

# NOTES

## THE DOCTRINE OF WORTHIER TITLE IN MISSOURI

Under the English common law, if an owner of land in fee tried to convey a life estate or an estate tail to another, and limit the remainder to the grantor's heirs, the remainder to the grantor's heirs was void, and a reversion was left in the grantor; consequently, if the heirs took any interest in the land at all, they took the reversion by descent from the grantor on his death, and not a remainder by purchase under the conveyance.<sup>1</sup> The rule was established as a rule of property in England in the late sixteenth century<sup>2</sup> and remained until abolished by statute in 1833.<sup>3</sup> In this country the rule has survived, but for the most part it no longer has the force of a rule of property, as was its original effect, but rather it operates as a rule of construction.<sup>4</sup>

The reasons now accepted for the rule are largely historical. Perhaps the original basis for the rule can best be explained as an attempt on the part of the courts to preserve the feudal incidents of relief, wardship, and marriage in favor of the overlord. These incidents redounded to the overlord only when the heirs took the land by descent and not when the heirs took by purchase. As a result, unless the limitation in the conveyance to the heirs was considered void, so that the heirs could not take by purchase, but had to take, if at all, by descent, the overlord would have lost these valuable incidents. Other reasons given were that title acquired by descent is a "worthier" title than that acquired by purchase; that the heir is part of the ancestor and therefore a conveyance to the heir is a conveyance to the ancestor, *i.e.*, a conveyance to one's self, which was impossible; and that the creditors of the ancestor could not reach the land in the hands of the heirs if they took by purchase, but could if they took by descent.<sup>5</sup> These reasons, some of them unconvincing even in

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1. 1 SIMES, LAW OF FUTURE INTERESTS 259 (1st ed. 1936).

2. Bingham's Case, 2 Co. Rep. 91a, 76 Eng. Rep. 611 (1598-1600); Earl of Bedford's Case, Moo. K.B. 718, 72 Eng. Rep. 861 (1592-1593).

3. 3 & 4 WILL. IV, c. 106.

4. RESTATEMENT, PROPERTY §314 (1940); 1 SIMES, LAW OF FUTURE INTERESTS 265 (1st ed. 1936); 16 A.L.R.2d 691 (1951).

5. See 1 SIMES, LAW OF FUTURE INTERESTS 261 (1st ed. 1936); RESTATEMENT, PROPERTY §314 (1940); 1 PAGE, WILLS 435 (lifetime ed. 1941).

the early stages of the common law, certainly find no support under the modern law, and as a result, the rule has been constantly adversely criticized.<sup>6</sup> Perhaps the only valid reason for the continuance of the doctrine today is that given by the *Restatement of Property*. The rule, according to this authority, is based on the reason that ". . . the average conveyer does not intend by a limitation to his own heirs to create in them an interest which is indestructible by him during his own lifetime."<sup>7</sup> In view of the modern emphasis on the intention of the grantor as the polestar of construction of a conveyance, this reason seems to be a valid one in support of the rule.

The doctrine under consideration has at least a superficial similarity to the rule in *Shelley's Case* in that under the application of both rules a limitation to "heirs" is found to be void. Hence for the purpose of clarity these two rules should be distinguished. The rule in *Shelley's Case* applies to the situation in which the grantor conveys to A and then to the heirs of A,<sup>8</sup> whereas the rule here considered applies to a conveyance by the grantor to A and then to the heirs of the grantor.<sup>9</sup> Although the rule in *Shelley's Case* has been abolished by statute in many states,<sup>10</sup> including Missouri,<sup>11</sup> there has been very little statutory treatment of the doctrine of worthier title.<sup>12</sup>

The best statement of the rule is found in the *Restatement of Property* as follows:

When a person makes an otherwise effective intervivos conveyance of an interest in land to his heirs, or of an interest in things other than land, to his next of kin, then, unless a contrary intent is found from additional language or circumstances, such conveyance to his heirs or next of kin is a nullity in the sense that it designates neither a conveyee nor the type of interest conveyed.<sup>13</sup>

This rule has had general application in this country, either as a rule of property or as a rule of construction. Although the

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6. See Harper and Heckel, *The Doctrine of Worthier Title*, 24 ILL. L. REV. 627 (1930); Comment, 5 MO. L. REV. 232 (1940).

7. RESTATEMENT, PROPERTY §314, comment e (1940).

8. 1 SIMES, LAW OF FUTURE INTERESTS 196 (1st ed. 1936).

9. *Id.* at 259.

10. *Id.* at 244.

11. MO. REV. STAT. §§442.490, 468.320 (1949).

12. Morris, *The Inter Vivos Branch of the Worthier Title Doctrine*, 2 OKLA. L. REV. 133, 170 (1949).

13. RESTATEMENT, PROPERTY §314 (1940).

rule was originally applied in England as a rule of property, the general tendency in this country has been to apply the rule as one of construction. That is, where there is a conveyance in which an interest in land is limited to the heirs of the grantor, or an interest in personalty is limited to the next of kin of the grantor, there arises a presumption that the grantor retains a reversion and that the heirs or the next of kin take nothing.<sup>14</sup>

The doctrine of worthier title is properly applicable only when the language of the conveyance attempts to create a remainder in the proper heirs or next of kin of the grantor, *i.e.*, those who would take the property from the grantor by intestate succession, if the grantor had died intestate. Consequently, there arises a problem of construing the instrument which purports to limit an interest to the heirs or next of kin of the grantor, a problem which must be answered before it can be determined whether the doctrine of worthier title is to be applied to avoid the limitation. The answer to the problem is to be found in the intention of the grantor; that is, it must be determined whether the grantor intended to limit an interest to his "heirs" or "next of kin" as these words are used in their primary sense. Normally, of course, the words describing the persons to whom the interest is limited should be given their usual meaning, but where a clear indication that another meaning was intended arises from other language of the conveyance or surrounding circumstances, that meaning should be given to the words. There are two such possibilities. The grantor, in limiting an interest to his "heirs" or "next of kin" could have intended to refer to persons other than those who would take from him by intestate succession, in which case the doctrine is not properly applicable. On the other hand, the grantor may have used words other than "heirs" or "next of kin" and yet have intended those people who would have taken by intestate succession, in which case the doctrine is properly applicable.<sup>15</sup>

If it is found that the grantor intended to limit an interest to

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14. Morris, *supra* note 12, at 143. Of course, even if there were a valid contingent remainder in the heirs or next of kin of the grantor, the grantor would retain a reversion. This reversion, however, would be subject to complete defeasance in the event the particular estate terminated before the death of the grantor. The effect of the application of the worthier title doctrine is to make this reversion indefeasible. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 88 (1st ed. 1951).

15. *Id.* at 90 (1951); Morris, *supra* note 12, at 149.

his heirs or next of kin, as these terms are used in their primary sense, the doctrine of worthier title is applied to avoid these interests with the end result that the grantor retains a reversion unless a contrary intent is shown. Some indication of the major factors seized upon by the courts to find a contrary intent is given in a later section of this note. It is sufficient to say at this point that the intent which must be shown by those claiming that the doctrine should not be applied to the conveyance under consideration is the intent that the grantor should not during his lifetime have the power of disposition of the remaining interest.<sup>16</sup>

Although the early reasons for the rule had import only as applied to realty, a fact which resulted in the limitation of the rule to transfers involving real property by the English courts, the American courts have quite generally applied the rule to transfers of personal property also.<sup>17</sup> In view of the fact that the reason now accepted as the basis for the rule is as equally applicable to transfers of personalty as to those of realty, this extension seems sound. It should be noted, however, that whereas the proper designation of the parties who will take from the grantor by descent is "heirs" if the property is realty, the proper designation is "next of kin" if the property is personalty. Consequently, when the subject matter of the conveyance is personalty, in the initial problem of construction just considered the courts should find that the grantor intended "next of kin" by the language used in the conveyance. However, quite often the word "heirs" is used even though the conveyance is of personalty. Little difficulty is encountered in this respect, and the courts appear willing to construe "next of kin" to mean heirs and "heirs" to mean next of kin, depending upon the nature of the subject matter of the conveyance. This liberality is quite probably due to the fact that under modern statutes of descent and distribution one's heirs and next of kin are the same group of people.<sup>18</sup>

The Supreme Court of Missouri in a recent opinion concerning this question<sup>19</sup> adopted the *Restatement* form of the rule

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16. RESTATEMENT, PROPERTY §314, comment *e* (1940).

17. RESTATEMENT, PROPERTY §314, comment *a* (1940); SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 85 (1st ed. 1951); 16 A.L.R.2d 691, 701, (1951).

18. Morris, *supra* note 12, at 142.

19. Davidson v. Todd, 350 Mo. 639, 167 S.W.2d 641 (1943).

and applied it to the facts before them. The grantor conveyed to A and the heirs of his body; the conveyance also contained the following provision, “. . . said premises to revert to the grantor herein or become part of his estate . . .” in the event that A die without heirs of his body. There was a further provision in the conveyance that the land should not be liable for the debts of A. The grantor died intestate leaving A as his only heir, and A then died intestate and without heirs of his body. The dispute arose between the collateral heirs of the grantor and the heir of A (his wife) as to who owned the land. A Missouri statute, which was applied in this case, converts what would be by the common law an estate tail into a life estate in the first taker and a contingent remainder in the heirs of the body of the first taker.<sup>20</sup> The collateral heirs of the grantor, relying on the case of *Norman v. Horton*<sup>21</sup> (discussed *infra*), argued that the deed created contingent class remainders in the alternative—first, in the bodily heirs of the life tenant, and second, in default thereof, in the collateral heirs of the grantor—and that, therefore, until the death of the life tenant, the fee was in abeyance. Consequently, it could not pass by intestate succession to the life tenant, but rather became vested in the collateral heirs of the grantor on the event of and at the time of the life tenant’s death without issue. The Missouri Supreme Court, however, rejecting this argument and approving the rule and reasoning as set forth in the *Restatement*, held that under the conveyance the grantor retained a reversion, which passed by intestate succession to the life tenant on the death of the grantor and on the death of the life tenant to the life tenant’s heirs, in this case, his wife. The court agreed with the *Restatement* that the rule was one of construction to be applied unless there was manifested in the instrument or in other circumstances a contrary intent, and that the contrary intent, which if found would prevent the operation of the rule, is the intent that the grantor could not destroy the interest of the heirs during his (the grantor’s) natural life. The court found no contrary intent from the facts in this case, but, on the contrary, found an affirmative manifestation of intent that the grantor should have control over the reversion during his life in the expression that the land should “revert” to the

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20. Mo. REV. STAT. §442.470 (1949).

21. 344 Mo. 290, 126 S.W.2d 187 (1939).

grantor or his estate (since this provision spelled out the possibility that the land might revert to the grantor himself), and from a clause in the deed which at least purported to keep the land free from the grantee's debts (since this showed an intent to preserve the remainderman's and the reversioner's interests).

The decision and reasoning in this case eliminated some confusion which existed in the previous Missouri cases and either impliedly overruled some of these cases or completely disregarded the reasoning therein. In *Christ v. Kuehne*,<sup>22</sup> the grantor conveyed to his wife by a deed containing the following habendum: "To have and to hold . . . from and after death of said party of the first part [grantor], for and during her natural life, and after her death to have and to hold to heirs at law of the said party of the first part and their heirs and assigns forever . . .", it being expressly stated that the grantor should retain the possession and control of the premises during his lifetime. Subsequently, the grantor and his wife joined in a conveyance of the same land to a straw party, who in turn conveyed it back to them as joint tenants. The grantor died, leaving as heirs some children by a former marriage, and then the wife died, leaving as heirs her mother and two brothers. Ejectment was brought by the wife's heirs against the lessees of the grantor's heirs and the court held for the defendants. After holding that the writing in question was not testamentary and consequently not revoked by the subsequent conveyance, the court, not citing any authority or even considering the question here under discussion, found that the writing created a remainder in fee in the heirs of the grantor which could not be destroyed by the subsequent action of the grantor in joining with his wife and conveying to another. The court said that after delivery of the deed to the wife, the grantor's interest, the interest of his wife and that of his heirs

. . . became fixed and absolute; and the grantor could do nothing while enjoying the possession of said premises under the reservation therein to himself to revoke or to impair the estate thus created, even though the wife should join him in the subsequent conveyance of said property. . . .<sup>23</sup>

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22. 172 Mo. 118, 72 S.W. 537 (1903).

23. *Id.* at 128, 72 S.W. at 539.

In *Rayl v. Golfinopoulos*<sup>24</sup> the conveyance was by a husband to a trustee to hold the property for the benefit of the grantor's wife during her life, the wife having power to direct the sale of the land at any time, and on her death the property, if not sold, was to "revert" to the grantor if the grantor survived the wife, and if he did not, then the property was to "revert" to the grantor's heirs at law. The court, again not referring to the particular doctrine here in question, and not mentioning the *Kuehne* case, held that the fee passed to the trustee, that an equitable life estate was created in the wife with power of appointment superadded, that there was a contingent remainder in the grantor to become vested if his wife predeceased him, and that there was a contingent remainder in the heirs of the grantor to become vested in the event of the grantor's death before the wife. The only authority cited to support this construction was a case involving estates identical to the above except that the remainder was limited to someone other than the grantor or his heirs.

In *Norman v. Horton*,<sup>25</sup> the grantor conveyed to A (his daughter) for life and on her death then to the heirs of her body, and if she died without heirs of her body, ". . . then the title to . . . the real estate, at her death, shall revert to and vest absolutely in the heirs-at-law of . . ." the grantor. The grantor died first, and then A died without heirs of her body. The case then arose between the surviving heirs of the grantor and the devisee of the land from A. It was the latter's contention that the interest limited to the heir of the grantor was void and that the grantor retained a reversion in the land which on the grantor's death intestate passed, in part at least, through A—an heir of the grantor—to the devisee under A's will. The surviving heirs of the grantor contended that the future interest given the heirs at law of the grantor was a contingent remainder, and not a reversion, which vested in the heirs of the grantor living at the death of the life tenant without bodily issue, and because A was not alive at this time, she took nothing at this time by this grant, and consequently the devisee likewise took nothing. The trial court accepted this latter contention, and it was affirmed by the Supreme Court of Missouri. The court expressly rejected the

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24. 264 S.W. 911 (Mo. 1924).

25. 344 Mo. 290, 126 S.W.2d 187 (1939).

contention of the devisee, saying that the rule he contended for was based on feudal concepts of no import now, and concluded that the grant created contingent class remainders in the alternative or with a double aspect. It further held that the class was determined, and that the remainders finally vested on the death of the life tenant, the court reasoning from its definition of a contingent remainder as one where the estate is limited to take effect either on a dubious or uncertain event, or is limited to a dubious or uncertain person. Here, both classes of remaindermen were dubious and uncertain as to both person and event. In support of this conclusion, the court reasoned that the word "revert," as used in the conveyance, could not have been used in its technical sense signifying a reversion, for the reason that a reversion is not, by definition, created by conveyance, but remains by the force of law after something less than that which the grantor had is conveyed away, and hence the word revert must have been used in the sense of "pass" or "go."

It is clear that the Supreme Court of Missouri is not going to follow the reasoning put forward in any of the aforementioned three cases, for in the *Davidson* case, although nothing was said about the *Kuehne* case or the *Rayl* case, the court in commenting upon the *Norman* case used the following language:

We think the issue rightly ruled upon which *Norman v. Horton* turned and distinguishable on the facts from the instant issue. Observations there made arguendo and unnecessary to a determination of the review, dictum, lack authoritative force as a precedent if necessarily inconsistent herein.<sup>26</sup>

The distinction which the court appears to be referring to is based upon the time of determining the heirs of the grantor. Before the doctrine of worthier title is applicable, the word "heirs" must have reference to those persons who would be the heirs of the grantor at the time of his death.<sup>27</sup> In the *Norton* case, the court concluded that the class of heirs was to be determined upon the death of the life tenant, and thus, even if the court had there decided to apply the doctrine of worthier title, the result would have been that the heirs had a remainder, for that case falls within the exception to the rule.

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26. 350 Mo. 639, 645, 167 S.W.2d 641, 644 (1943).

27. RESTATEMENT, PROPERTY §314 (1940); SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 86 (1st ed. 1951). See 16 A.L.R.2d 691 (1951).

Outside of these three cases, no other cases in Missouri have been found in which the facts would have warranted an application of the doctrine of worthier title to an inter vivos transaction and in which the court has not held that the interest in the grantor or his heirs was a reversion,<sup>28</sup> although in some of the cases no mention was made of the doctrine in express language. For instance, the doctrine was in effect applied in *Wells v. Kuhn*,<sup>29</sup> where the conveyance was from A to B for life, and if B died before A then the land was to revert to A, but if A predeceased B the land was to descend and vest in A's heirs at law. The court held that A retained a reversion, and as a result when A subsequently made a further conveyance purporting to convey the whole title to the land to B, B took a fee simple title. The court put its decision on the ground that the word "heirs" when used in a conveyance is presumptively a word of limitation and not of purchase, and that there was nothing to show that a contrary intent was present in this case. In other words, where there is a limitation in favor of the heirs of the grantor, the words are not used as words of purchase indicating a particular class to take under the instrument, but are words of limitation describing the quality of the preceding estate, in this case the life estate of B.

As indicated above, the rule is today generally applied to personalty as well as to realty,<sup>30</sup> but there is no case in Missouri involving the question of whether the rule applies to personal property alone. However, in *Stephens v. Moore*<sup>31</sup> both real estate and personal property were involved. There the grantor transferred real estate of the value of \$30,000 and personal property worth \$10,000 to a trustee to be held for the benefit of the grantor for his life, and on his death the corpus of the property "... shall pass to and vest in my legal heirs or as may be directed in my will." The court held that the grantor retained a reversion in the property, and consequently, there being no one else besides the grantor beneficially interested in the trust, the grantor could

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28. *Bullock v. People's Bank of Holcomb*, 351 Mo. 587, 173 S.W.2d 753 (1943); *Stephens v. Moore*, 298 Mo. 215, 249 S.W. 601 (1923); *Wells v. Kuhn*, 221 S.W. 19 (Mo. 1920).

29. 221 S.W. 19 (Mo. 1920).

30. See note 17 *supra*.

31. 298 Mo. 215, 249 S.W. 601 (1923).

revoke the trust without the consent of others.<sup>32</sup> The court indicated that it conceived of the reason for the rule as that given by the *Restatement* by using the following language:

When the deed involved in this proceeding is considered as a whole it seems very clear that the grantor had no thought of making a disposition of his estate to take effect at his death; the sole purpose was to provide for the handling and managing of his property during his own lifetime; the words, 'and the trust shall pass to and vest in my legal heirs or as may be directed in my will', is a mere statement, by way of further limitation of the trustee's estate, that the grantor reserves full authority to dispose of the reversion as he sees fit.<sup>33</sup>

Throughout the Missouri cases there is no discussion of the initial problem of construction to determine the grantor's intent with regard to the description of the persons who are to take the interest in the property after the termination of the particu-

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32. Where the trust conveyance is by the grantor to the trustee in fee simple, to hold for the benefit of the grantor for life, and on his death to convey the property to the grantor's heirs, a situation is presented where technically either the rule in *Shelley's Case* or the doctrine of worthier title is applicable to avoid the purported equitable interest in the grantor's heirs. This is true for whereas the rule in *Shelley's Case* applies where there is a limitation to the heirs of the grantee, and the doctrine of worthier title is applicable where the limitation is to the heirs of the grantor, here the grantor and the grantee are the same person. A distinction should be kept in mind, however. This situation arises only where the limitation in trust is such as to give the heirs of the grantor-grantee an equitable remainder, and not a legal remainder, for if there is a legal remainder in the heirs of the grantor, the rule in *Shelley's Case* would not be applicable because the grantor-grantee would have only an equitable interest, and the rule applies only where the grantee and his heirs have interests of the same quality. In this last factual situation, the only available doctrine to avoid the purported legal interest in the heirs of the grantor-grantee would be the doctrine of worthier title. It is submitted that in the situation where a choice is available as to which rule should be applied the doctrine of worthier title should be used because the reason given to justify the application of the doctrine in modern times is just as convincing here as in any other situation.

33. 298 Mo. 215, 227, 249 S.W. 601, 604 (1923). It should be pointed out that a number of courts have seized upon the fact that the grantor in this situation expressly retained the power to dispose of the corpus of the trust by will only to find an intent contrary to the application of the doctrine of worthier title, and thus have found that the heirs of the grantor received a contingent remainder under the trust conveyance. The reasoning is this: If the grantor retained a reversion he would have all the incidents of ownership including full power to dispose of the property either by will or by deed. By expressly singling out the power to dispose of the property by will only, he has indicated that he means to relinquish all other incidents of ownership and consequently that he intends to create a remainder in his heirs. The leading case adopting this reasoning is *Whittemore v. Equitable Trust Co.*, 250 N.Y. 298, 165 N.E. 454 (1929). For a full discussion of the cases see *Morris*, *supra* note 12, at 151.

lar estate. As already indicated, these persons must be the heirs or next of kin of the grantor, as these terms are used in their primary sense; otherwise, the doctrine of worthier title is not applicable. One possible situation where this problem of construction arises is where the grantor has conveyed a life estate to A and then limited a "remainder" to a class of people whom the grantor may have confused with his heirs, such as his children or issue.<sup>34</sup> In such a situation, the court is confronted with the problem of determining whether the grantor actually meant children or issue, or whether he mistakenly substituted one of these words for the word "heirs" or "next of kin." However, in Missouri this problem of possible substitution of one word such as children for the word "heirs" has not yet arisen, for in every case where the doctrine of worthier title has been applied or could have been applied, the limitation contained some language indicating that the property was to go to those who would have taken the property by intestate succession from the grantor, such as "grantor's heirs" or "grantor's estate." However, the same problem of construction has arisen in a slightly different way, for, although there are no cases where the grantor could have mistakenly substituted another word for the word "heirs," in many cases the grantor, besides limiting an interest to those who would take from him by intestate succession, included himself in the limitation. In fact, in only two cases was the limitation in the exact form required for the applicability of the doctrine of worthier title (X to A for life, and then to the heirs of X). In one of those cases the doctrine was applied, the decision being that X retained a reversion, whereas the doctrine was specifically rejected in the other.<sup>35</sup> The two possible situations which arise when the grantor includes himself in the limitation are: first, that in which the grantor designates that the property is to go, after the termination of the preceding particular estate, to the grantor and his heirs, and secondly, that in which it is indicated that the property is to go to the grantor or

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34. Of course, unless a strong showing of contrary intent is made, these words would be given their normal meaning, but if such an intent be shown, it is possible to construe "children" to mean heirs. See: *RESTATEMENT, PROPERTY* §§305-307 (1940). For a case construing "heirs" to mean children see *George v. Widemire*, 242 Ala. 579, 7 So.2d 269 (1942).

35. *Norman v. Horton* 341 Mo. 290, 126 S.W.2d 187 (1939) (rejected); *Stephens v. Moore*, 298 Mo. 215, 249 S.W. 601 (1923) (applied).

his heirs. The second limitation might be spelled out more fully to the effect that the property is to go to the grantor if he survives the life tenant, but that the heirs of the grantor are to have the property if the grantor predeceases the life tenant.

The fact that the grantor used one of these two phrases rather than the other, and rather than the term "his heirs" alone, in describing those persons who are, by the terms of the conveyance, to take the property may become important at three different levels in the consideration of the applicability of the doctrine of worthier title. First of all, it must be determined, in the initial problem of construction, whether the grantor really intended to include himself in the limitation or rather whether he intended merely to limit an interest to his heirs by the use of one of the two aforementioned phrases. Secondly, if it is determined that the grantor intended to include himself in the limitation, how is this going to affect the application of the doctrine of worthier title? And finally, if it is found that the doctrine is still applicable when the grantor uses one of these two phrases, how is this going to be taken into account when the consideration is whether a contrary intent is expressed? When we turn to the limitation to the "grantor" and his "heirs" at the first level, the problem is merely one of discovering the intent of the grantor. Just as it may be found in some cases in which the grantor conveyed property in language similar to "grantor to A for life and then to the grantor's children" that he really meant to say "grantor to A for life and then to the grantor's heirs," it is also conceivable, although not likely, that when the grantor conveyed property in language similar to "grantor to A for life and then to the grantor and his heirs" the grantor really meant to say "grantor to A for life and then to the grantor's heirs." However, although in many situations it is quite possible that the grantor did confuse the meaning of the word "children" with that of the word "heirs," it is indeed unlikely that such a confusion would exist between the phrases "grantor and his heirs" and "his heirs." Certainly no argument can be made in favor of construing the former phrase to mean the latter on the basis of the doctrine of worthier title, for it is utterly unlikely that the grantor had the problem in mind at the time of the conveyance. If he did, certainly he would have spelled out his intention more fully. Nevertheless, it is conceivable that in some cases

such a construction can be put on the phrase "grantor and his heirs."<sup>36</sup>

Once it is concluded that the grantor did not intend to limit the interest to his heirs by the use of the phrase "the grantor and his heirs," it follows that the application of the doctrine of worthier title is going to be affected. The doctrine is, by the statement of the rule, limited to the situation in which the grantor limits an interest to his heirs.<sup>37</sup> When the limitation is to the grantor and his heirs one of the essential elements for the application of the doctrine is missing. However, where this is the form of the limitation a result similar to that which would have been reached had the doctrine been applied is nevertheless reached, although the basis for the result is different. By definition a remainder is an interest created in a party other than the grantor,<sup>38</sup> and also by definition a reversion can exist only in the grantor and arises by operation of law when the grantor conveys away something less than he has.<sup>39</sup> Consequently, when a grantor limits an interest to himself and his heirs after a life estate, he is limiting to himself exactly what the law would have implied had nothing more than the life estate been conveyed away, and he is trying to create in himself and his heirs something which, by definition, can be created only in some other person. The result is that the remainder limited in the conveyance is void, the grantor retaining a reversion.<sup>40</sup> The Missouri cases are in accord on this point, although from the discussion in the cases, the ground on which the decisions are reached is not at all clear. In *Hobbs v. Yeager*<sup>41</sup> the grantor conveyed to A and B for life, and on their death ". . . to their children if any such be living at such time, forever, and if no such children be living at their death, then to the . . . [grantor] . . . and his heirs forever." The argument was made that under the deed the entire title passed out of the grantor, that since there were no

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36. If a seventy-five year old grantor conveyed his land to his twenty-five year old granddaughter for her life in consideration of the latter's caring for the grantor for the remainder of his days, with a "remainder" to the grantor and his heirs, it would seem that such a construction would be possible.

37. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 85 (1st ed. 1951).

38. 38 AM. JUR. 510.

39. 2 TIFFANY, REAL PROPERTY 15 (3rd ed., Jones, 1939); 33 AM. JUR. 510.

40. 2 TIFFANY, REAL PROPERTY 7 (3rd ed., Jones, 1939).

41. 263 S.W. 225 (Mo. 1924).

children of the life tenant in whom the fee could vest, it went into abeyance to abide the time when children, in whom the fee could "vest" as contingent remaindermen, might be born, and that since the life tenant died without children, the fee reverted at that time to the grantor's heirs. It was further argued that contingent class remainders in the alternative were created by the deed, the respective classes to be determined at the death of the life tenant along the line of the reasoning in the *Norman* case. The court rejected both of these arguments, and found that the deed created a life estate, and also provided for a "contingent remainder to vest in the children" of A and B. It further found that the grantor retained a reversion subject to complete defeasance by the life tenant's death with children. The court said that this was not the case of a ". . . reversion by operation of law to the grantor and his heirs upon the expiration of the estate granted, but, under this deed there was an express retention, a reservation by the grantor himself, subject to its being thereafter divested. . . ." <sup>42</sup>

In *Keller v. Keller*<sup>43</sup> the grantor conveyed land to A and his heirs, but in a subsequent part of the instrument it was recited that "it is hereby expressly agreed to and understood . . . that in the case that the said . . . [A] . . . die without children the . . . real estate shall revert to . . . [grantor] . . . and his heirs. . . ." The court, with practically no discussion of the problem, held that the conveyance passed a determinable fee simple, with the grantor retaining a possibility of reverter

Although the decisions in both of these cases are in accord with the proposition stated above, it appears that the reasoning is not the same, and it further appears from the argument of counsel that in their minds, at least, there was some confusion between these facts and those to which the doctrine of worthier title is applicable. It is suggested that a consideration of the definition of remainders and reversions and a decision based on such definitions would aid in the solution of the problem.

At the third level of importance, the fact that the grantor limited the interest to himself and his heirs would appear to have no effect. If, in the first place, it is found that the grantor actually intended to limit the interest to himself and his heirs,

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42. *Id.* at 227.

43. 338 Mo. 731, 92 S.W.2d 157 (1936).

the doctrine of worthier title is not applicable, as we have seen. If, on the other hand, it is found that the grantor meant only to limit the interest to his heirs, the fact that the grantor mentioned himself in the limitation can have no effect toward showing an intent contrary to the application of the doctrine, for, by the initial determination of intent, the court will have found that nothing was meant by the insertion of the word "grantor" into the limitation.

We shall now direct attention to the limitation to "the grantor or his heirs." As to the initial problem of construction, the problem is much the same as the problems of construing the phrase just considered. However, no matter what construction is placed on the phrase, the court is faced with two possible decisions, and either of these decisions could result under either of the possible constructions. If, by the initial process of construction, it is determined that the grantor actually intended that the limitation include himself, as to the limitation to the grantor a reversion should be found, based on the same reasoning as that just considered, and as to the limitation to the grantor's heirs, the decision should turn on whether the doctrine of worthier title is to be applied. The reversion in the grantor would have to be in fee simple, for all reversions are in fee simple; but unless the doctrine is applied to the limitation to the heirs, the reversion would be defeasable on the grantor's dying before the termination of the particular estate. If the doctrine is applied, the effect would be to make the reversion indefeasible, for the limitation to the heirs which made the reversion defeasible would be void. If, however, by the initial construction it is determined that the grantor did not intend to include himself in the limitation, and that he only intended to limit the interest to his heirs, the doctrine of worthier title is applicable to the whole phrase, and the same two possibilities result. This is so because, whereas in the first situation where the court finds the limitation to the grantor to be void, and a reversion is found to remain in him, the court is doing nothing more than finding a reversion where one would be found had nothing been said about the grantor in the limitation, in this situation nothing is said about the reversion and one will be found by operation of law. Consequently, in both situations the court is left with the possibilities of finding this reversion to be indefeasible or de-

feasible accordingly as it finds the doctrine of worthier title to be applicable or inapplicable. However, there is a possibility that the particular construction placed on the phrase in the original consideration of it may have a bearing on whether a contrary intent is expressed. This aspect will be considered below.

This form of the limitation has arisen in four Missouri cases. In *Davidson v. Todd*<sup>44</sup> the limitation was to "the grantor herein or become part of his estate." As already indicated, the court held that the grantor retained a reversion and put its decision squarely on the doctrine of worthier title, without discussing the interpretation to be put on this phrase. From the fact that the decision was placed squarely on this ground, nothing can be inferred as to what the court thought of this phrase; under either the interpretation that it merely meant to the grantor's heirs, or that it meant to the grantor or his heirs, the doctrine is properly applicable. However, because the court subsequently found an intent that the doctrine should be applied from the fact that the grantor mentioned himself in the limitation, it is inferable that the court put the latter interpretation on the phrase. In *Rayl v. Golfnopulos*<sup>45</sup> the limitation was to the grantor if he outlived the life tenant, or to the grantor's heirs if he predeceased the life tenant. The court again did not consider the interpretation to be put on the phrase, perhaps because the latter contingency actually came to pass, and found that a remainder was created in the heirs of the grantor by the conveyance. In *Wells v. Kuhn*<sup>46</sup> the limitation was in the same form, and again no consideration was given to this question. However, in this case the court found that the grantor retained a reversion. In *Bullock v. People's Bank of Holcomb*<sup>47</sup> the conveyance was from X to A ". . . for her natural life and the remainder in fee to the bodily heirs . . ." of A, and if A die without bodily heirs the land was to "revert" back to the grantor if he was still living, but if he was dead it was to go to the grantor's estate. Under the aforementioned Missouri statute, it was held that A had a life estate and that there was a contingent remainder in A's bodily heirs. The court also held, without any discussion of the doctrine of worthier title or any consideration of the problem here in ques-

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44. 350 Mo. 639, 167 S.W.2d 641 (1943).

45. 264 S.W. 911 (Mo. 1942).

46. 221 S.W. 19 (Mo. 1920).

47. 357 Mo. 587, 173 S.W.2d 753 (1943).

tion, that the grantor retained a reversion subject to complete defeasance.

It is at the third level that it is possible that a difference in the initial interpretation may make an important difference. If, in the first place, the initial interpretation is that the grantor merely intends to limit an interest to his heirs, it is difficult to find any indication of intent from the fact that he included himself in the limitation, for it has already been determined that he meant nothing by such inclusion. If, on the other hand, it is determined that he meant to include himself in the limitation, the argument presents itself that by so doing the grantor was thinking of himself as again coming into possession of the land. That inference in turn shows that he really did not intend to give up the interest which he had in the land except during the period of the particular estate, and consequently shows an intent to keep a reversion.<sup>48</sup> However, an argument to the contrary can also be made. The grantor, if he has an indefeasible reversion in fee simple, has all the incidents of ownership including the right to go into possession on the termination of the particular estate. By spelling out that the property is to go to himself or his heirs, depending on who is living at the termination of the particular estate, he is accurately describing who would have gone into possession of the land on the termination of that estate had there been no limitation of the ownership of the land after the particular estate. Since this would have occurred anyway, it seems more consistent to say that by spelling this out he meant something other than that which would have happened anyway, and consequently an intention is manifested that he thought of himself as having a defeasible reversion and the heirs a contingent remainder. Of two weak arguments the former seems the better, for if the latter were accepted it would

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48. In *Davidson v. Todd*, 350 Mo. 639, 644, 167 S.W.2d 641, 644 (1943), the court said with reference to this point:

. . . grantor conveyed to himself as grantee that estate which he already held—conveyed as a remainder what he had as a reversion. If an *inter vivos* gift in remainder to grantor's own heirs be a nullity for the reasons indicated, a *fortiori* the average grantor would not intend to create an indestructible interest in himself or in his estate in a grant *inter vivos*. The quoted words [The said premises to revert to the grantor herein or become part of his estate] usually may be considered to express an intention to hold the reversion and not to put the fee in abeyance. . . .

be an argument in favor of finding a contrary intent where the grantor limited an interest simply to his heirs.

The rule as applied to devises or bequests has been stated as follows:

A devise to an heir which gives to him no greater estate than he would have had if the words of devise had been omitted, and which gives to him no different estate in quality, connection with other tenants, and the like, is without any legal effect; and the heir takes by descent and not by devise.<sup>49</sup>

The reasons for this rule are substantially the same as those given for the rule as applied to inter vivos transactions,<sup>50</sup> and, as the inter vivos doctrine has been criticized, so has the application of the rule in the case of wills.<sup>51</sup> The *Restatement of Property* has taken the position that the doctrine has no application to wills,<sup>52</sup> and it would seem that since no reason for the rule remains except that given by the *Restatement*, and that that reason depends on the grantor's continued life, which obviously cannot occur in the case of a devise, the *Restatement* position is sound. This view is supported by the cases in Missouri, for in no case that has been found where there was an interest limited to the heirs or next of kin of the testator has the interest of the heirs been considered anything other than a remainder. Here again, most of the cases decided do not even consider the doctrine or worthier title.

In the latest case<sup>53</sup> there was a devise by the testator to his daughter for life and on her death remainder to the daughter's children, the lineal descendants of any deceased child taking his parent's share, and if the daughter die without lineal descendants, ". . . then the lands . . . shall revert to my-heirs-at-law." The court held that the conveyance created a life estate in the daughter and "an alternative or substitutional estate in the remainder," *i. e.*, a remainder in the children of the daughter or their descendants, and in default thereof in the heirs of the testator, and that the determination of the members of the respective classes was to be made at the death of the life tenant. The court relied in

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49. 1 PAGE, *op. cit. supra* note 5, at 435.

50. *Ibid.*; Harper and Heckel, *supra* note 6, at 627.

51. See note 50 *supra*.

52. RESTATEMENT, PROPERTY §314(2) (1940); SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 84 (1st ed. 1951).

53. *Brittin v. Karrenbrock*, 186 S.W.2d 35 (Mo. App. 1945).

part on the *Norman* case in order to construe the word "revert" to mean "pass" or "go," and was perfectly cognizant of the decision in the *Davidson* case, for it cited the case. The court apparently distinguished the latter case on two grounds: (1) on the ground that in this case a will was involved, whereas in the *Davidson* case the transfer was *intervivos*; that in construing the instruments it is the intention of the testator or grantor, as the case may be, which is to govern; that the reason for holding that a "remainder" to the heirs of the grantor is not a remainder, but a reversion, is the presumed intent of the grantor that he retain the power to destroy the interest of the heirs, during his (the grantor's) life, whereas in the case of a will ". . . he had no thought of a reversion in the sense of an estate left in himself, as might be the case in a grant made by deed, because he was speaking by will";<sup>54</sup> (2) on the ground that the identification of the heirs was to be made at the death of the life tenant and not at the death of the testator.

The other cases involving testamentary dispositions are substantially in accord with this case.<sup>55</sup> The cases are too numerous to be discussed individually, and nothing would be gained thereby. It is clear that no distinction is made between a gift of real or personal property, and for the most part no consideration is given to the doctrine here in question. In connection with this last statement, it should be pointed out that in practically every case the devise or bequest was either "X to A for life and on A's death then to the heirs of X," or "X to A for life and on A's death to A's bodily issue, but if A die without bodily issue, then to the heirs of X." The major issue which the Missouri Supreme Court decided in each case was at what time the determination of the class of heirs or bodily issue should be made—at the death of the testator or of the life tenant. Its decisions have gone both ways, depending on the facts of each of individual case. The court, in making the determination, assumes the interest in the heirs of the testator to be a remainder, usually without discussion.

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54. *Id.* at 37.

55. *Harwell v. Magill*, 348 Mo. 365, 153 S.W.2d 362 (1941); *Fullerton v. Fullerton*, 132 S.W.2d 966 (Mo. 1939); *Irvine v. Ross*, 339 Mo. 692, 98 S.W.2d 763 (1936); *Gardner v. Vanlandingham*, 334 Mo. 1054, 69 S.W.2d 947 (1934); *Evans v. Rankin*, 329 Mo. 411, 44 S.W.2d 644 (1931); *Baker v. Kennedy* 238 S.W. 790 (Mo. 1922); *Tevis v. Tevis*, 259 Mo. 19, 167 S.W. 1003 (1914).

In conclusion, it is apparent that the courts of Missouri are going to follow the doctrine and reasoning set forth in the *Restatement of Property*, for in every case decided since the publication of that work, the decision of the court has been in accord with the rule stated therein.<sup>56</sup> And the rule expounded by the *Restatement* is a sound one in view of the reason given in support of it—i.e., that it is probably the intention of the grantor to retain control over the reversion, but such cannot be the intention of the testator. But the rule as there stated is only a rule of construction and is to be applied only when a contrary intent is not shown. Although none of the Missouri cases have discussed what would be a contrary intent, numerous cases in other jurisdictions have considered the point, and perhaps a brief summary of what has been held to be a manifestation of a contrary intent in those cases is justified here.

One of the most important factors which has been seized upon as showing a contrary intent is the provision in a trust instrument that the settlor retains power to dispose of the corpus of the trust only. Thus were the settlor conveys property in trust for A for life and on A's death the corpus is to go to the heirs of the settlor unless the settlor has otherwise disposed of the property by will, the courts have generally found that a contingent remainder is created by the instrument in the settlor's heirs on the ground that a contrary intent is shown by the inclusion of that phrase. The reasoning is as follows. If the settlor had a reversion he would have all the rights and powers incident to the ownership of the reversion, including the right to dispose of the property by will or deed. By singling out the power to dispose of the property by will only, the settlor has indicated that that is the only way he can dispose of the interest, and this is inconsistent with the idea that he retains a reversion.<sup>57</sup> But as already pointed out the Missouri case of *Stephens v. Moore*<sup>58</sup> is inconsistent with this reasoning.

Some courts have seized upon the fact that the grantor has said that the land shall "revert" to the heirs or next of kin of

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56. *Bullock v. Peoples Bank of Holcomb*, 351 Mo. 587, 173 S.W.2d 753 (1943); *Davidson v. Todd*, 350 Mo. 639, 167 S.W.2d 641 (1943); *Harwell v. Magill*, 348 Mo. 365, 153 S.W.2d 362 (1941); *Brittin v. Karrenbrock*, 196 S.W.2d 35 (Mo. App. 1945).

57. *Morris*, *supra* note 12, at 151.

58. 298 Mo. 215, 249 S.W. 601 (1923).

the grantor and found from this an intention that a remainder was not to be created. This reasoning is placed on the ground that the grantor is merely spelling out what would have happened to the property had nothing more than the particular estate been conveyed away, and that by the use of the word "revert" the grantor is showing that that is all he was doing.<sup>59</sup> However, the Missouri courts seem to attach little importance to the fact that the word was used or not used.<sup>60</sup>

Where the property is conveyed in trust with a "remainder" to the settlor's heirs or next of kin, and the settlor retains a good deal of power of control over the trust property, there is also an indication of intent that the heirs or next of kin do not have remainders. This result is on the ground that such broad power over the trust property seems to negate any idea that the creation of any interest in the heirs or next of kin of the settlor was intended. In *Gordon v. Chemical Bank & Trust Co.*,<sup>61</sup> the settlor transferred personal property in trust. The income of the property was to be paid to him until he reached the age of forty, and after he reached that age \$2,000 per year of the principal was to be paid to him in addition to the income until all of the property and income were paid to him, but if he died before this occurred the property was to go to his heirs unless his will indicated otherwise. The settlor was co-trustee, and he had the power to remove the other trustee. The court held that no remainder was created, seizing on the fact that the grantor had such broad powers of control to find such an intent.

Where the grantor spells out what law of descent and distribution is to govern who will be his heirs or next of kin, some courts have found an intention that the grantor intended to create a remainder, even though the statute mentioned was the one which would have governed anyway. Apparently the reasoning is that since the statute mentioned was the same one which would have

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59. *Morris*, *supra* note 12, at 155.

60. In *Norman v. Horton*, 344 Mo. 290, 126 S.W.2d 187 (1939), the court found that the heirs of the grantor got a remainder under a provision that the property should revert to the heirs of the grantor, construing "revert" to mean to "pass" or "go". And in *Davidson v. Todd*, 350 Mo. 639, 167 S.W.2d 641 (1943), the court found the grantor retained a reversion under a similar limitation, but placed absolutely no reliance on the fact that the limitation contained the word "revert."

61. 272 App. Div. 565, 73 N.Y.S.2d 914 (1st Dept. 1947); *Morris*, *supra* note 12, at 154.

governed had none been mentioned, the grantor must have meant something else by such mention of the statute, and this intention is that the heirs or next of kin get a remainder. This seems weak. The words spelling out the particular statute which should govern should be treated as what the grantor probably intended them to be, *i.e.*, a mere statement of what the law is, from which no intention concerning the problem here in question can be drawn. Most of the cases are in accord with this treatment. However, where the statute mentioned is that of a state other than the one in which the grantor is living, an intention that the persons who would take under that statute should take as remaindermen can fairly be found.<sup>62</sup>

It has been said that where the people who will fit the description of the grantor's heirs or next of kin are to be determined at a time other than the grantor's death, there is an intention shown that the heirs or next of kin are to take as remaindermen.<sup>63</sup> However, the better statement seems to be that the doctrine of worthier title simply does not apply to a situation like this, and consequently there is no opportunity for finding any contrary intent at all. This is because the doctrine presupposes that the heirs or next of kin have a possibility of taking the property by either of two methods at the grantor's death—by descent or by purchase—and the rule is applied to determine how they are going to take. If, by the terms of the conveyance, it is found that the heirs or next of kin are not to be determined at the grantor's death, then they cannot take by descent, and, consequently, there is no opportunity to apply the doctrine to determine by which method they are to take. Under such circumstances, the heirs or next of kin must take as purchasers.

The above is merely a brief summary of some factors which have been seized upon in other jurisdictions to find the grantor's intent. There are possibly many other factors which could be used; in general the contrary intent to be found is that which shows that the grantor did not intend to have complete control over the interest left after the particular estate, and there is no natural limit on the number of factors which can be used to show such an intent.

C. HAVARD PERKINS

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62. *Id.* at 157.

63. *Id.* at 156.