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FUTURE INTERESTS-INTER VIVOS APPLICATION OF WORTHIER TITLE DOCTRINE- DESTRUCTION OF THE *Doctor v. Hughes* RULE

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FUTURE INTERESTS—INTER VIVOS APPLICATION OF WORTHIER TITLE DOCTRINE—DESTRUCTION OF THE *Doctor v. Hughes* RULE—In one case, settlor executed an instrument whereby certain property was conveyed to trustees to pay the income therefrom to settlor during her life and upon her death to convey the principal of the trust estate to such persons as she should appoint in her will, or, in default of appointment, to her next of kin as in intestacy. In addition, settlor reserved to herself the right and power to approve and join in the execution of any conveyance or mortgage of the property. After the settlor died without having exercised the power of appointment, her four children applied as next of kin for an order directing the trustee to distribute the corpus of the trust estate among them in equal shares as remaindermen and for a determination that the surviving spouse of settlor had no interest in the trust fund. Upon the granting of the order by the lower court, the executor appealed on the ground

that the limitation to the next of kin had resulted in a reversion. In a second case involving a similar trust instrument, the settlor alone attempted to work a revocation pursuant to section 23 of the New York Personal Property Law which permits a settlor to revoke a trust in personal property with the consent of all persons "beneficially interested" in the trust.[1] The trustee questioned the validity of the revocation on the ground that the limitation to the next of kin created a remainder instead of a reversion and, therefore, the consent of the presumptive remaindermen was necessary. The settlor appealed from a judgment denying the attempted revocation. *Held,* in a combined review of both cases, order and judgment affirmed. Despite the language of *Doctor v. Hughes*[2] that a limitation to the heirs[3] of a grantor creates a reversion unless there is clear evidence to the contrary, the rule has been limited in application, to the extent that it is now merely a presumption in favor of reversions which may be rebutted by an indication of a contrary intent gathered from the instrument as a whole. The reservation by settlor of a testamentary power of appointment over the subsequent disposition of the corpus of the trust estate was a sufficient indication of such contrary intent. *In re Burchell's Estate,* 299 N.Y. 351, 87 N.E.(2d) 293 (1949).[4]

The significance of this decision lies not so much in what was actually decided as in the language that was used.[5] For really the first time the New York Court of Appeals has expressly recognized that a whole series of cases, of which the principal one is but a part, has resulted in a departure from a position that the court had heretofore maintained was consistent.[6] Historically the worthier title doctrine in the context of inter vivos conveyances amounted to an absolute rule of law whereby any attempt by a grantor to create a remainder in his heirs would be ineffective and would automatically result in a reversion.[7]

[1] A similar statute applies to trusts composed of real property. N.Y. Real Prop. Law, §118 (1932).

[2] 225 N.Y. 305, 122 N.E. 221 (1919).

[3] While the rule is usually stated in terms of 'heirs' for sake of convenience, it is nonetheless applicable when 'next of kin' is used, especially as to personalty. Oler, "'Remainders' to Conveyors' Heirs or Next of Kin," 44 DICK. L. REV. 247 at 252 (1940); 125 A.L.R. 548 at 560 (1940).

[4] Also noted in 35 VA. L. REV. 794 (1949) and 2 SYRACUSE L. REV. 319 (1949).

[5] There was already strong authority at the court of appeals level in New York for the proposition that the reservation of a testamentary power of appointment is a sufficient expression by the grantor of his intent to create a remainder. Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929); Engel v. Guaranty Trust Co., 280 N.Y. 43, 19 N.E. (2d) 673 (1939); Richardson v. Richardson, 298 N.Y. 135, 81 N.E. (2d) 54 (1948).

[6] Cf. Richardson v. Richardson, 298 N.Y. 135, 81 N.E. (2d) 54 (1948), decided about one year prior to the principal case on strikingly similar facts, where this same court stated the problem as follows: "Thus direction to transfer trust property to one's next of kin is insufficient in and of itself to create a remainder. There must be additional factors, i.e., other indications of intention in order that there may be found "sufficient" or "clear expression" of intention on the part of settlor to create a remainder to his next of kin."

[7] For a clear statement of the history of, and basis for, the doctrine of worthier title as applied to inter vivos conveyances, see: 1 SIMES, FUTURE INTERESTS §144-148 (1936); 3 PROPERTY RESTATEMENT § 314 (1940).

But in 1919 Judge Cardozo in writing the opinion of the landmark case of *Doctor v. Hughes* announced that the ancient rule had survived only to the extent that "to transform into a remainder what would ordinarily be a reversion, intention to work such a transformation must be *clearly expressed.*"[8] This clear suggestion that the rule was now one of construction instead of law was adopted by the majority of the courts considering the question.[9] However, the decisions in New York since *Doctor v. Hughes,* while espousing the rule announced in that case, have greatly weakened its application by actually holding that the contrary intent need not be clearly expressed but can be gathered from indications in the trust instrument as a whole.[10] It is the court's clear and unequivocal recognition of this rejection of Cardozo's language in *Doctor v. Hughes* in favor of the milder position, which makes the principal case important. It can easily be argued that these decisions have done away completely with any kind of effective rule whatsoever.[11] Rules of construction are said to operate like rebuttable presumptions and, as such, the number of factors necessary to rebut them varies.[12] Whereas *Doctor v. Hughes* adopted a strong presumption, the approach now followed appears to be but a presumption of window dressing proportions. As the conflicting case results point out, the sole reservation of a testamentary power to appoint by will, where the grantor has made a limitation to his heirs, is itself capable of two interpretations when trying to determine if a remainder or a reversion has been created.[13] How, then, can it be said that any real presumption exists when an ambiguous factor is allowed to rebut it?[14] In any trust deed something can be found that a court can seize on as pointing one way or the other. While there has been this rejection of any effective presumption in favor of reversions, there is at the same time an unwillingness to give full effect to language limiting an interest to a grantor's heirs by calling it a remainder.[15] By adopting this halfway approach in an admittedly ambiguous

[8] Emphasis supplied.

[9] For a complete analysis of the various states' holdings on this, see Morris, "The Inter Vivos Branch of the Worthier Title Doctrine," 2 OKLA. L. REV. 133 at 143 (1949); 125 A.L.R. 548 at 555 (1940).

[10] Principal case at p. 297: "It is clear from the cases in this State since Doctor v. Hughes . . . that, despite the language in that opinion . . . , the rule has been less limited in application. . . . The presumption . . . has lost much of its force since Doctor v. Hughes, supra. Evidence of intent need not be overwhelming in order to allow the remainder to stand." See also, 62 HARV. L. REV. 313 at 314 (1948).

[11] ". . . unless some simple, explicit, clear cut rule of construction is adopted . . . it is probable that this rule . . . will break down from the sheer weight of its own complications and uncertainties." Warren, 2 UNIV. TORONTO L.J. 389 at 392 (1938).

[12] SIMES, FUTURE INTERESTS §309 (1936).

[13] For a compilation of cases, see Morris, "The Inter Vivos Branch of the Worthier Title Doctrine," 2 OKLA. L. REV. 133 at 151 (1949).

[14] ". . . the fact that he has omitted to reserve a power to appoint in any way except by will is some indication that he intended to make his heirs or next of kin beneficiaries of the trust . . . ; but it is not of itself sufficient to overcome the inference that he intended to be the sole beneficiary of the trust." 1 TRUST RESTATEMENT §127 (1935).

[15] Principal case at 297.

area, this court has removed any real guide posts.[16] Consequently, a stand should be taken one way or the other, and it is submitted that the rule of *Doctor v. Hughes* is the more rational. Not only does it make for greater freedom of alienability, but it is most likely to accord with the general subjective intent of the grantor who probably never wanted to create an indestructible interest.[17]

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[16] Nossaman, "Gifts to Heirs—Remainder or Reversion," 24 CALIF. S.B.J. 329 at 330 (1949).

[17] 3 PROPERTY RESTATEMENT §314, comment *a.* (1940); 62 HARV. L. REV. 313 at 314 (1948).