TRUSTS

USE OF DOCTRINE OF WORTHIER TITLE TO DETERMINE THE INTENT OF THE SETTLOR

The venerable rule that a man cannot make his right heirs purchasers[1] seems still to apply in Indiana to conveyances of legal interests.[2] In recent years this doctrine of worthier title, in other jurisdictions, has been enunciated most frequently in litigation involving trusts, and this litigaton has centered in the courts of New York. New York's experience, and particularly its failure to develop the rule in such a way as to give some certainty to its law, has significance for Indiana. For not only are New York's cases repositories of much persuasive learning; they also illustrate snares which the careful draftsman can avoid and the wise court abolish.

On April 3, 1947, Jane Richardson served a notice of revocation to the trustees of a trust of personal property which she had established in 1924. The terms of the trust were typical: they provided for the payment of the income to the settlor, Jane, for life; and on her death the corpus was to be paid over and delivered to such person or persons as she might designate by her will. Failing such designation, the corpus was to be paid to her mother, if living, and if not living, then the corpus was to go to such persons as would be entitled to the same under the intestacy laws of the State of New York. The mother died in 1943 leaving Jane as sole heir. At the time the notice of revocation was served, Jane's husband and three children, two of whom were infants and were therefore under legal disability, would have been entitled to the trust corpus under the intestacy laws of New York. The trustees contested the revocation on the ground that Jane had created remainders to those persons entitled to take her property in event of intestacy, and that since the consent of these remaindermen had not

1. Pibus v. Milford, 1 Vent. 372, 86 Eng. Rep. 239 (1674); Read v. Erengton, Cro. Eliz. 322, 78 Eng. Rep. 571 (1594).
2. Dilman v. Fulwider, 57 Ind. App. 632, 105 N. E. 124 (1914); Wheeler v. Loesch, 51 Ind. App. 262, 99 N. E. 502 (1912); Thompson v. Thompson, 173 Ind. 593, 89 N. E. 314 (1904); Bateman v. Bennet, 31 Ind. App. 281, 66 N. E. 79 (1903); Brown v. Bernhamer, 159 Ind. 539, 65 N. E. 580 (1902); McClanahan v. Williams, 136 Ind. 30, 35 N. E. 897 (1893); Stilwell et ux. v. Knapper, 69 Ind. 558 (1880).

been obtained she was not entitled to revoke the trust under the applicable New York statute.[3] Jane contended that under the doctrine of worthier title she had retained a reversion, was the only person beneficially interested, and therefore need not obtain the consent of any other person in order to be entitled to revoke the trust. The New York Court of Appeals reversed a ruling of the Appellate Division[4] allowing revocation, holding that the terms of the trust had created remainders in Jane's next-of-kin. *Richardson v. Richardson*, et al., 81 N. E.2d 54 (N. Y. 1948).

In New York, where the doctrine of worthier title seems early to have been adhered to as a rule of property,[5] there was originally no difficulty in determining who were the beneficiaries of a trust the terms of which directed that the corpus be paid to the settlor's heirs or next of kin upon termination of the particular estate. That doctrine, imported into New York's law of trust without express discussion, made such trust terms ineffective to create a remainder. Rather the equitable conveyances left a reversion in the settlor and that interest passed to his heirs or next of kin by operation of law upon his death. Title thus derived by the laws of descent or distribution was deemed "worthier" than title derived by purchase, *i.e.*, by conveyance.[6]

In 1919, Judge Cardozo's famous opinion in *Doctor v. Hughes*[7] indicated that the doctrine of worthier title would no longer be adhered to as a rule of property preventing absolutely a settlor from creating remainders in his heirs or next of kin, if an intention to create a remainder is "clearly

3. N. Y. PERS. PROP. LAW § 23: "Upon the written consent of all the persons beneficially interested in a trust of personal property or any part thereof or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof."
4. Richardson v. Richardson et al., 272 App. Div. 321, 71 N. Y. S.2d 1 (1st Dep't 1947).
5. Williams v. Conrad, 30 Barb. (N. Y.) 524 (1859); Buckley v. Buckley, 11 Barb. (N. Y.) 43 (1850).
6. Montague v. Curtis, 191 App. Div. 904, 181 N. Y. Supp. 709 1920); Doctor v. Hughes, 225 N. Y. 305, 122 N. E. 221 (1919); see also Godolphin v. Abingdon, 2 Atk. 57, 26 Eng. Rep. 432 (1740); Godbold v. Freestone, 3 Lev. 406, 83 Eng. Rep. 753 (1694). See also 3 RESTATEMENT, PROPERTY 314 (1935); 125 A. L. R. 548, 551 (1940).
7. 225 N. Y. 305, 122 N. E. 221 (1919).

expressed."[8] Henceforth the doctrine has been applied in New York as a rule of construction, serving to show the intent of the settlor when that intent is not clearly to be drawn from the terms of the trust. Indiana seems never to have recognized the doctrine of worthier title as having any application to equitable interests, either as a rule of property or a rule of construction. But there is implicit authority for the proposition that the doctrine is not a rule of property.[9]

Although voluntary trusts are presumed irrevocable unless the settlor expressly or impliedly has reserved a power of revocation, one exception to this rule is recognized. A settlor can revoke a trust with the consent of all the beneficiaries provided none of them are under a legal disability to give their consent.[10] New York[11] and a few other states[12] have adopted this exception in statutory form. Thus when a settlor attempts to revoke a trust containing provisions that the corpus go to the settlor's next of kin at the termination of the particular estate, it becomes necessary to know what persons are beneficially interested. Obviously, a revocation may be effected more easily if the settlor has reserved a reversion rather than created a remainder.[13] It is in arriving at a determination of what equitable interests the trust instrument has created that the doctrine of worthier

8. *Id.*, 122 N. E. at 222: "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."

9. Ewing v. Jones, 130 Ind. 247 (1892). Where grantor conveyed land in trust for grantor's maintenance for life and on his death the property was to descend to the grantor's legal representatives, excepting an adopted half brother, the court held that the grantor's legal representatives took remainders by the trust deed. Their permission was necessary before the trust could be revoked. However, the doctrine of "worthier title" was not mentioned in the court's decision.

10. Botzum v. Havana National Bank, 367 Ill. 539, 12 N. E.2d 203 (1937); Ewing v. Jones, 130 Ind. 247, 29 N. E. 1057 (1892); Fowler v. Lanpher, 193 Wash. 308, 75 P.2d 132 (1938); Fredericks v. Near, 260 Mich. 627, 245 N. W. 537 (1932). See also RESTATEMENT, TRUSTS § 338, 3 SCOTT, TRUSTS § 338 (perm. ed. 1939).

11. See note 3 *supra.*

12. *E.g.*, MONT. REV. CODES ANN. § 7921 (1935); N. DAK. REV. CODE § 59-0218 (1943); SO. DAK. CODE § 59-0216 (1939).

13. If the settlor has retained a reversion and if he is also the life beneficiary, he does not need the consent of any other person in order to revoke the trust. If another person is the life beneficiary, his consent alone must be obtained by the settlor in order to revoke the trust.

title in those jurisdictions where it is effective becomes important. This problem of what persons are beneficially interested in a trust corpus was the one presented to the court in the *Richardson* case. Easy of formulation, the problem has proved difficult of solution, as is evidenced by a wealth of cases.

The decision in *Doctor v. Hughes*[14] did not indicate what factors in the trust instrument might be considered as clearly expressing an intention to create a remainder to the settlor's heirs. The leading case of *Whittemore v. Equitable Trust Co. of New York*[15] was one of the first important cases purporting to follow the rule of *Doctor v. Hughes.* In reality the test used in the *Whittemore* case was an extension of the rule. It was held that if the instrument as a whole evidenced an intention of the settlor to make a complete disposition of the entire estate at the time of the execution of the instrument, it would follow that there was an intention to create a remainder in the settlor's next of kin. This test has remained of controlling significance in the New York courts.

Around the doctrine of *Doctor v. Hughes* and the *Whittemore* test the New York courts have built a sizable body of law purporting to explain how a grantor's intention to create a remainder or reversion may be determined. But that the guiding principles are not yet clear is apparent from the conflict of opinion between the lower and highest appellate courts of New York. Appellate Division cases have been consistently overruled by the Court of Appeals[16] or have reached results seemingly inconsistent with the decisions of that court.[17] Factors which the Court of Appeals has considered indicative of an intention to create a remainder have

14. See note 7 *supra.*

15. 250 N. Y. 298, 165 N. E. 454 (1929).

16. Richardson v. Richardson et al., 81 N. E.2d 54 (N. Y. 1948); Matter of Scholz v. Central Hanover Bank & Trust Co., 295 N. Y. 488, 68 N. E.2d 503 (1946); Engel v. Guaranty Co., 280 N. Y. 43, 19 N. E.2d 673 (1939); City Bank Farmers Trust Co. v. Miller, 278 N. Y. 134, 15 N. E.2d 553 (1938); Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929).

17. *Compare* Beam v. Central Hanover Bank & Trust Co., 248 App. Div. 182, 288 N. Y. Supp. 403 (1st Dep't 1936) *with* Davis v. City Bank Farmers Trust Co., 248 App. Div. 380, 288 N. Y. Supp. 398 (1st Dep't 1936). These two cases with similar provisions were decided on the same day. In the *Beam* case the reservation of a testamentary power of appointment was found to be indicative of a remainder, while in the *Davis* case the court found it consistent only with a reversion.

been construed by the Appellate Division to be indicative of the retention of a reversion by the settlor.[18]

One of the factors which the courts consider of most significance as showing an intention of the settlor to create remainder interests in his heirs or next of kin is the reservation of a testamentary power of appointment.[19] The ground for this conclusion is that the settlor intended to dispose of all his property at the settling of the trust, retaining only the right to designate new beneficiaries or to reapportion the interests of old beneficiaries by will. Other factors which have influenced a finding that the settlor intended to create remainders in heirs are: (a) a conveyance in default of exercise of a testamentary power of appointment;[20] (b) a direction to deliver corpus at the termination of the trust to the appointees or heirs of an income beneficiary other than the settlor;[21] (c) the absence of a reservation of a power to grant or assign property during life;[22] (d) a dis-

18. *Compare* Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929), *with* Engel v. Guaranty Trust Co., 254 App. Div. 117, 3 N. Y. S.2d 1000 (1st Dep't 1938). In the *Whittemore* case, the testamentary power of appointment was held to be a strong factor consistent only with a remainder while in the *Engel* case the court considered this factor to be only a superfluous direction by the settlor to distribute the principal according to law. *Compare* Berlenbach v. Chemical Bank & Trust Co., 260 N. Y. 539, 184 N. E. 83 (1932), *with* Kuntze v. Guaranty Trust Co., 242 App. Div. 7, 272 N. Y. Supp. 883 (1st Dep't 1934). A reversion of corpus to settlor at end of definite period of time was held by the court to be indicative of a reversion in the former case, while in the latter the same factor was present where the court found that the settlor intended to create a remainder.

19. Richardson v. Richardson et al., 81 N. E.2d 54 (N. Y. 1948); Hopkins v. Bank of New York, 261 App. Div. 465, 25 N. Y. S.2d 888 (1st Dep't 1941); Minc v. Chase Nat. Bank, 263 App. Div. 141, 31 N. Y. S.2d 592 (1st Dep't 1941); Engel v. Guaranty Trust Co., 280 N. Y. 43, 19 N. E.2d 673 (1939); Beam v. Central Hanover Bank & Trust Co., 248 App. Div. 182, 288 N. Y. Supp. 403 (1st Dep't 1936); Hussey et al. v. City Bank Farmers Trust Co., 236 App. Div. 117, 258 N. Y. Supp. 396 (1st Dep't 1932); Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929).

20. *In re* City Bank Farmers Trust Co., 69 N. Y. S.2d 235 (Spec. Term 1947); Minc v. Chase National Bank of New York, 263 App. Div. 141, 31 N. Y. S.2d 592 (1st Dep't 1941); Hopkins v. Bank of New York, 261 App. Div. 465, 25 N. Y. S.2d 888 (1st Dep't 1941).

21. Hussey v. City Bank Farmers Trust Co., 236 App. Div. 117, 258 N. Y. Supp. 396 (1st Dep't 1932); Corbett v. Bank of New York & Trust Co., 229 App. Div. 570, 242 N. Y. Supp. 638 (1st Dep't 1930).

22. Richardson v. Richardson et al., 81 N. E.2d 54 (N. Y. 1948); Minc v. Chase National Bank of New York, 263 App. Div. 141, 31 N. Y. S.2d 592 (1st Dep't 1941); Engel v. Guaranty Trust

posal of corpus other than by a reversion on the occurrence of certain contingencies;[23] and (e) a provision for a class of beneficiaries to take at a time other than upon the settlor's death.[24]

The New York courts have also found reversions even although the settlor retained a testamentary power of appointment.[25] Justification for seemingly inconsistent results may be found in the presence of additional factors in such cases, consistent only with an intent to reserve a reversion. Some of those factors have been: (a) provision for the return of corpus to the settlor at end of a definite period of time;[26] (b) a disposition of the trust estate that did not dispose of it finally, under all contingencies;[27] (c) retention by the settlor of control over principal;[28] (d) the fact that the trust had been set up expressly to provide for a particular obligation of the settlor, such as a separation settlement in a divorce;[29] and (e) a direction to trustee to turn corpus over to settlor's executor or estate upon his death.[30] Thus the

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Co. of New York, 280 N. Y. 43, 19 N. E.2d 673 (1939); Schoellkopf v. Marine Midland Trust Co., 267 N. Y. 358, 196 N. E. 288 (1935); Hussey v. City Bank Farmers Trust Co., 236 App. Div. 117, 258 N. Y. Supp. 396 (1st Dep't 1932); Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929).

23. Richardson v. Richardson et al., 81 N. E.2d 54 (N. Y. 1948); Engel v. Guaranty Trust Co., 280 N. Y. 43, 19 N. E.2d 673 (1939); Schoellkopf v. Marine Midland Trust Co., 267 N. Y. 358, 196 N. E. 288 (1935); Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454 (1929).

24. *In re* City Bank Farmers Trust Co., 69 N. Y. S.2d 235 (Spec. Term 1947); Schoellkopf v. Marine Midland Trust Co., 267 N. Y. 358, 196 N. E. 288 (1935).

25. Fish v. Chemical Bank & Trust Co. et al., 270 App. Div. 251, 59 N. Y. S.2d (1st Dep't 1945); City Bank Farmers Trust Co. v. Miller, 278 N. Y. 134, 15 N. E.2d 553 (1938); Genesse Valley Trust Co. v. Neuborn, 168 Misc. 703, 6 N. Y. S.2d 498 (1938); Davis v. City Bank Farmers Trust Co., 248 App. Div. 380, 228 N. Y. Supp. 398 (1st Dep't 1936); Berlenbach v. Chemical Bank & Trust Co., 260 N. Y. 539, 184 N. E. 83 (1932).

26. Green v. City Bank Farmers Trust Co., 72 N. Y. S.2d 442 (1947); Berlenbach v. Chemical Bank & Trust Co., 260 N. Y. 539, 184 N. E. 83 (1932).

27. Matter of Scholz v. Central Hanover Bank & Trust Co., 295 N. Y. 488, 68 N. E.2d 503 (1946).

28. Conroy v. Title Guarantee & Trust Co., 271 App. Div. 200, 62 N. Y. S.2d 926 (1st Dep't 1946); Whittemore v. Equitable Trust Co., 162 App. Div. 607, 147 N. Y. Supp. 1058 (1st Dep't 1914).

29. Willis v. Willis et al., 265 App. Div. 746, 40 N. Y. S.2d 772 (1st Dep't 1945).

30. St. George v. Fulton Trust Co., 273 App. Div. 516, 78 N. Y. S.2d 298 (1st Dep't 1948); Franklin v. Chatham Phoenix Trust Co., 234 App. Div. 369, 255 N. Y. Supp. 115 (1st Dep't 1932); Hoskin

reservation of a testamentary power of appointment in itself is not controlling in ascertaining the settlor's intention to create a remainder, if from the presence of other factors the courts are able to find the intention to reserve a reversion.

In those jurisdictions where the doctrine of worthier title is held to be simply a rule of construction, there is an obvious solution of the problem of how to avoid litigation of the question of the settlor's intent. A clear statement by the draftsman that the intent is to retain a reversion or to create a remainder would preclude questions on this score. Obviously the same expedient would be of utility too in jurisdictions giving the doctrine no effect whatsoever, since the ultimate question there remains one of intent. The Indiana draftsman thus has it in his power conclusively to prevent the question of intent from being seriously challenged.

The moral in New York's story is that the doctrine of worthier title has no utility whatsoever in the field of trusts. Even when relegated to the status of a rule of construction, the doctrine has become encrusted with the gloss of so many judicial applications that the problem of finding the true intent of a particular settlor is hindered rather than furthered. Nor has there been any countervailing gain; the quest for some degree of certainty has been unsuccessful. For New York, the solution to its vexatious problem seems to be the total abandonment of the doctrine of worthier title, since it is improbable that it will ever be restored to the force of a rule of property. Although abandonment could be achieved by judicial interpretation, the drafters of the Uniform Property Act[31] have provided a statute whose adoption would achieve that result. For Indiana, there will be no problem to solve if its courts are diligent to avoid decisions or implications which may admit of future inferences that the doctrine is applicable to the law of trusts.

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v. Long Island Loan & Trust Co., 139 App. Div. 258, 123 N. Y. Supp. 994 (2nd Dep't 1910).

31. Section 15 of the act, as approved by the commissioners on uniform state laws, and the American Law Institute provides: "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." Nebraska has adopted the Uniform Property Act. REV. STATUTES OF NEBRASKA § 76-114 (1943).