted not in a remainder to the heirs but in a reversion in the
grantor. Several explanations were advanced for such construction. The rule
was probably based on the feudal preference for title by descent over title by
purchase, originating in the desire of the overlords to preserve valuable incidents
accruing to them when property passed by descent. Lord Coke thought the
principle behind the rule to be the common-law fiction that "the ancestor during
his life bears in his body (in judgment of law) all his heirs." Later authority saw
the doctrine as a special application of the rule in Shelley's Case, while still
others propounded the maxim nemo est haeres viventis. Although the rule was
abolished in England by statute in 1833, the doctrine of worthier title has been
applied in modified form by the American courts as a "rule of construction."
In the leading case of Doctor v. Hughes, Judge Cardozo, speaking of a limitation
to the heirs of the settlor of an inter vivos trust, declared that "to transform into
a remainder what would ordinarily be a reversion the intention to work the
transformation must be clearly expressed." Largely on the authority of Doctor v.
Hughes, an increasing number of American courts have given effect to the
grantor's clearly expressed intention to transfer a remainder to his heirs. As

1 Bingham's Case, 2 Co. Rep. 91a (K.B., 1600); Read v. Erington, 78 Eng. Reprint 571
(K.B., 1594); Bedford v. Russel, 79 Eng. Reprint 726 (K.B., 1593); Fennick v. Mitford, 74
2 Rest., Property § 314 Comment a (1940).
3 Co. Litt. *22b. Coke states that the same principle accounts for the construction in the
more common case, "that if land be given to a man and his heirs, all his heirs are so totally in
him, as he may give the lands to whom he will." Ibid.
4 "In this case, inasmuch as the interest limited to the heirs special of the grantor cannot
vest until his death, and the preceding interest may regularly expire before his death, pay the
very instant after delivery of the deed creating them, there is a freehold use remaining undis-
posed of in the grantor, sufficient to attract the operation of the rule [in Shelley's Case]."
2 Fearne, Contingent Remainders 226 (1844).
5 Brolasky's Estate, 302 Pa. 439, 153 Atl. 739 (1931); Glenn v. Holt, 229 S. W. 684 (Tex-
Civ. App., 1921); Robinson v. Blankenship, 116 Tenn. 394, 92 S.W. 854 (1906). The principle,
however, would not seem to preclude the interest from vesting if the grantor predeceases the
6 3 & 4 Wm. IV, c. 106, § 3, provides: "[W]hen any land shall have been limited by any
assurance . . . to the person or to the heirs of the person who shall thereby have conveyed the
same land, such person shall be considered to have acquired the same as a purchaser by virtue
of such assurance, and shall not be considered to be entitled thereto as his former estate or
part thereof."
7 225 N.Y. 305, 122 N.E. 221 (1919).
8 Ibid., at 312.
9 See cases collected in 125 A.L.R. 548 (1940).
thus modified, the doctrine has been accepted as harmonious with the modern emphasis on intent as a touchstone in interpreting writings.\textsuperscript{10}

In the New York courts the problem of determining intent in applying the \textit{Hughes} doctrine has now become a constant source of litigation. Settlers of inter vivos trusts have continuously invoked the rule of worthier title to eliminate their heirs from the class of "beneficially interested" persons whose consent was necessary for revocation.\textsuperscript{11} Successive cases have emphasized different factors in deciding whether the heirs had been intended to take as remaindermen: 1) Has the settlor reserved the power to defeat the limitation to heirs by testamentary appointment?\textsuperscript{22} 2) Has there been a "full and formal" disposition of the trust property?\textsuperscript{23} 3) Has the settlor reserved powers to grant or assign an interest in the property during his lifetime?\textsuperscript{24} 4) Can the property return to the settlor during his lifetime upon any contingency?\textsuperscript{25} 5) Is the trust primarily for the benefit and enjoyment of the settlor?\textsuperscript{26} 6) Are the purported remaindermen to be determined upon any date other than the settlor's death?\textsuperscript{27} 7) Is a particular state designated whose laws of intestate succession would control the determination of beneficiaries?\textsuperscript{28}

\textsuperscript{10}"The continuance of the rule... as a rule of construction is justified on the basis that it represents the probable intention of the average conveyor." Rest., Property § 314 Comment a (1940).


\textsuperscript{24}Richardson v. Richardson, 87 N.E. 2d 54 (N.Y., 1948); Engel v. Guaranty Trust Co. of N.Y., 280 N.Y. 43, 19 N.E. 2d 673 (1939); Hussey v. City Bank Farmers Trust Co., 261 N.Y. 533, 185 N.E. 726 (1933); Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929).

\textsuperscript{25}Richardson v. Richardson, 87 N.E. 2d 54 (N.Y., 1948); Engel v. Guaranty Trust Co. of N.Y., 280 N.Y. 43, 19 N.E. 2d 673 (1939).


The uncertain bearing of these factors upon the settlor's intent has led to conflicting and unpredictable results in the New York courts, and a considerable body of law has grown up around the hitherto seldom invoked rule. The attempt to qualify the doctrine of worthier title has succeeded largely in multiplying the occasions upon which litigation is necessary to determine the legal effect of the disputed limitations. There are, moreover, other results which have to be laid at the door of the Hughes doctrine. The English version of the rule of worthier title had, prior to its abolition, been applied only to transfers of real property. However, in the change from a rule of law to a rule of construction, the way was paved for its application to personal property as well as realty. The result was that the scope of the rule has been increased considerably beyond its original ambit by the very attempt to limit it. But this broadened application has not been compensated for by increased freedom in the judicial determination of intention, since much of the same evidence of this intent ushered in by the Hughes doctrine had already been admissible under the English rule to prove that the grantor had meant the remaindermen to be personae designatae rather than technical heirs.

Finally, although the courts have been nominally committed by the American rule to the search for intention, their approach hardly supports the theory that their construction reflects the transferor's intent. Although a grantor says that a limitation is to his heirs, this seemingly clear mandate will not be given effect unless further corroborated by any of a host of auxiliary circumstances, such as those required by the New York courts. When worthier title was a rule of law, the courts did not profess to be searching for the grantor's intention, but in the subsequent attempt to make such a search no reason was given why the direct words of the limitation were not to be considered sufficient evidence of the grantor's meaning.

Moreover, the intention sought by the courts has commonly been that of creating a remainder or of reserving a reversion. Once this problem has been resolved, all of the grantor's rights are crystallized in toto and all of the incidents of remainders or reversions presumably attach to his grant. The notion is that the court must first decide upon the interest created before it can determine the

19 The court in the Whittemore case, 250 N.Y. 298, 165 N.E. 454 (1929), while refusing to apply the rule to a trust of personal property, had intimated that it was applicable in a proper case. This was stated squarely in Engel v. Guaranty Trust Co. of N.Y., 280 N.Y. 43, 19 N.E. 2d 673 (1939).

20 This is one of the significant differences from the rule as applied to devises. See 4 Kent's Comm. 506 (12th ed. by Holmes, 1873); Harper and Heckel, The Doctrine of Worthier Title, 24 Ill. L. Rev. 627 (1930).

21 "We are aware that this conclusion antagonizes a cardinal rule in the present day construction of written instruments in that it wholly eliminates a portion of the language of the deed, to which portion due effect might readily be given." Brolaskys' Estate, 302 Pa. 439, 447, 153 Atl. 739, 741 (1931). But see Rest., Property § 314 Comment a (1940): "Where a person makes a gift in remainder to his own heirs... he seldom intends to create an indestructible interest in those persons who take his property by intestacy, but intends the same thing as if he had given the remainder 'to my estate.'"
rights of the parties litigating the construction of the instrument. Since the task is to search for evidence consistent with the creation of a certain kind of future interest, the future interest itself is posited as the object of the grantor’s intent. The interpretive process is therefore a determination of the concept which most exactly subsumes the aggregate of incidents which have been written into the grant. The result is then labeled the grantor’s “intent.”

What are the particular sources of litigation in which the rule of worthier title may determine the result? The cases indicate five basic situations: 1) actions determining the rights of creditors to levy on the interest;22 2) actions, usually in partition, between heirs who claim as remaindermen and heirs claiming the reversion by descent;23 3) actions to revoke an inter vivos trust without the consent of heirs claiming to be “beneficially interested,”24 4) actions between subsequent conveyees or devisees of the grantor’s reversionary interest and those who claim as remaindermen;25 and 5) tax actions against the estate of the holder of the purported reversion.26 Although a grantor’s or settlor’s intent as to each contingency may vary, this difficulty may be glossed over very easily by holding them all dependent upon the presence or absence of a reversionary interest. But such technique overlooks the fact that the kind of interest which has been created or reserved need necessarily be relevant in only two situations. The first is in tax actions, where the presence of a reversionary interest subjects the property to the federal estate tax;27 the second is in the determination of creditors’ rights, where the ownership of the interest must be ascertained to authorize the right to levy upon it. The other situations in which worthier title arises involve only a determination of the particular incidents attached to the grant—incidents which, if specifically enumerated, would have provided no cause for litigation.

Since a grantor may have some intention with respect to these incidents, courts which define their task in terms of a search for the intended type of future interest are, to that extent, falsifying the object of their inquiry. Evidence relevant to the problem of whether the interest in question is a remainder or a reversion may have little bearing on the particular issue being litigated. The court that emphasizes the fact that the heirs are to be determined at a date

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23 Shaw v. Arnett, 33 N.W. 2d 609 (Minn., 1948); Brolasky’s Estate, 302 Pa. 439, 153 Atl. 739 (1931).
24 Notes 12–18 supra.
25 Wilcoxon v. Owen, 237 Ala. 169, 185 So. 897 (1938); West Tenn. Co. v. Townes, 52 F. 2d 764 (D.C. Tenn., 1931); Akers v. Clark, 184 Ill. 136, 56 N.E. 296 (1900).
26 Commissioner of Internal Revenue v. Spiegel’s Estate, 159 F. 2d 257 (C.C.A. 7th, 1946), cert. den. 331 U.S. 737 (1946); Beach v. Busey, 156 F. 2d 496 (C.C.A. 6th, 1946); Morsman v. Commissioner of Internal Revenue, 90 F. 2d 18 (C.C.A. 8th, 1940).
other than the grantor's death, to settle the question of whether he meant to reserve powers to convey or devise the interest claimed by the purported remaindermen, may be doing grave injustice to what the grantor actually had in mind.2

A recent Minnesota case, Shaw v. Arnett,9 provides a useful illustration. A grantor executed an inter vivos conveyance to his son for life, "with remainder in fee to his children; should he die leaving no child or children . . ., then said lands to revert to the heirs of the grantor herein."30 After the grantor's death the life tenant died intestate and childless, leaving his widow as sole heir at law. In the suit for partition of the subject matter of the conveyance, the widow claimed her husband's intestate share on the theory that the estate reverted to the grantor by operation of the rule of worthier title. The grantor's surviving children asserted that they took a contingent remainder under the grant which vested at the life tenant's death, so that the life tenant had no interest in the fee. The court concluded that there was only one question for determination: "Did [the grantor] retain a reversion in the real estate in question after he conveyed the life estate to his unmarried son, who later married but never had children?"31 This issue was considered to turn upon the rule of worthier title. There being no evidence of an intent to create a remainder, the interest was held to be a reversion which vested in the grantor's heirs, including the life beneficiary, upon the grantor's death.

The Minnesota court's approach to the problem made it necessary to determine whether the interest passed by purchase or descent before the court could decide the date upon which it vested. But this date was itself the only material issue of the litigation. If the date of the grantor's death controlled, the life beneficiary was included within the phrase "heirs of the grantor herein." If the date of termination of the life estate controlled, the widow could take no interest, since her husband could not be a member of the class "heirs." The problem should thus have been only to determine the grantor's intent as to this date. The clear meaning of the word "heirs" should have indicated that the grantor thought of the class in terms of the date of his death,32 and this inquiry should

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28 The recent trend of the New York cases in refusing to consider the date upon which the heirs are to be ascertained as relevant in determining the right of revocation may imply a recognition of this possibility. Julier v. Central Hanover Bank & Trust Co., 272 App. Div. 598, 74 N.Y.S. 2d 262 (1947), motion for leave to appeal denied 297 N.Y. 853, 78 N.E. 2d 869 (1947); Scholtz v. Central Hanover Bank & Trust Co., 295 N.Y. 488, 68 N.E. 2d 503 (1946); Green v. City Bank Farmers Trust Co., 72 N.Y.S. 2d 442 (1947).
29 33 N.W. 2d 609 (Minn., 1948).
30 Ibid., at 610.
31 Ibid., at 611.
32 Rest., Property § 308 (1940). This was cited by the court but employed differently. The objection that the solution submitted merely substitutes one "rule" for another is not without force. However, the principle that heirs are determined upon the ancestor's death unless a contrary intention is expressed, has an immeasurably stronger foundation in the actual intention of the grantor than the assumption that a remainder or reversion is the object of this intent.
have been divorced from the barren question of whether he intended a reversion or a remainder. Yet this distinction was obscured by the fact that the court felt obliged to classify the future interest before it could settle the issue before it.

The effect of the doctrine of *Doctor v. Hughes* has been to cause the courts considerable embarrassment in this branch of the law of future interests. While short shrift has been made of the touchstone of intention, the difficult problems of construction introduced and their extension to personal as well as real property have served only to increase litigation. It may be that the solution to these difficulties lies in a return to the arbitrary but more predictable English version of worthier title. Intention can be furthered as much by clear rules of guidance at the drafting stage as by elastic rules of construction when litigation arises. The New York experience seems to warrant a step in this direction. Still, if intention is to be sought at all, the approach submitted has the merit of stating it in terms that are realistic. The Uniform Law Institute has proposed a third alternative giving effect to the literal words of the disputed limitation. Both the latter solution and the discarded English view recognize the value of a clear and predictable rule, although this is necessarily at the expense of being somewhat arbitrary.

**CONSTITUTIONALITY OF STATE EQUALIZATION OF PROPERTY ASSESSMENTS IN ILLINOIS**

In two decisions involving the assessment and taxation of real property,¹ the Illinois Supreme Court recently upheld the constitutionality of the Butler Program² of state equalization which attempts to effect "full value" assessments in the administration of the Illinois general property tax. A definite ruling on the program's validity in relation to personal property taxation was avoided, however, by the United States Court of Appeals for the Seventh Circuit³ on an appeal from a district court decision which had found the program, as it is presently administered, to be unconstitutional, particularly as applied in the taxation of personal property.⁴

The enactment of the Butler Program reforms in 1945 marked an important

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¹ "When any property is limited, in an otherwise effective conveyance inter vivos, in form or in effect, to the heirs or next of kin of the conveyor, which conveyance creates one or more prior interests in favor of a person or persons in existence, such conveyance operates in favor of such heirs or next of kin by purchase and not by descent." Proposed Uniform Property Act § 15. But for an able defense of the present rule, see Professor Warren's article in 2 U. of Toronto L.J. 389 (1938).


⁴ In the Matter of Chicago Railways Co., 175 F. 2d 322 (C.A. 7th, 1949).

⁵ In re Chicago Railways Co., 79 F. Supp. 989 (Ill., 1948).