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## A Surviving Oddity: The Inter Vivos Branch of the Doctrine of Worthier

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## STUDENT NOTES

### A Surviving Oddity: The Inter Vivos Branch of The Doctrine of Worthier Title

The scope of this writing is to examine the status of the doctrine of worthier title<sup>1</sup> in relation to inter vivos conveyances of real and personal property in West Virginia. This, it is believed, should be of importance both to the general practitioner engaged in frequent conveyances of real property and in certification of titles, and also to the estate planner who chooses the trust deed as a vehicle of partial or complete disposition of a client's possessions.

It is probably a rule of law in this jurisdiction that when an inter vivos conveyance of real property by the owner of the fee

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<sup>1</sup> This rule has also been referred to as "the rule against a remainder to the grantor's heirs", and also as "the conveyor-heir rule." See, *Braswell v. Braswell*, 195 Va. 971, 81 S.E.2d 560 (1954); *McKenna v. Seattle-First Nat'l Bank*, 35 Wash.2d 662, 214 P.2d 664 (1950).

simple estate contains a limitation to the heirs of the conveyor, or equivalent words, such limitation is construed as void and there remains an immediate reversionary interest in the conveyor by operation of law.<sup>2</sup> According to the case law six requisites must be satisfied before the rule is invoked: (a) there must have been an inter vivos conveyance; (b) a conveyor must have owned the fee; (c) the subject of the conveyance must have been real property; (d) there must have been language in the grant ultimately limiting property to the conveyor's heirs; (e) there must have been language determining the heirs only at the death of the conveyor; and (f) the deed must have transferred another interest in the property mediately or immediately preceding the void interest in the conveyor's heirs.<sup>3</sup> Without further elaboration at this point as to the content and effects of the doctrine, an examination of the reasons for a discussion of the subject appears germane.

First, the particular words of the granting instrument which invoke the application of the doctrine are the ones commonly used by conveyancers in many contexts, admittedly, however, not often in the atypical situation to be described at length within. Second, the ultimate state of the title of the property involved in the dispositive web of the doctrine may be in absolute opposition to the intentions of the grantor and the unwary conveyancer. Third, because of the manner in which the rule became a part of the law of this jurisdiction and because there has been neither mention or adjudication of it by the West Virginia Supreme Court nor statutory elaboration of it by the West Virginia Legislature, the doctrine simply has not been brought to the attention of those who may be affected by it. A collateral reason for discussion is to distinguish this doctrine from the defunct Rule in Shelley's Case (defunct as to all conveyances made since 1931 which would have been affected by the Rule in Shelley's Case). Finally, the difference between the statement of the West Virginia view of the doctrine and that of the majority of other jurisdictions' statement of the rule will be discussed.

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<sup>2</sup> Cf RESTATEMENT, PROPERTY § 314 (1) (1940); 1 AMERICAN LAW OF PROPERTY § 4.19 (Casner ed. 1952); Annots. 125 A.L.R. 548 (1940), 16 A.L.R.2d 691 (1951). There is no definitive statement of the doctrine of worthier title comparable to Gray's statement of the Rule Against Perpetuities.

<sup>3</sup> See the cases collected in note 8, *infra*; See generally SIMES & SMITH, FUTURE INTERESTS § 1606 (1956).

What was the original basis for the doctrine of worthier title? It has been concluded by most modern authorities that its origin stemmed from the feudal incidents of the day.<sup>4</sup> Chief among these incidents, *only imposed upon the heir when he took by descent*, were: relief, a sum payable by the adult heir for the privilege of succeeding to the land upon the death of the tenant; wardship, by which the lord was entitled, during the guardianship of a minor heir, to the rents and profits from land; and marriage, which obligated the heir or heiress to pay to the lord the value of the marriage should he or she reject a suit proffered by the lord, or double the value of the marriage should he or she marry without consent.<sup>5</sup> The tenants in time sought devices such as the deed to circumvent these "taxes." A deed effectively circumvented the rule that the feudal incidents were imposed upon the heir by descent in that the heir instead took his land by inter vivos purchase. Avoiding the obvious pitfall of trying to ascertain which came first — the rationale of the doctrine, i.e., the worthier title is by descent, or the doctrine itself — suffice it to say that the doctrine provides one more example why it remains incumbent upon the modern conveyancer to maintain more than academic interest in feudal estates.

In one of the earliest textual statements of the Doctrine of Worthier Title, Blackstone said,<sup>6</sup>

"For if one seized of a parental estate in fee makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion . . . ; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done: for it is an old estate, which was originally in him, and never yet was out of him."

Hargrave, when speaking of the principle said it was "a positive rule of . . . our law."<sup>7</sup> These statements represented the commentators' assimilation of the English cases to that time.<sup>8</sup> Most of

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<sup>4</sup> SIMES & SMITH, *op. cit. supra* note 3 § 1602; 1 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 2; 3 POWELL, REAL PROPERTY § 381 (1952).

<sup>5</sup> RESTATEMENT, PROPERTY § 314, comment a. (1940); 1 TIFFANY, REAL PROPERTY § 19 (1939); BURBY, REAL PROPERTY at 4 (1943).

<sup>6</sup> 2 BLACKSTONE, COMMENTARIES \*176.

<sup>7</sup> 1 HARGRAVE'S LAW TRACTS 571 (1787).

<sup>8</sup> *Godolphin v. Abingdon*, 2 Atk. 57, 26 Eng.Rep. 432 (Ch. 1740); *Godbold v. Freestone*, 3 Lev. 406, 83 Eng.Rep. 753 (K.B. 1695); *Barton's Case*, Moore K.B. 742, 72 Eng.Rep. 876 (1599-1600); *Bingham's Case*, 2 Co. 91a, 76 Eng.Rep. 611 (K.B. 1598-1600); *Butler v. Archer, Owen* 152, 74 Eng.Rep. 968 (K.B. 1594); *Earl of Bedford's Case*, Moore K.B. 718, 72 Eng. Rep. 861 (1592-3); *Read v. Erington*, Cro.Eliz. 321, 78 Eng.Rep. 571 (K.B. 1591); *Fennick & Mitford's Case*, 1 Leon. 182, 74 Eng.Rep. 168 (K.B. 1589).

these early decisions concerned limitations in remainder to the conveyor's heirs, preceded either mediately or immediately by a fee tail,<sup>9</sup> rather than by a life estate as Blackstone put it. Notwithstanding the type of present estate created, the principle with emphasis on the future estate (the limitation over to the conveyor's heirs) became a judicial addition to the common law of England.<sup>10</sup>

In approaching this particular problem, the practitioner must be aware of the differences between the two future interests<sup>11</sup> of remainder and reversion. The former arises by the express words of the parties themselves, for example: *A* conveys to *B* for life, then to *C* and his heirs. By the words of the instrument, *C*, a living person, took a vested future interest in remainder. His property right is a present one but it does not become possessory until the life estate terminates. Stated differently, the words, "Then to *C* and his heirs" are words which designate *C* as a purchaser of the remainder. Specifically, the words "and his heirs" are words of limitation, describing the extent of *C*'s estate, which is a fee simple remainder.<sup>12</sup> Herein the point of distinction is made in relation to the reversion, and also to the Doctrine of Worthier Title. The owner of a reversion, always a vested future interest, owns what he has by operation of law and not by purchase.<sup>13</sup> The doctrine is a rule favoring reversions rather than remainders. This favoritism only arises, however, when a conveyor attempts to limit a future interest to his own heirs.<sup>14</sup> Although the conveyance to *A*, above, limited to *C* and his heirs, was valid, a similar limitation to *A*'s heirs is not. For example: *A* conveys to *B* for life, then to *A*'s heirs. By the construction of the doctrine, the

<sup>9</sup> All the cases collected in note 8, *supra*, except Bingham's Case, *id.* (one of the preceding interests was a life estate) concerned limitations to the grantor's heirs after a fee tail.

<sup>10</sup> 8 BACON'S ABR.TIT. "Remainder and Reversions", (B)2; BROOKE 105 (March's transl.); BROOKE'S ABR.TIT. "Done and Remainder", 15; COKE ON LITTLETON, \*22b; 1 HARGRAVE'S LAW TRACTS 571 (1787); 2 BLACKSTONE, COMMENTARIES \*176.

<sup>11</sup> "Interests (or ownership) in land or other things in which the privilege of possession or of enjoyment is future and not present." BLACK, LAW DICTIONARY 806 (4th ed. 1951).

<sup>12</sup> Cf. "Remainder", BLACK, LAW DICTIONARY 1456 (4th ed. 1951); 2 BLACKSTONE, COMMENTARIES \*164; See, *Carney v. Kain*, 40 W. Va. 758, 23 S.E. 650 (1895). See generally, 16 M.J., *Remainders, Reversions and Executory Interests* § 1, 3-26 (1951).

<sup>13</sup> *Copenhaver v. Pendleton*, 155 Va. 463, 155 S.E. 802 (1930); *Carney v. Kain*, *id.*; Cf., "Reversion", BLACK, LAW DICTIONARY 1483 (4th ed. 1951).

<sup>14</sup> See, *Thurman v. Hudson*, 280 S.W.2d (Ky. 1955); *Cochran v. Frier-son*, 195 Tenn. 174, 258 S.W.2d 748 (1953).

words, "then to *A*'s heirs," are struck from the habendum of the granting instrument, leaving only, "*A* conveys to *B* for life." Obviously, the grantor has conveyed less than he owns, and in accord with the doctrine, the reversion, an estate by operation of law, abides in the conveyor.<sup>15</sup> *A*'s heirs take nothing by this conveyance; they will only receive the property if *A* does not dispose of it during his lifetime, and if he either devises it to them or dies intestate.<sup>16</sup>

A more striking example that the heir presumptive takes nothing by this conveyance is to be found in a recent Virginia case<sup>17</sup> where the intent of the grantor was clearly expressed. The words of grant were construed as follows: *A* conveyed to *B* for life and then to *B*'s lawful heirs at *B*'s death, and if *B* should die without a lawful heir surviving him, then the realty conveyed should revert to the grantor or his lawful heirs. It was held that the grantor upon execution of the deed retained a reversion in the property conveyed. Even though the intent of the grantor was to create (by words of purchase in the deed) a reversion in himself or his heirs, such limitation was void. There was a reversion in the grantor, but it was created by operation of law immediately upon execution of the deed; whereas the grantor intended the reversion to be a contingent interest until *B* died without a surviving heir. Thus, this rule of the ancient courts has continued to defeat the expressed intention of a grantor to limit a future interest to his heirs by purchase. Conversely, though intent be defeated, the grantor is still benefited in that he retains his interest to convey another day;<sup>18</sup> only the heirs presumptive may ultimately lose. Again, an inquiry may be directed as to what consequence this is to the property owner residing presently in West Virginia. Although the feudal incidents were abolished by 1691<sup>19</sup> in England and the Doctrine of Worthier Title protecting the lords in the fruits of their seignory was abolished by a special statute in 1833,<sup>20</sup> the doctrine as to

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<sup>15</sup> Cochran v. Frierson, *supra* note 14.

<sup>16</sup> Wilson v. Pharris, 203 Ark. 614, 158 S.W.2d 274 (1941).

<sup>17</sup> Braswell v. Braswell, 195 Va. 971, 81 S.E.2d 560 (1954).

<sup>18</sup> Thurman v. Hudson, *supra* note 14.

<sup>19</sup> The Tenures Abolition Act, 12 Car.II, c.24 (1660) (abolishing wardship and marriage); Fraudulent Devises Act, 3 & 4 Wm. & M., c.14 (1691).

<sup>20</sup> The Inheritance Act, 3 & 4 Wm.IV, c.106, 33 (1833).

inter vivos conveyances<sup>21</sup> apparently survives intact in the law of this jurisdiction. The chronology of events leading to this assumption is traced below.

Most of the English decisions establishing and following the doctrine as a rule of property were decided in the last decade of the sixteenth century (1589-1601).<sup>22</sup> In *Bingham's Case*,<sup>23</sup> the facts, by construction, were these: *A* conveyed to *T* on trust for *A* and *W*, and *A*'s heirs; then *A* conveyed a second time to *T* in trust for *A* for life, then to *B* in tail, and upon termination of the trust, to "his (*A*'s) own right heirs." It was held that *A* had a fee expectant upon an estate tail, as a reversion, and not as a remainder. This is the case that most authorities rely upon as establishing the rule.<sup>24</sup> Next, an act of the Virginia convention in 1776 declared that the common law of England and the statutes or acts of parliament in aid thereof, which were prior to the fourth year of the reign of King James I, and which were of a general nature and not local to that kingdom, should be in full force.<sup>25</sup> James I was enthroned March 24, 1603, and thus the fourth year of his reign began March 24, 1607.

Article VIII, section twenty-one of the West Virginia Constitution provided that all parts of the common law in force when the constitution went into effect and not repugnant thereto should continue to be the law of this state until abrogated by the legislature.<sup>26</sup> And more specifically the West Virginia Code states, "The common law of England, . . . shall continue in force . . . , except . . . wherein it was altered by the general assembly of Virginia be-

<sup>21</sup> As the doctrine originated and developed in England it was also applicable to *testamentary* dispositions of real property. The testamentary branch of the rule is not a subject of this discussion for the reason that it is of little or no importance in modern property law. RESTATEMENT, PROPERTY § 314(2), comment *j.* (1940). For a treatment of the testamentary branch of the doctrine, see Harper & Heckel, *Doctrine of Worthier Title*, 24 ILL.L.REV. 627 (1930); Notes, 46 HARV.L.REV. 993 (1933), 14 N.C.L.REV. 90 (1935), 16 TENN.L.REV. 358 (1940).

<sup>22</sup> *E.g.* cases collected in note 8, *supra*.

<sup>23</sup> *Supra* note 8.

<sup>24</sup> One writer has named the doctrine as the "Rule in Bingham's Case." PATTON, TITLES § 223 (1957).

<sup>25</sup> Ord. of Convention, May 1776, 9 Hen. Stat. at Large 127 (1821), as cited in, *Ray v. Sweeney*, 77 Ky. (14 Bush)1(1878) (Kentucky is also an offspring of Virginia). *Cf.*, *Shifflette v. Lilly*, 130 W. Va. 297, 43 S.E.2d 289 (1947).

<sup>26</sup> W. VA. CONST. art. VIII, § 21.

fore the twentieth day of June, eighteen hundred and sixty-three

. . . .<sup>27</sup>

Collateral to the proposition that the Doctrine of Worthier Title is an existing rule of property in West Virginia, the question arises whether the type of statute abolishing the Rule in Shelley's Case<sup>28</sup> abolishes this doctrine. Both are rules restricting the creation of remainders.<sup>29</sup> The Rule in Shelley's Case<sup>30</sup> forbade the creation of limitations to the heirs of the ancestor who was a grantee in the same instrument of a life estate or estate tail; whereas the Doctrine of Worthier Title forbids the creation of limitations to the heirs of the grantor.<sup>31</sup> There is a point of apparent overlap where both rules would seem to apply to the same facts. For example, *A* conveys to *T* on trust for *A* for life, and upon termination of the trust, then the whole estate to go to *A*'s heirs.<sup>32</sup> Here, *A* is both the grantor of the legal estate and grantee of the equitable or beneficial estate. These facts would seem to fall within the situation construed by the Rule in Shelly's Case before it was abrogated by statute to permit the limitation in *A*'s heirs to be valid through purchase. But Shelley's Rule has never applied on these facts in the first instance because it could not have been invoked before the statute unless the present and future interests conveyed were either both legal or both equitable.<sup>33</sup> Therefore, the Doctrine of Worthier Title, alone, construes the remainder as void. And most of the recent decisions in states that have interpreted both rules have held that a specific statute abrogating the Shelley's

<sup>27</sup> W. VA. CODE ch.2, art. 1 § 2 (Michie 1955). See, *Cunningham v. Dorsey*, 3 W. Va. 293 (1869).

<sup>28</sup> E.g., W. VA. CODE ch.36, art.1, § 14 (Michie 1955).

<sup>29</sup> See, Annot., 125 A.L.R. 548, 565 (1940); *Morris, The Inter Vivos Branch of the Worthier Title Doctrine*, 2 OKLA.L.REV. 133, 139 (1949).

<sup>30</sup> "It is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; that always in such cases 'the heirs' are words of limitation of the estate and not words of purchase." *Shelley's Case*, 1 Co. 93b, 104a, 76 Eng.Rep. 206, 233 (K.B. 1579-1581).

<sup>31</sup> *Fennick & Mitford's Case*, 1 Leon. 182, 74 Eng.Rep. 168 (K.B. 1589).

<sup>32</sup> E.g., *Wilcoxon v. Owen*, 237 Ala. 169, 185 So. 897 (1938); *Doctor v. Hughes*, 225 N.Y. 305, 122 N.E. 221 (1919); *Robinson v. Blakenship*, 116 Tenn. 394, 92 S.W. 854 (1906).

<sup>33</sup> *Shackelford v. Bullock*, 34 Ala. 418 (1859); *Mercer v. Safe Deposit & Trust Co.*, 91 Md. 102, 45 Atl. 865 (1900); *Mercer v. Hopkins*, 88 Md. 292, 41 Atl. 156 (1898). *But cf.*, RESTATEMENT, PROPERTY § 314, comment g. (1940). Whereas with the doctrine of worthier title the limitation to the heirs may be either legal or equitable without regard to the prior estate. See, *Richardson v. Richardson*, 272 App. Div. 321, 71 N.Y.S.2d 1 (1947).



Rule did not purport to do the same to the Worthier Title Doctrine.<sup>34</sup> West Virginia would apparently be in accord with this statutory interpretation. In the *Carter* case, it was stated in referring to a statute purporting to wholly abolish the Rule in Shelley's Case, "Being in derogation of the common law is limited in its operation to cases falling within its terms. . . ."<sup>35</sup>

Continuing with a discussion of the proposition that the doctrine is a binding rule of property in this jurisdiction, it is necessary to point out that the doctrine has never been mentioned, recognized or rejected in this jurisdiction. There has been one recent occasion, however, when the rule could have been discussed and applied. In *Stephenson v. Kuntz*,<sup>36</sup> the facts, as construed by the court, were: (in 1887), *A* conveyed to *B* for life, then to *C* and in the event *C* shall die without children surviving him, "Then the real estate conveyed shall go back to the surviving heirs of (*A*) forever . . . ."<sup>37</sup> *A* died at a date unknown, but prior to the death of *C*, leaving five heirs at law surviving him. There was no evidence in the record to indicate whether *A* had died testate or intestate. *B* died in 1920. *C* died testate, without children in 1925. In a contest between *C*'s devisee and *A*'s heirs, it was held that *A*'s heirs took the fee by the terms of the deed upon *C*'s death without issue. Here the final disposition of the real estate could have been different. Had the doctrine been invoked, it would have been tantamount to the decision to know whether *A* had subsequently made another general conveyance of the property or, if not, whether he had died testate and devised the property in his will. As mentioned previously the estate of reversion in *A* arises by operation of law and is contrary to *A*'s intention to make ultimate disposition of the subject property by deed. Therefore, if the facts were known and the

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<sup>34</sup> *Wilcoxon v. Owen*, 237 Ala. 169, 185 So. 897 (1938); *Fidelity & Cas. Trust Co. v. Williams*, 268 Ky. 671, 105 S.W.2d 814 (1937); *Doctor v. Hughes*, 225 N.Y. 305, 122 N.E. 221 (1919). For the bearing of other statutes on the doctrine, see Annot. 125 A.L.R. 548, 568 (1940).

<sup>35</sup> *Carter v. Reserve Gas Co.*, 84 W. Va. 741, 100 S.E. 738 (1919). *Accord*, *Shifflette v. Lilly*, 130 W. Va. 297, 304, 43 S.E.2d 289, 293 (1947) where it was said "The common law is not to be construed as altered or changed by statute, unless the legislative intent to do so be plainly manifested." See generally, 3 SUTHERLAND, STATUTORY CONSTRUCTION § 5301-5305 (1943).

<sup>36</sup> 131 W. Va. 599, 49 S.E.2d 235 (1948).

<sup>37</sup> *Id.* at 601, 49 S.E.2d 235.

rule applied, the occasion could have arisen where persons other than *A's* heirs would have received the property.<sup>38</sup>

On the basis of absorption, the Doctrine of Worthier Title became a part of the law of this jurisdiction by: (a) being in existence in 1607; (b) general authorization of the constitution; (c) not being abrogated by specific statutes or by those in derogation of the common law such as the one abolishing the Rule in Shelley's Case; (d) and by not being rejected by the case law of Virginia (*circa* 1776-1863) or of West Virginia. Like Banquo's ghost, its presence arises as a vestige of the shadowy past, a rule without reason to haunt the minds of modern conveyancers.

With only the English decisions to rely upon, what is the status of the doctrine in West Virginia? According to the English view it was a rule of law<sup>39</sup> and it presumptively remains such in this jurisdiction. The significance of this is to be found in a comparison of definitions. A rule of law, or here a rule of property, is a settled principle, supported by precedents, and binding as to the ownership or devolution of property in a particular situation.<sup>40</sup> On the other hand, a rule of construction is an interpretative rule, which a court will use to construe a written instrument where the intent of the author is not patent from the words he uses.<sup>41</sup> Contemporary decisions in other jurisdictions have come to accept the Doctrine of Worthier Title as only a rule of construction.<sup>42</sup> Since 1919 with the leading case of *Doctor v. Hughes*<sup>43</sup> written by Justice Cardozo, most courts have agreed that although a presumption favors the rule, it will not be given effect where the disposition of the grantor is clearly expressed.<sup>44</sup>

<sup>38</sup> See, *Wilson v. Pharris*, 203 Ark. 614, 158 S.W.2d 274 (1941), (Where the grantor conveyed the reversion by a subsequent deed); *Corwin v. Rheims*, 390 Ill. 205, 61 N.E.2d 40 (1945), (Where the grantor-testator devised the reversion to a third party).

<sup>39</sup> Note 8, *supra*.

<sup>40</sup> BLACK, LAW DICTIONARY 1496-7 (4th ed. 1951).

<sup>41</sup> *Id.* at 386.

<sup>42</sup> *Dreyer v. Lange*, 74 Ariz. 39, 243 P.2d 468 (1952); *Thurman v. Hudson*, 280 S.W.2d 507 (Ky. 1955); *Braswell v. Braswell*, 195 Va. 971, 81 S.E.2d 560 (1954), and cases cited therein in Annots., 125 A.L.R. 548, 555 (1940); 16 A.L.R.2d 691, 697 (1951).

<sup>43</sup> 225 N.Y. 305, 122 N.E. 221 (1919).

<sup>44</sup> *Engel v. Guaranty Trust Co.*, 280 N.Y. 43, 19 N.E.2d 673 (1939); *Braswell v. Braswell*, 195 Va. 971, 81 S.E.2d 560 (1954); *McKenna v. Seattle-First Nat'l Bank*, 35 Wash.2d 662, 214 P.2d 664 (1950). *Accord*, RESTATEMENT, PROPERTY § 314(1), comment *a.* (1940).

Another important modification of the doctrine is that it is now also applied to dispositions of personal property.<sup>45</sup> The extension, important to those engaged in estate planning, seems to have been a natural one. According to Professor Powell,\* this has resulted in "a symmetry in the law."<sup>46</sup>

Although the English cases concerned grants where the prior interest was a life estate or an estate tail, modern cases have also applied the rule to a fee subject to a condition subsequent.<sup>47</sup> This extension developed because the emphasis of interpretation, as to whether the rule applied, remains on the words of the limitation "to the heirs of the grantor" or their equivalent. Other combinations of words in the limitation that invoke the rule present a related problem of construction. Where the rule has been extended to personalty a limitation "to the next of kin of the conveyor" invokes the rule.<sup>48</sup> Also, as to both realty and personalty, or to either, a limitation "to those who would take under the statutes of descent and distribution as if the grantor had died testate," will invoke the rule.<sup>49</sup> In short, any combination of words signifying the word "heirs" in their technical or legal sense will suffice.

Concerning the operations of the doctrine, the particular problems facing the practitioner in a jurisdiction where the rule is in force are several. Some of the more common may be briefly indicated. The scope of this note does not permit more than a cursory glance at these problem areas.

<sup>45</sup> *Beach v. Busey*, 156 F.2d 496 (6th Cir. 1946); *Morsman v. Commissioner*, 90 F.2d 18 (8th Cir. 1937); *Fidelity & Cas. Trust Co. v. Williams*, 268 Ky. 671, 105 S.W.2d 814 (1937); *City Bank Farmers Trust Co. v. Miller*, 278 N.Y. 134, 15 N.E.2d 553 (1938); *Dunnet v. First Nat'l Bank & Trust*, 184 Okla. 82, 85 P.2d 281 (1938); *Bottimore v. First & Merchants Nat'l Bank*, 170 Va. 221, 196 S.E. 593 (1938). *Accord*, a host of New York cases collected in *Annots.*, 125 A.L.R. 548, 559 (1940), 16 A.L.R.2d 691, 715 (1951).

\* Official Reporter for the Restatement of Property.

<sup>46</sup> RESTATEMENT, PROPERTY § 314, comment *a*, 1778 (1940).

<sup>47</sup> *Coomes v. Frey*, 141 Ky. 740, 133 S.W. 758 (1911); *In Re Brolasky's Estate*, 302 Pa. 439, 153 Atl. 739 (1931). It is submitted that the doctrine would also apply if the prior estate were a mere term of years. 1 AMERICAN LAW OF PROPERTY § 4.20 (Casner ed. 1952).

<sup>48</sup> *Whittemore v. Equitable Trust Co.*, 162 App. Div. 607, 147 N.Y.S. 1058 (1948).

<sup>49</sup> See, *Morsman v. Commissioner*, 90 F.2d. 18 (8th Cir. 1937); *Burton v. Boren*, 308 Ill. 440, 139 N.E. 868 (1923); *Caigliardi v. Bank of N.Y. & Trust Co.*, 230 App. Div. 192, 243 N.Y.S. 573 (1930); *Glenn v. Holt*, 229 S.W. 684 (Tex.Civ.App. 1921).

As has been previously explained, the grantor retains a reversion which he unknowingly may dispose of at a later time by will or deed. In a hypothetical situation, for example, assume that *A* conveyed valuable real estate located in a metropolitan area to his wife for life, then to his heirs in fee, supposing that he had provided adequately for them. Assume further that *A* died testate, making complete disposition of his personal estate by bequest and also including a general devise of all the rest and residue of his real estate in the county in which the metropolitan real estate also is to be found, to his brother, *X*. Assume that his intent was to make a gift to *X* of an undivided one-half interest in the ancestral farm inherited by *X* and *A* from their father. The state of the title is as follows: The wife has a life estate in the downtown property. *X* owns a vested reversion in the same property which will mature into a fee simple upon the death of the testator's wife, and, incidentally, owns the farm in fee. Thus, the doctrine in conjunction with the seemingly innocent words contained in the general devise has effectively disenfranchised the heirs of *A*.<sup>50</sup> A similarly vexatious result would obtain, where, on the same facts as above, *A* conveyed all of his remaining real estate he then owned in the county in which the metropolitan real estate is to be found, to *X* by a subsequent deed.<sup>51</sup> Problems also arise in the area of creditors rights. For example, *A*, the grantor, retains a vested property interest that can be levied upon by his creditors.<sup>52</sup> Conversely, *A*'s children, as heirs expectant, have no attachable property interest.<sup>53</sup>

In a situation where *A* seeks to divest himself of ownership and control and still be able to reach a portion of the income from the real estate, he may convey it to a trustee on trust for *A* for life with the instructions that the corpus be conveyed to his heirs at his death. This type of trust may or may not benefit others. Since the limitation to his heirs is void, he is the only party in interest and may terminate the trust at will.<sup>54</sup> There may be no benefit,

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<sup>50</sup> See, *Corwin v. Rheims*, 390 Ill. 20, 61 N.E.2d 40 (1945); *Pewitt v. Workman*, 289 Ky. 459; 159 S.W.2d 21 (1942); *Re Ryan's Will*, 73 N.Y.S.2d 295 (1947).

<sup>51</sup> See, *Wilson v. Pharris*, 203 Ark. 614, 158 S.W.2d 274 (1941); *Thurman v. Hudson*, 280 S.W.2d 507 (Ky. 1955).

<sup>52</sup> *King v. Fay*, 169 F. Supp. 934 (D.D.C. 1958); *McKenna v. Seattle-First Nat'l Bank*, 35 Wash.2d 662, 214 P.2d 664 (1950).

<sup>53</sup> *Doctor v. Hughes*, *supra* note 43.

<sup>54</sup> *Dreyer v. Lange*, 74 Ariz. 39, 243 P.2d 468 (1952); *Re Prehn*, 132 N.Y.S.2d 244 (Misc. 1954); *Re Gilorney Trust*, 109 N.Y.S.2d 898 (Misc. 1951).

however, if his purpose was to divest himself of the tax burden of ownership. It is likely that *A* has retained too much control to escape this incidence of ownership.<sup>55</sup> Retention problems raised by the doctrine are also of moment to the estate planner in relation to federal estate taxes and state inheritance taxes.<sup>56</sup>

The careful draftsman, recognizing the import of the doctrine, can easily avoid the possibility of ensuing litigation over a grant of a future interest limited to the conveyor's heirs. Implicit in the foregoing discussion are several ways to wholly avoid the application of the doctrine. First, the rule will not apply if there is a future interest limited to a *named* person even if he is the heir apparent or subsequently turns out to be the heir of the conveyor.<sup>57</sup> A general limitation to the *lineal* heirs of the grantor also would not invoke the rule because such grant does not satisfy the technical definition of heirs.<sup>58</sup> A fortiori, a grant to the conveyor's heirs determined at some time other than the death of the grantor, will not invoke the doctrine.<sup>59</sup> For example, *A* conveys to *B* for life, then to the heirs of *A* living at the death of *B*.

In conclusion, the doctrine that when an inter vivos conveyance of real property contains a limitation to the heirs of the conveyor, or equivalent words, such limitation is construed as void and there remains an immediate reversionary interest in the conveyor by operation of law, appears to have been absorbed into the existing common law of West Virginia.

Should the occasion arise for the invocation of the doctrine in this, a jurisdiction wherein the question remains open to interpretation, will the rule be applied liberally, as one of construction and extend to encompass personalty, and apply to any limitation to the grantor's heirs? Will it, on the other hand, be limited to the subject matter of real estate and be applied unswervingly as a rule of law?

Considering the alternatives, it would be of greater benefit to those who wish to avoid the machinations of the rule to continue

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<sup>55</sup> *Morsman v. Commissioner*, 90 F.2d 18 (8th Cir. 1937) (Income tax liability).

<sup>56</sup> *Beach v. Busey*, 156 F.2d 496 (6th Cir. 1946) (Estate tax liability); *Bartlett v. United States*, 137 Ct.Cl. 38, 146 F.Supp. 719 (1956).

<sup>57</sup> *Schoellkopf v. Marine Trust Co.*, 267 N.Y. 358, 196 N.E. 288 (1935).

<sup>58</sup> See, *RESTATEMENT, PROPERTY* § 314 (1940).

<sup>59</sup> *Fish v. Chemical Bank & Trust Co.*, 270 App.Div. 251, 59 N.Y.S.2d 62 (1945); *Braswell v. Braswell*, 195 Va. 971, 81 S.E.2d 560 (1954) (dictum).

to regard it as a rule of law rather than of construction. Professor Powell, commenting on the great number of ambiguous New York holdings,<sup>60</sup> (wherein the doctrine is a rule of construction only) has said, “. . . no case involving a substantial sum can be fairly regarded as closed until it has been carried to the court of appeals. . . . This means uncertainty in the law and wasteful expenditures . . . by helpless clients.”<sup>61</sup>

A third alternative would be to wholly abolish the doctrine by legislation. This has been suggested by the authors of the proposed Uniform Property Act<sup>62</sup> and has been followed by Nebraska, whose legislature adopted the proposed act verbatim in 1940.<sup>63</sup> This section abolishes the rule and directs that the conveyance shall operate in favor of the heirs or next of kin by purchase and not by descent. Considering that all reason for the doctrine of worthier title as a rule of law is gone and that its continued application to contemporary factual situations has only made for unsettled law, complete abrogation by specific statute appears to be the best answer.

*Charles Harold Haden II*

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<sup>60</sup> See collection of cases in Annots., 125 A.L.R. 548, 559 (1940), 16 A.L.R.2d 691, 715 (1951). See also commentaries on the New York cases in SIMES & SMITH, FUTURE INTERESTS § 1608 (1956).

<sup>61</sup> 3 POWELL, REAL PROPERTY § 381 at 269 (1952).

<sup>62</sup> UNIFORM PROPERTY ACT § 15, 9b ULA 408 (1957).

<sup>63</sup> “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.” NEB. REV. STAT. of 1943, ch. 76, § 115 (Reissue 1958).