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Real Property

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REAL PROPERTY

THE DOCTRINE OF WORTHIER TITLE

Texas. The recent case of *Spaulding v. Higgs*[1] involves the construction of three separate deeds, each purporting to convey an interest in the same parcel of realty and each having the same grantor and grantee. The conveying instruments may be summarized as follows:

1. By the first instrument, drafted and executed in 1930, the grantor conveyed an undivided one-half interest in the land to his wife.

2. In 1933 a second deed was executed which purported to convey the remaining one-half interest in the property to the grantor's wife for life, with a remainder over to the grantor's heirs.

3. A third instrument, executed in 1939, was in the nature of a general warranty deed under which the grantor purported to convey the entire premises to his wife in fee simple.

Query: Did the grantor have any interest left in the property after the execution of the 1933 deed?

The district court, in determining this controversy between the plaintiff, who was the grantor's widow, and the defendants, who were some of the grantor's children, held that the 1933 instrument served to divest the grantor of all his interest in the property; and that, therefore, the 1939 deed conveyed nothing. In so holding, the trial court reasoned that the grantor used the phrase, "my heirs at law," in the same sense that he would have used "my children," and that the grantor's then living children took, by reason of the deed, a vested remainder in fee. From this construction of the 1933 deed, the plaintiff appealed.

[1] 254 S. W. 2d 208 (Tex. Civ. App. 1953) *er. ref. n.r.e.*

In rejecting the district court's construction of the deed, the court of appeals held that the portion of the 1933 instrument which purported to convey a remainder to the grantor's heirs was void by reason of the fact that, as a living man, the grantor had no heirs and the conveyance to them failed for want of an ascertained grantee.[2]

Without specifically referring to it, the court applied a familiar rule of law which is popularly called the Doctrine of Worthier Title[3] and which finds its roots deep in the old common law of England.[4] Stated simply, the rule stands for the proposition that where a person owning a fee simple estate conveys an estate for life with a remainder to the heirs of the grantor, the attempted conveyance of the remainder is void, thus leaving the reversion in the grantor.[5]

As originally promulgated by the English courts, this doctrine was treated as a rigid rule of property[6] which defeated even the most emphatically expressed intent of the grantor. The *Restatement of Property* suggests that perhaps the most realistic justification for the doctrine is "found in the preference for title by descent rather than title by purchase, which preference had its origin in the feudal system."[7] A more frequently used

[2] *Id.* at 211. In the course of its opinion the court stated: "There are cases in which our courts have held the word 'heirs' to mean 'children,' but the word 'heirs' has been accompanied with qualifying words and phrases, clearly indicating that the grantor did not mean heirs in the technical sense of those who would ultimately be heirs, and something in the instrument or in the circumstances surrounding its execution, showing clearly the grantor meant to convey to his children; and generally it has been a case in which it was contended the Rule in Shelley's case applied and to apply the Rule in Shelley's case would have defeated the expressed intent of the grantor."

[3] Warren, *A Remainder to the Grantor's Heirs,* 22 Tex. L. Rev. 22 (1943), suggests that the popular title is misleading and that a more accurate description of the doctrine is found in the phrase, "a rule against a remainder of a grantor's heirs." The point is well taken.

[4] Fennick & Mitford's Case, 1 Leon. 182, 74 Eng. Rep. 168 (K. B. 1589); 2 Bl. Comm. *176.

[5] Read v. Erington, Cro. Eliz. 321, 78 Eng. Rep. 571 (Q. B. 1594).

[6] Bodolphin v. Abingdon, 2 Atk. 57, 26 Eng. Rep. 432 (Ch. 1740). As will be noted *infra,* the modern trend is toward treating the rule as one of construction rather than as one of law.

[7] 3 Restatement, Property (1940) § 314, Comment a on Subsection (1).

rationale is the one employed by the principal case[8] and is one which finds its most terse expression in the Latin maxim, "*Nemo est haeres viventis.*"[9] The fact that a living man has no heirs, however, affords no real basis for the Doctrine of Worthier Title. For it is well settled, and has been for centuries, that a grant of a contingent remainder is valid.[10] The older cases contain language to the effect that the ancestor, during his life, bears all his heirs in his body; and to this interpretation of the law they attached the familiar doctrine that one cannot be *both* the grantor and grantee in the same instrument.[11] This concept is apparently the foundation for those cases which treat the maxim, "*Nemo est haeres viventis,*" as the rationale underlying the doctrine now under consideration.

Still another rationale, and the one which probably explains the continued life of the so-called Doctrine of Worthier Title, is that the rule gives effect to the probable intent of the grantor.[12] The courts and the commentators have long felt that a person is not inclined intentionally to divest himself of all power over his property prior to his death. Thus they have treated the word "heirs," when used in its present context, as a word of limitation (which merely defines the estate that the first grantee has) rather than as a word of purchase[13] (under which the heirs would take as purchasers from the grantor). Such treatment of the grantor's language is erroneous, however, for the estate of the first taker is clearly defined as being one for life only. The word "heirs,"

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[8] 254 S. W. 2d 208, 210. "The grantor was living, hence had no heirs, and such conveyance to them was void for uncertainty of a grantee."

[9] Glenn v. Holt, 229 S. W. 684 (Tex. Civ. App. 1921); as applied to the Rule in Shelley's Case, see Davis v. First National Bank of Waco, 139 Tex. 36, 161 S. W. 2d 467 (1942).

[10] 3 POWELL, REAL PROPERTY (1952) §350.

[11] Co. LITT.* 22b; 24 HALSBURY'S LAWS OF ENGLAND (1912) 213; Doctor v. Hughes 225 N. Y. 305, 122 N. E. 221 (1919).

[12] Warren, *A Remainder to the Grantor's Heirs,* 22 Tex. L. Rev. (1943); 3 RESTATEMENT, PROPERTY (1940) § 314, p. 1778.

[13] Burton v. Boren, 308 Ill. 440, 139 N. E. 868 (1923).

while properly a word of limitation in some instances,[14] can only be a word of purchase in its present context.[15]

Regardless of the grantor's probable "real" intent, however, the fact remains that this doctrine, like the Rule in Shelley's Case, defeats the *expressed* intent of the grantor. Recognizing this fact and apparently cognizant of the ease with which the grantor could express a contrary intention, the English Parliament abrogated the rule by statute in 1833.[16]

Having been introduced into American jurisprudence as a part of the common law, this "rule against a remainder to a grantor's heirs," in a substantially modified form, remains a part of the common law of this country today.[17] The basic modification referred to *supra* is the fact that in most American jurisdictions which still recognize the doctrine, it is treated as a rule of construction rather than a rule of law.[18] In *Doctor v. Hughes*[19] Justice Cardozo expressed the modern concept of the rule as follows: "But at least the ancient rule survives to this extent: That, to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed." This is the view espoused by the *Restatement of Property*[20] and is the one accepted by most of the more recent cases in point.[21]

[14] The most common examples may be illustrated as follows: (1) "to grantee and his heirs"; (2) "to grantee and the heirs of his body." Here the term "heirs" defines the estate held by the grantee. Change the context only slightly, however, and the word "heirs" is transformed from one of limitation into one of purchase; *e.g.*, "to grantee, then to his heirs." In the absence of the Rule in Shelley's Case, the grantee gets a life estate, and his heirs get a contingent remainder in fee, with a reversionary interest remaining in the grantor by operation of law.

[15] Otherwise, no effect whatever can be given to the use of the term.

[16] Inheritance Act, 1833, 3 & 4 WM. IV, c. 106, § 3.

[17] 3 RESTATEMENT, PROPERTY (1940) § 314. The doctrine has, of course, been abolished by statute in some jurisdictions.

[18] 225 N. Y. 305, 122 N. E. 221 (1919); 3 RESTATEMENT, PROPERTY (1940) § 314.

[19] 225 N. Y. 305, 122 N. E. 221, 222.

[20] § 314.

[21] Beach v. Busey, 156 F. 2d 496 (6th Cir. 1946); Davidson v. Davidson, 350 Mo. 639, 167 S. W. 2d 641 (1943); Norman v. Horton, 344 Mo. 290, 126 S. W. 2d 187 (1939); McKenna v. Seattle—First National Bank, 35 Wash. 2d 662, 214 P. 2d 664 (1950).

The principal case accords with the modern trend. Although the language utilized by the court is wrapped in overtones of negation,[22] the clear implication exists that the doctrine now under consideration is to be used as a mere aid in ascertaining the grantor's intent.[23] Also explicit in the opinion, however, is the fact that to circumvent the "rule against a remainder to a grantor's heirs," the contrary intention must be made very clear in the instrument itself, or there must be substantial evidence dehors the instrument clearly indicating the grantor's intent to have his "heirs" take as purchasers under the deed.[24]

That the court in the *Spaulding* case considered the intent of the grantor to be the controlling factor is evidenced by the following excerpt from its opinion: "We recognize that every part of an instrument should be harmonized and given effect to if it can be done, and that the construction which is most consistent with the intention of the grantor as gathered from the terms of the conveyance is accepted as the true one."[25] But to this noble principle is attached a qualification which states that, although the grantor says one thing (viz., that he "grants, sells and conveys . . . a remainder to his heirs"), he is held to intend quite another thing (viz., that he "retains a reversionary interest.") Even under the modern application of the Doctrine of Worthier Title, the grantor is *presumed* to have intended the contrary of what his written word expresses. Thus, while the principal case is in accord with the modern trend in the development of the

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[22] Reference is made to the quotation in note 2 *supra*. Also, consider the following excerpt from the opinion, 254 S. W. 2d at 210, 211: "We do not find anything in the 1933 deed to indicate that the grantor intended by the use of the words 'my heirs at law' to designate some particular person or persons other than those described generally as heirs."

[23] The court pointed out that there was no evidence of prior or contemporaneous acts indicating an interest on the part of the grantor to make an immediate conveyance to his children; also, that there were no qualifying words in the grant which would remove it from the scope of the general rule.

[24] See 3 RESTATEMENT, PROPERTY (1940) § 314, Comment e on Subsection (1), for suggested wording which would keep the Doctrine of Worthier Title from operating.

[25] 254 S. W. 2d at 211. Correctly cited in support of this proposition was Hancock v. Butler, 21 Tex. 804 (1858).

Doctrine of Worthier Title, its holding still frustrates the express intent of the grantor.

Dissatisfaction with the doctrine has led many jurisdictions to abrogate it by statute.[26] The doctrine is abolished in the proposed Uniform Property Act.[27] The writer submits that those jurisdictions which still adhere to the doctrine would do well to follow the lead of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The Doctrine of Worthier Title is an antiquated rule which has seemingly outlived any constructive utility which it might have had at its inception.

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[26] See, for example, GA. CODE (1933) § 85-504.

[27] Uniform Property Act, § 15, 9A U.L.A. 249, 254. The Section reads:

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.