3-1-1942

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Recommended Citation
John W. English, The Uniform Property Act in Pennsylvania, 46 Dick. L. REV. 144 (1942). Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol46/iss3/2

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THE UNIFORM PROPERTY ACT IN PENNSYLVANIA *

JOHN W. ENGLISH

Section 7. Conveyance of Future Interests.

"The conveyance of an existing future interest, whether legal or equitable, is not ineffectual on the sole ground that the interest so conveyed is future or contingent."

Section 8. Subjection of Future Interests to Claim of Creditors.

"The subjection to the claims of creditors of a future interest, whether legal or equitable, is not prevented or avoided on the sole ground that such interest is future or contingent."

These two sections may be dealt with appropriately together. Section seven deals with the question of whether contingent future interests can be transferred and Section eight subjects them to the claims of creditors. A creditor generally asserts his claim through attachment, execution, or in bankruptcy proceedings, or after the death of the debtor, by presenting a claim against his estate. Transferability is the broad test of what property will be subjected to bankruptcy proceedings. 1 Indeed, the power of the debtor to alienate inter vivos is a general test of whether a creditor can reach the debtor's interest. 2 So many of the cases which deal with transferability of future interests approach the question as a result of creditor's suits or of sheriff's sales, that it would involve a needless duplication of citations to deal with these sections separately.

The cases do not seem to make any distinction between personality and realty in regard to these questions. Therefore no distinction will be considered here. The questions which must be considered will be: First, is the interest transferable? Second, is there a transfer of a true legal interest or is it a mere contract to convey which equity will recognize? This is important because it has been held that an interest which is only transferable in equity is not subject to attachment execution 3 and will not pass to the trustee in bankruptcy. 4 Third, is this legally transferable interest subject to the claims of creditors?

*Continued from the October, 1941, issue, vol. 46, p. 37.

1Packer's Estate (No. 2), 246 Pa. 116, 92 A. 70 (1914); Suskin & Berry v. Romley (C.C.A. N.C.) 37 F. (2d) 304 (1930); see, Federal Bankruptcy Act, sec. 702 (5), 11 U.S.C.A. Sec. 110 (a) (5); 42 DICK. L. REV. 92, 98; 45 DICK. L. REV. 223.
2SIMES, LAW OF FUTURE INTERESTS, 194, sec. 737 (1936).
4See: In Re Twaddle (D. C. Pa.) 110 F. 145 (1901); In Re Wetmore, 102 F. 290 (1900).
But see 45 DICK. L. REV. 223.
Indefeasibly Vested Future Interests

It is well settled that indefeasibly vested future interests are transferable, will pass to the trustee in bankruptcy, and are subject to attachment and execution.

The mere futurity of an interest will not therefore affect the question. Our inquiry may be confined to future interests which are subject to some contingency.

The types of contingent future interests to be considered are the possibility of reverter, right of entry for condition broken, contingent remainder, shifting executory devise, and remainder vested subject to divestment. The first four of these interests will vest only upon the future happening of an uncertain event. The last mentioned estate, while technically vested, may be divested by some uncertain future event. All these interests have one element in common—their uncertainty of value.

Transfers in Equity

The equity courts of Pennsylvania are always willing to recognize the transfer of a contingent future interest or expectancy if it is supported by consideration. Such a transfer, however, is not really a present transfer but rather a contract to convey in the future which Equity will enforce if and when the promisor comes into the property which was the subject of transfer. We are not concerned with this type of transfer but rather with the transfer of a future interest which here and now exists and is subject to present assignment.

Devises and Intestate Succession

Unless the contingent interest is of a sort which is conditioned upon the continued life of the first taker, it will pass upon his death intestate to his heirs.

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5Moses v. Dunkle, 1 Woodward 338 (1867); Eckert's Estate, 157 Pa. 585, 27 A. 781 (1893); the point was assumed in, In Re Palm's Estate, 13 Pa. Super. 296 (1900); In Re Singer's Estate, 217 Pa. 293, 66 A. 548 (1907); In Re Yardley's Estate, 21 Pa. Dist. 518 (1912); In Re Winter's Estate, 29 Pa. Dist. 982 (1920); In Re Brolasky's Estate, 309 Pa. 30, 163 A. 292 (1932).

6In Re Twaddle (D. C. Pa.) 110 F. 145 (1901); see Packer's Estate (No. 2), 246 Pa. 116, 92 A. 70 (1914).

7In Re Bloodhart's Estate, 2 Pa. Co. Ct. 476 (1886).

8Humphreys v. Humphreys, 2 Dall. 223, 1 Yeates 427, 1 L. Ed. 357 (1793); Bean v. Kulp, 7 Phila. 650, 27 L. I. 61 (1870).

9Possibilities of reverter and rights of entry for condition broken are for the purposes of this article, considered as contingent future interests. If they were considered as vested, then mere futurity would have to be considered more fully as a possible bar to alienation.

10In Re John Wilson's Estate, 2 Pa. 325 (1845); Power's Appeal, 63 Pa. 443 (1869); East Lewisburg Lumber & Manufacturing Co. v. Marsh, 91 Pa. 96 (1879); Ruple v. Bindley, 91 Pa. 296 (1879); Devore's Estate, 89 Pa. Super. 47 (1926); see, Bayler v. Commonwealth, 40 Pa. 37 (1861).
or next of kin. It is also clear that such contingent interests are devisable. Therefore, we must concentrate upon the question of inter vivos transmissibility of contingent interests.

**Possibilities of Reverter and Rights of Entry for Condition Broken**

In Pennsylvania at common law the possibility of reverter could be assigned, and could be sold on execution. A right of entry for condition broken can also be assigned and is subject to execution. In this respect the Pennsylvania judges have shown eminent common sense in obtaining a desirable result without the aid of a statute.

**Future Interests Vested Subject to Divestment and Executory Shifting Devises**

A remainder which is vested subject to total divestment by a condition subsequent is freely transferable and is subject to claims of creditors. The same rule is applicable to shifting executory devises.

**Contingent Remainders**

By the Act of April 1, 1909, "All deeds . . . shall be construed to include all the estate . . . of the grantor or grantors . . . and the reversions and remainders . . . thereof." Under this act it has been assumed by the courts that contingent remainders will pass. This result merely confirms the common law.

In *Stewart v. Neely* it was held that a contingent remainder would not merge with a life estate to cut off an alternate contingent remainder. The court went on to say, in dicta, that a deed purporting to convey a contingent remainder operates only as an estoppel in equity. This dictum is given strength by a previous holding that a contingent interest is not subject to attachment.
The dictum of *Stewart v. Neely* is not supported by the great majority of cases. In almost every case where the holder of the future interest at the time of the assignment, was ascertained, and the contingency related to an event rather than to the taker, it was held that the interest of the holder can be transmitted. This would seem to be a present legal transfer since adequate consideration is not required. Where, however, the future interest is contingent not only as to an uncertain vesting but also as to who shall take, an assignment by a prospective taker is ranked as nothing more than an assignment of an expectancy, which may be enforced in equity but passes nothing at law. This conclusion is in accord with that reached in a recent note:

"The result in Pennsylvania then would seem to be that contingent interests where the person is ascertained are freely alienable; and where the person is not ascertained such a conveyance acts as a contract to convey which will be enforced in equity."*

This conclusion cannot be reconciled with the language in every case. In *Robbin's Estate* there was a life estate and after the death of the life tenants and 20 years after the death of the testator the estate was to be divided up among the nephews and nieces of the testator or their issue. One nephew assigned his interest for the benefit of creditors before it vested. The court sharply distinguished the nephew's interest from a mere expectancy and said that it was a real interest. On the facts, even if this were a contract to transfer in equity, since the interest had vested when the action was brought, the result would have been the same. But the language would seem to go further than treating it as a mere equitable transfer.

**Subjection to Claims of Creditors**

*Attachment and Execution.*

It has been stated that "contingent future interests are not subject to attachment before they vest". This rule has taken, unfortunately, a firm hold upon the law of this Commonwealth. Where the contingency happens after the

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24 Whelen v. Phillips, 151 Pa. 512, 25 A. 44 (1892); Robbin's Estate, 199 Pa. 500, 49 A. 233 (1901); *In Re Richardson's Estate*, 236 Pa. 136, 84 A. 70 (1912); *see*, Estate of Moss, 80 Pa. Super. 325 (1923).

25 *See*, Phillip's Estate (No. 2), 205 Pa. 511 (1905); Whelen v. Phillips, 151 Pa. 312; Davidson v. Little, 22 Pa. 245 (1853)—this last was concerned with a vested interest.

26 *See*, *In Re Twaddle* (D.C. Pa.) 110 F. 145 (1901); *In Re Wetmore*, 102 F. 290 (1900).


2842 DICK. L. REV. 92, at 95 (1937).

29199 Pa. 500, 49 A. 233 (1901); and *see*, Rash's Estate, 2 Parsons 160 (1850).

3042 DICK. L. REV. at 97 (1937).

attachment but before the trial, and the interest is vested at the trial, the interest
is subjected to the attachment. 32

Strangely enough, the rule in regard to the sale of a contingent future in-
terest on execution would seem to be different than the rule in regard to attach-
ments. Execution is possible against a right of entry for condition broken, 33 a
possibility of reverter, 34 a contingent remainder, 35 and a shifting executory in-
terest. 36 It would seem therefore that while many of these interests are not sub-
ject to attachment, they can be sold on execution. Any such distinction is funda-
mentally unsound. 37

ASSIGNMENTS FOR BENEFIT OF CREDITORS

Assignments for the benefit of creditors are treated like any other transfers.
If an interest is transmissible either in law or equity, it would seem to pass under
such an assignment. 38

BANKRUPTCY

By the Federal Bankruptcy Act the trustee receives from the bankrupt all
those interests which the bankrupt could transfer or which are subject to attach-
ment or execution. 39 Therefore, the broad test of what the trustee will receive
is transmissibility under the state law. Thus it has been held that all future in-
terests which are contingent as to the event will pass. 40 But not those which are
contingent as to the person. 41

CONCLUSION

All contingent future interests are freely transmissible except those which
by their limitation are uncertain as to the possessor. Even expectancies and their
kin, the future interests where the person is unascertainable, are transferable in
equity by a contract to convey in the future. Those interests which are transfer-
able are subject to execution sale and proceedings in bankruptcy, but are not sub-
ject to attachment until they vest.

32 Pennsylvania Company v. Youngman, 314 Pa. 274, 171 A. 617 (1934); Mechanics National
33 See note 13, supra.
34 See note 12, supra.
35 De Hass v. Bunn, 2 Pa. 335, 44 Am. Dec. 201 (1845); see, Drake v. Brown, 68 Pa. 223
(1871); In Re Barker's Estate, 159 Pa. 518, 28 A. 365, 368 (1894).
36 See note 17, supra.
37 The distinction is probably based on the fact that in Pennsylvania the attachment execution is
fundamentally a garnishment proceeding, while an execution is directly against the defendant's prop-
erty. The present rule may be thought to protect the garnishee, but there seems to be no reason why
the defendant's interest in the property held by the garnishee should not be sold.
38 See, Robbin's Estate, 199 Pa. 500, 49 A. 233 (1901).
39 See, note 1, supra, and cases cited.
237 (1887); But see, 45 DICK. L. REV. 223.
41 In Re Wetmore, 102 F. 290 (1900); In Re Twaddle (D.C. Pa.) 110 F. 145 (1901).
It is seen, therefore, that the present Pennsylvania law is largely in accord with sections seven and eight of the proposed act. Section eight might change the present rule in Pennsylvania in regard to the attachability of contingent future interests. The qualification of the present rule which allows a prior attachment to take effect upon an interest which vests after the writ was served but before the trial so limits the present law that section eight would effect little change in practical results. Any change would merely bring the law as to attachments in accord with the law of transferability and execution, and this, it is contended, would be a desirable result.

Section seven might render interests, where the person is not ascertained, presently transferable. However, it is not altogether clear that it would do so. The section deals with "the conveyance of an existing future interest". It is altogether conceivable that the Pennsylvania courts would consider this merely a restatement of the present law and would rule that where there is a present estate with a contingent remainder in a class not ascertainable until the termination of preceding estates, a potential member of that class would not be possessed of "an existing future estate" and that any conveyance by him would merely be enforceable in equity. It is desirable to clear up any ambiguity on this subject and therefore section seven should be clarified. It is suggested that the ambiguity will be removed by the following wording:

"The conveyance of an existing future interest, whether legal or equitable, is not ineffectual on the sole ground that the interest so conveyed is future or contingent, or that the holder thereof is unascertained."

The passage of section eight in its present form and of section seven in altered form is strongly recommended, since they will put in statutory form an important, but by no means clear, phase of Pennsylvania law and will work certain small but desirable changes in the present law.

Section 9. Conveyance of Land or Thing Other Than Land not in the Possession of the Conveyor.

"Any act which would be effective as a conveyance inter vivos or as a mortgage or as a testamentary disposition of property when the land or thing other than land is in the possession of the conveyor, is effective as a conveyance of the conveyor's interest therein, when the land or thing other than land is out of the conveyor's possession whether adversely held or not."

This section is designed to do away with any vestige of the old concept that a man cannot alienate what he does not actually possess. This concept was based on the theory that where a man was out of possession of his land or his chattels, he merely possessed a right of action, the transfer of which would be champertous and therefore void.\(^1\) It will now be our inquiry whether anything

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remains of this doctrine either in regard to land or chattels in Pennsylvania.

LAND MORTGAGES

A mortgage of land in Pennsylvania is a transfer of a defeasible title by the mortgagor to the mortgagee.\(^2\) As such, it is merely a sort of conveyance by deed. It follows therefore that if a man out of possession can make a conveyance he can mortgage the land. If the old doctrine has not been applied in ordinary transfers, it will surely not be applied to mortgage transfers.

DEVISES AND INTER VIVOS CONVEYANCES

Pennsylvania never adopted the old English common-law rule that the interest of a disseisee of land could not be transferred. It was early decided in *Stoeny v. Whitman*\(^3\) that this phase of maintenance was inapplicable in Pennsylvania and therefore a man out of possession of his land could convey his interest to a grantee, who would receive good title. A few years after this decision, its result was affirmed and extended to devises. In *Humes v. McFarlane*\(^4\) Chief Justice Tilghman said:

"Of the right of a testator to devise land, of which he has been disseised, I think there can be no question. The tenures attached to the feudal system never having prevailed in Pennsylvania, we have paid no regard to that principle of the English law which requires seizin in order to authorize the alienation of land by deed or will."\(^5\)

The principle behind these cases was impliedly recognized by the legislature in the Act of April 13, 1807, which provided that actions of ejectment would not abate on the death of the plaintiff or defendant but the person next in interest might be substituted.\(^6\)

There was an even closer implication of the rule in the Act of April 26, 1850, which provided that where an action of ejectment had been commenced and then the plaintiff conveyed his interest in the land, the action would not be discontinued and the bond of the purchaser or assignee might be substituted for

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\(^4\) S. & R. 427.

\(^5\) Id. at 435.

\(^6\) April 13, 1807, P.L. 296, 4 Sm. L. 476, sec. 3, 12 P.S. 12: "No writ of ejectment shall abate by reason of the death of any plaintiff or defendant but the person or persons next in interest may be substituted in the place of the plaintiff or defendant who shall have died pending the writ." Under this section in *Robb v. Simpson*, 2 W.N.C. 68 (1875), the names of residuary devises were substituted for that of a decedent plaintiff.
that of the original owner.  

Transfers of Personalty

When the owner of a chattel of which he was not at the time possessed, transferred it to another person the early courts had difficulty in allowing the assignee to bring an action for its recovery or value.  

Pennsylvania has had a little experience with this difficulty. In Overton v. Williston it was decided that when the owner of a chattel sold it to the plaintiff after it had been converted by a wrongdoer, the plaintiff could not bring an action of trover. This was decided on the basis that the plaintiff in trover had to allege his right of possession at the time of the conversion, and said if he could not do so, he must fail. This case cannot be authority, however, for any proposition that the plaintiff does not have title to the chattel. It merely denies him the remedy of trover. Even this rule would not, in all probability, be adhered to in a modern court.

The true nature of a transfer of a chattel by an owner when it is in the possession of another person was carefully analyzed in Woods v. Nixon.

In that case A bought a horse from B, who retained possession of it. A then sold the horse to C for an old debt. C requested the horse from B who refused to give it to him. B then brought replevin for the horse. The court in allowing recovery for the plaintiff decided that the transaction between B and C was more than a mere assignment of a right of action, but it was rather a transfer of a property interest. This case would unquestionably be followed today and its principle is certainly sound.

Upon the death of the owner of a chattel which is in the possession of another, all his rights go to his personal representative.

Conclusion

It seems, therefore, that the owner of either lands or chattels can convey his interest in them when they are not in his possession, whether or not they are adversely held or are merely subject to lease or bailment.
Section nine would not change the law of Pennsylvania. It is doubtful that a Pennsylvania court would seriously concern itself with the problem behind section nine, so antiquated does that problem appear. However, there has never been a Pennsylvania statute directly on this subject. In regard to chattels few cases have arisen where interests in a chattel adversely held, have been transferred. Outside of Overton v. Williston, no case directly on point has been found, and the grounds of that undesirable opinion were technical. It is urged therefore that since section nine is in conformity with modern Pennsylvania law, and would clarify that law in statutory form, the section should be adopted.

However, the adoption of this section is certainly not important and unless the entire act or substantial parts of it are to be adopted en masse, it seems questionable if section nine alone would be worth the trouble of enactment.

Section 10. Estates in Fee Tail Abolished.

"The creation of fees tail is not permitted. The use in an otherwise effective conveyance of property, of language appropriate to create a fee tail, creates a fee simple in the person who would have taken a fee tail. Any future interest limited upon such an interest is a limitation upon the fee simple and its validity is determined accordingly. Nothing herein contained shall affect the operations of Sections 11, 12 and 13 of this Act."

This section is designed to do away with the creation of estates tail. In providing that an estate tail limitation will create a fee simple it goes on to specify that any limitation on the estate tail shall be taken as limited upon a fee simple and will be dealt with accordingly. This specification is inserted to eliminate any doubt as to how such limitations on the estate shall be considered. Any possible effect of this section or the Pennsylvania rule on Sections 11, 12 and 13 will be taken up in the discussion of those sections.

ESTATES TAIL IN PENNSYLVANIA

In Pennsylvania it was always held that estates tail were not possible in personalty. However, under our common law, they flourished in realty. What is the condition of estates tail in land today?

The legislature by the Act of April 27, 1855, provided:

"Whenever hereafter by any gift, conveyance or devise, an estate in fee tail would be created according to the existing laws of this state, it shall be taken and construed to be an estate in fee simple.

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1831 Pa. 155 (1858), supra, note 9.
Eichelberger v. Barnetz, 17 S. & R. 294 (1828); Smith's Appeal, 23 Pa. 9 (1854); Pott's Appeal, 30 Pa. 168 (1856).
Bender v. Fleurie, 2 Grant 345 (1856); Blair v. Miller, 30 W.N.C. 486 (1892); Carter v. McMichael, 10 S. & R. 429 (1823); Paxson v. Lefferts, 3 R. 59 (1831); and see authorities cited in Seybert v. Hibbert, 5 Pa. Super. 357 (1897).
and as such shall be inheritable and freely alienable."³

This act does not specifically state what will be done with interests limited upon what was before the act a fee tail. However, by judicial decision it has been determined that a gift over after a fee tail must take effect, after the statute, as an executory shifting interest if it is going to take effect at all.⁴ Such interests are therefore subject to the rule against perpetuities and will fail if they do not vest within the legal period.

There is one possible difference between the present Pennsylvania law and the proposed statute. In the statute it is stated, "The creation of fees tail is not permitted." The Pennsylvania cases say that under the Pennsylvania statute an estate tail can still be created. But it is then immediately converted into a fee simple by the statute.⁶ This is merely a distinction without a difference. The result is the same.

CONCLUSION

In Pennsylvania by operation of the Act of 1855, fees tail upon their creation become instantly converted into fees simple,⁶ and any interests limited upon them must take effect as executory interests if at all. Therefore, the law of Pennsylvania is in complete accord with section 10. The adoption of section 10 is not recommended. Its language is not superior to that of the present Act to any appreciable degree, and there is no other reason for its adoption. It would be useless legislation and could not affect the law.

Section 11. Definite Failure of Issue.

"Whenever property is limited upon the death of any person without 'heirs' or 'heirs of the body' or 'issue' general or special or 'descendants' or 'offspring' or 'children' or any such relatives described by other terms, such limitation, unless a different intent is effectively manifested, is a limitation to take effect only when such person dies not having such relative living at the time of his death or in gestation and born alive thereafter and is not a limitation to take effect upon the indefinite failure of such relatives; nor, unless a different intent is effectively manifested, does it mean that death without such relative, in order to be material, must occur in the lifetime of the creator of the interest."

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³April 27, 1855, P.L. 368, sec. 1, 68 PS 12. This was repealed as to devises by sec. 27 of the Act of June 7, 1917, P.L. 403, 20 PS 225, and re-enacted as to devises in substantially the same language by sec. 13 of the same Act.
This section deals with three problems of construction of wills and deeds. By providing that "death without issue" will mean death without "... such relative living at the time of his death..." a presumption is raised against a construction which would make such a limitation mean "death without ever having had issue".

This section also raises a presumption against an indefinite failure of issue and is in favor of the more natural construction. By the "indefinite" construction the prior estate would not terminate until the direct inheritable line of the first taker had terminated.

Finally, by its provision that such death, to be material, need not occur in the lifetime of the creator of the interest, a presumption is raised in favor of the construction that death without issue really means what it says and that a gift over upon such a limitation will take effect or at least be eligible to do so whenever the death occurs. This does not, however, cover the situation where there is a prior estate to A for life with a remainder to B in fee, but if B "dies without issue" then to C. The question of whether B's death without issue must be before the death of A to let C recover is left open by the proposed Act.

Since these three problems are dealt with in section eleven, it will be well to take them up in order and observe the way that Pennsylvania has dealt with them.

**Death Without Ever Having Had Children**

This construction has not been specifically considered by the courts of Pennsylvania. Doubtless in many cases it might have been argued but it has either not been urged upon the courts or they have disregarded it.

The result of this construction would be that where there is a devise "to A and his heirs, and if A dies without issue, then to B and his heirs," the birth of a child to A would indefeasibly vest the estate in A even though the child might subsequently die before A and A would die without issue living at his death.1

This construction is strained and artificial and it seems doubtful that a Pennsylvania court would consider it unless forced to do so by the words of the testator.

**Definite Failure of Issue**

At common law in Pennsylvania there was a strong presumption that where there was a gift to "A and his heirs and if A died without issue, then to B and his heirs," the death "without issue" meant an indefinite failure of issue and in land created an estate tail.2 After the Act of April 27, 1855,3 such estates tail

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3. Supra, section 10, note 3.
were construed as fees simple. The presumption for the indefinite failure construction was even extended to personalty. The result therefore was that A would receive a fee simple in Blackacre, which might or might not be subject to an executory shifting devise in favor of B. We shall deal with that later.

This "indefinite failure" construction was, of course, merely a presumption which might be rebutted by a sufficient indication that the testator intended a definite failure of issue.

By the Act of July 9, 1897, the legislature raised a statutory presumption that "die without issue" meant a failure of issue during the life or at the death of the first taker, and that an indefinite failure of issue was not meant unless clearly indicated.

This statute reversed the common law presumption. Under it, the presumption is in favor of definite failure of issue and against a construction which would allow indefinite failure of issue.

Pennsylvania is in accord with section 11 in approving a definite failure of issue construction. There is, however, one more part to section eleven which is not contained by the Pennsylvania statute. I refer to the clause at the end of section 11:

"... Nor, unless a different intent is effectively manifested, does it mean that death without such relative, in order to be material, must occur in the lifetime of the creator of the interest."

This part of the section rejects a presumption in favor of substitutional gifts rather than limitations to take effect in succession and creates a presumption for the latter, or successional, construction.

THE GIFT OVER AS SUBSTITUTIONAL

Suppose that a testator left a devise "To A and his heirs", but if A dies without issue him surviving, then to B and his heirs. A survives the testator and

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5Hoff's Estate, 147 Pa. 636 (1892); see, Eichelberger v. Barnitz, 9 Watts 447 (1846).
7Act of July 9, 1897, P.L. 213, sec. 1, 21 Ps 9. "In any gift, grant, devise or bequest of real or personal estate, the words 'die without issue' or 'die without leaving issue,' or 'have no issue,' or any other words which may impute either want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person, and not indefinite failure of his issue, unless a contrary intention shall appear by the deed, will or other instrument in which such gift, grant, devise, or bequest is made or contained." This was repealed as to devises and bequests by sec. 27, Act of June 7, 1917, P.L. 403; and reenacted as to wills and devises by sec. 14.
8Dilworth v. Schuylkill Imp. Land Co., 219 Pa. 527, 69 A. 47 (1908); Lewis v. Link-Belt, 222 Pa. 139 (1908); Smith v. Piper, 231 Pa. 378, 80 A. 877 (1911); In Re English's Estate, 270 Pa. 1, 112 A. 913 (1921). Compare the Pennsylvania statute with the English Wills Act from which its language is drawn, 1 Vict. c. 25, sec. 29 (1837).
later dies leaving no issue. On a casual glance at the limitation it would seem that B is entitled to the property. That, however, would depend upon the theory adopted.

There is in the limitation a gift to A in fee with a subsequent limitation upon the fee in favor of B if A dies without issue. Many courts have held there is an inconsistency between the gift of a fee and the subsequent limitation, and consequently they say that the gift over is substitutional. That is, the gift over will only take effect if A die without issue before the death of the testator and if he survives the testator he takes the property free of any executory limitation in B.

The second theory would say that the testator intended what he said and meant that if A dies without issue at any time, the executory shifting devise in B would vest the property in him.

Where does Pennsylvania stand in this clash of theories?

In *Caldwell v. Stilton* the testator devised land to his wife for life or widowhood and then to his children and their heirs and assigns as tenants in common, and if either of the children dies, then to his children, and if the child dies without issue born alive, then to the surviving children. It was held that each of the children took an indefeasible interest upon the death of the testator. The court reasoned that there was a gift over if a child died, on the wording of the devise, no matter how he died. This was inconsistent with the gift in fee and the only way to reconcile the two contradictory intents of the testator was to say that they were substitutional gifts.

This decision was sound since the devise was substantially "to A in fee, but if he dies, then to B." There is no way for the fee in A to have effect barring immortality. There was a real inconsistency which was removed by the only construction which would reconcile the two limitations.

The substitutional principle of *Caldwell v. Stilton* was, however, extended by *Mickley's Appeal* to a devise to sons and daughters of the testator in fee and "if a son should die without leaving issue living at his death" then over to surviving children and issue of dead ones per stirpes. The court held that upon the death of the testator the sons took absolute interests. The decision was not logical since there is here a gift in fee with an executory shifting devise which would not be inconsistent with the gift in fee. This case, however, has been fol-

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1013 Pa. 152 (1850).
11Bell, J., at p. 157, quoted approvingly the following from Powell on Devises: "Where a devise in fee is followed by several alternative limitations over, which aggregately provide for the death of the devisee under all circumstances; as where there is a devise over if he die, leaving children, and another if he die without children, the case then becomes analogous to that of a limitation if he die generally, and accordingly the words are held to refer to the death of the devisee in the lifetime of the testator".
1292 Pa. 514 (1880).
lowed or approved by numerous Pennsylvania decisions. Therefore the Pennsylvania rule is that in the absence of clear evidence of contrary intent, a devise or bequest to one in fee with a gift over if the first taker dies, or dies without issue, or other terms meaning death without living descendants, the gift over will be construed as substitutional, and if the first taker survives the testator he receives an indefeasible fee.

If the testator manifests his intent to treat the first takers as living at a period subsequent to his death, then the substitutional presumption is overcome and the rule of *Mickley's Appeal* is not applied. This, however, does not mitigate or narrow the effect of the rule when the expression "die without issue" or a similar phrase is used without further explanation of the testator's intent.

Where there is a postponed gift, the contingency of death without issue must occur before the end of the period of postponement in order to let the gift over take effect. Thus, if there is a gift to A for life, with a remainder to B in fee, but if B dies without issue then to C, B's death without issue must occur during the preceding life estate in order to give C any claim. If B survives A, he takes an indefeasible interest.

This particular problem is not covered by the proposed Act. It seems desirable to specifically provide for this problem and to discard the presumption in favor of the substitutional contentions.

**CONCLUSION**

Section eleven is in accord with Pennsylvania law insofar as it raises a presumption for definite failure of issue. However, in rejecting the substitutional gift theory which is the rule of *Mickley's Appeal*, it is completely opposed to Pennsylvania law.

The Supreme Court of Pennsylvania has read the substitutional theory into the Pennsylvania law and has declared:

"... unless the legislature amends the Act our construction of it... must have the same effect as if written into the body of the statute at the time of its enactment, and should not be altered by the courts..."\(^{16}\)


\(^{16}\)Lerch's Estate, 309 Pa. 23 at 28, 159 A. 868 (1932).
It has already been explained how the rule of Mickley's Appeal has grown up. It is logical to say that where there is a gift "to A in fee but if A dies, then to B in fee," this should be construed as substitutional, since it is the only way to reconcile absolutely contradictory expressions. However, it is not logical to extend this rule to the case where the limitation is "to A in fee, but if A dies without issue, then to B in fee." The limitations here are not contradictory. It is perfectly possible to have a fee subject to a shifting executory interest, and it is contended that interest should be given effect.

It should be the endeavor of the courts and legislature to lay down rules which will really approximate the testator's intent, which would accomplish what he would desire if he had foreseen the problem. It is highly improbable that the rule of Mickley's Appeal accomplishes the intent of many testators. It is rather a rule to defeat intent.

It is very strongly urged therefore that the latter part of section 11 should be made part of the law of the Commonwealth.

It is recommended that section 11 be adopted in its entirety and that section 1 of the Act of July 9, 1897, be repealed with section 14 of the Act of June 7, 1917. However, it may be deemed that those Acts should be retained, in which event it is recommended that section 1 of the Act of July 9, 1897, be amended to read:

"In any gift, grant, devise or bequest of real or personal estate, the words 'die without issue' or 'die without leaving issue' or 'have no issue', or any other words which may import either want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person; and not indefinite failure of his issue, unless a contrary intention shall appear by the deed, will or other instrument in which such gift, grant, devise or bequest is made or contained; nor shall it mean that death without such issue, in order to be material, must occur in the lifetime of the creator of the interest, unless a contrary intention shall appear."

It is also suggested that if the substitutional theory is also to be discarded in regard to postponed gifts, the last sentence should read:

"... must occur in the lifetime of the creator of the interest, or during a preceding estate, unless a contrary intention shall appear."
Section 12. The Rule in Shelley's Case Abolished.

"Whenever any person, by conveyance, takes a life interest and in the same conveyance, an interest is limited by way of remainder, either mediately or immediately, to his heirs, or the heirs of his body, or his issue, or next of kin, or some of such heirs, heirs of his body, issue, or next of kin, the words 'heirs' 'heirs of the body' 'issue' or 'next of kin' or other words of like import used in the conveyance, in the limitations therein by way of remainder, are not words of limitation carrying to such person an estate in the property, but are words of purchase creating a remainder in the designated heirs, heirs of the body, issue, or next of kin."

This section does away with the rule in Shelley's Case. This rule was that where there was a prior estate of freehold in a person, and a subsequent remainder of the same quality, legal or equitable, in the same instrument to the heirs, general or special, of that person, the heirs took no estate, but the ancestor took an estate of inheritance corresponding in quantum to the class of heirs who were specified as remaindermen.

This section covers both wills and deeds and specifically negatives the idea that "heirs" or similar terms will be words of limitation, but rather will be words of purchase in situations where the rule applied.

It is necessary now to consider whether the Rule in Shelley's Case is the law of Pennsylvania, and if so, how, and to what, it is applied.

The Rule Applied to Personalty

At common law in Pennsylvania it seems clear that the Rule in Shelley's Case will not be applied to personalty as a rule of law. In Dull's Estate, the interest on a charge on land of $2000 was to be paid to his heirs. The court in holding A had only a life estate, conceded that in a devise of realty the testator's words would have created a fee and went on to say:

"The exception made by the rule in Shelley's Case does not extend to bequests of personalty and though the analogy may sometimes, in default of a better guide, be followed, it is never allowed to defeat a plain intent."

This result has been followed.
From the language of the cases, however, it would seem that the rule might be applicable to personalty as a rule of construction. However, in Mitinger's Estate the court said:

"The legislature by the Act of July 15, 1935 . . . radically modified the effect of the rule in Shelley's case. While that Act is not directly applicable it indicates an intention on the part of the legislature to make a marked change in the law. Under such circumstances we certainly would not extend the rule in Shelley's case beyond the clear import of previous decisions."

It seems doubtful therefore that the rule in Shelley's case would be used as even a rule of construction as applied to personalty in Pennsylvania.

**THE RULE APPLIED TO REALTY**

The Rule in Shelley's Case has been consistently applied to realty by Pennsylvania common law. It is a rule of law and not a rule of construction although in wills it is not applied where the testator has indicated that he meant the first taker to have only a life estate and the "heirs" or "issue" to be a definite class taking by purchase. The rule applies to equitable as well as legal estates. But it does not apply where there is an equitable life interest and a legal remainder. It is clear therefore that the Rule in Shelley's Case has been strongly imbedded in the common law of Pennsylvania. It remains to be seen what kinds of limitations invoked its operation.

**LIMITATIONS SUBJECT TO THE RULE**

There are various limitations to which the Rule in Shelley's Case may be applied. Where there is a transfer to A for life with a remainder to his heirs, or to his legal heirs, the rule will usually apply and give A a life estate with a remainder to himself in fee which will merge to give him a fee. Where the remainder is to A's issue or the "heirs of his body", A would receive a fee tail which would be enlarged to a fee simple. It is perfectly possible to apply the

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6 Supra, note 5.
7 132 Pa. Super. at 483, 1 A. (2d) 572 (1938). The Act of 1935 will be considered infra.
10 Powell v. Board of Domestic Missions, 48 Pa. 46 (1865); Perry v. Lowber, 49 Pa. 483 (1865); Abbott v. Jenkins, 10 S. & R. 296 (1823).
11 Pratt v. McCawley, supra, note 8; Findlay's Lessee v. Riddle, 3 Binn. 139, 5 Am. Dec. 355 (1810).
Another thing is worthy of note. It is not necessary that the preceding freehold estate be immediately before the remainder so that they can merge upon application of the rule. The rule will still operate even though there is an intervening estate in remainder. The first taker will have a life estate and also a remainder in fee.20

It is also not necessary for the Rule to work that the remainder interest be a vested one. Thus where there is a gift to A for life, remainder to his oldest son living at his death, but if he die without a surviving son, then remainder to his heirs, the Rule works to give him a contingent remainder in fee so that on his death without a son the property is subject to his testamentary disposition.21

LIMITATIONS NOT SUBJECT TO THE RULE

In order to get a full picture of the way in which the Rule in Shelley's Case was applied it would be well to consider some instances where it is not applied.

By breaking down the definition of the Rule in Shelley's Case we find that there are five elements which must be present before the Rule is applied: First, the ancestor must have a prior estate of freehold. If he has anything less than a life estate, such as a term for years, the Rule cannot apply.22 Second, the subsequent estate in the heirs must be an estate in remainder. An executory devise to the heirs of the ancestor will not invoke the Rule.22 Third, this remainder must be to the "heirs" or "issue" or some other such term in the sense of those taking in inheritable succession under the ancestor, and not as a class to which the testator intended to give a remainder directly as purchasers. Thus, if the testator leaves a remainder to the "issue of A" and it is clear that he meant the "children of A", the Rule will not apply.24 Fourth, the freehold of the ancestor and the remainder to the heirs must be both of the same type of estate. Thus where there is an active trust of land for A for life with a legal remainder to the heirs of A, the Rule will not govern the case.26 Fifth, both estates, the freehold and the remainder, must be created by the same instrument. Therefore the

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19The whole problem is ably discussed in Guthrie's Appeal, 37 Pa. 9 (1860) and in Seybert v. Hibbert, 5 Pa. Super. 537 (1897).
20See, Doebler's Appeal, 64 Pa. 9 (1870); Kleppner v. Laverty, 70 Pa. 73 (1871).
23Ibid, sec. 20; and see Hess v. Hess, 67 Pa. 119 (1870). In Kuntzleman's Estate, 136 Pa. 142, 20 Am. St. Rep. 909 (1890) the husband and mother of the life tenant were excluded from "heirs". This defeated the operation of the Rule in Shelley's Case. In Bennett v. Morris, 5 Rawle 9 (1834) a remainder for life to "heir" of A was not within the Rule. The remainder must be in fee.
25See, Townes Estate, 260 Pa. 445, 103 A. 875 (1918); see supra, note 12, and cases cited.
creation of a freehold in A and the subsequent creation of a remainder to his heirs will not be within the Rule.26

**Statutory Modifications of the Rule**

The Act of 1897 created a presumption in favor of a definite failure of issue construction.27 This indirectly affected the Rule in Shelley's Case in regard to one of its minor applications. Before this Act where there was a gift to "A for life but if he dies without issue then to B" there was an implied gift in remainder to the issue of A. Thus, the limitation was made to read "to A for life, remainder to the issue of A, but if A dies without issue to B in fee". Such a limitation was subject to the Rule in Shelley's Case and by its application A received a fee tail which was in turn converted by the Act of 1855 into a fee simple.28 The Act of 1897 by saying that "die without issue" meant a definite failure of issue made the implied gift to issue a gift to a definite class29 who would take as purchasers and here the Rule in Shelley's Case would not operate.

The legislature radically modified the Rule in Shelley's Case by the Act of 193530 which read:

"Grants or devises in trust or otherwise, becoming effective hereafter, which shall express an intent to create an estate for life with remainder to the heirs of the life tenant, shall not operate to give such life tenant an estate in fee."

This statute modifies but does not purport to abolish the Rule in Shelley's Case. It does not, by its terms, cover a number of situations where the rule is applied.31 It does not apply to personalty,32 but this is a minor defect since the Rule itself does not, as we have seen, apply to personalty in Pennsylvania.33 It is unfortunate that the statute is so recent since there has not yet been time for a body of cases to grow up interpreting its provisions. It is possible that the courts will give the terms of the statute such a broad and liberal interpretation that all of its defects will be remedied by judicial legislation. But for purposes of criticizing and evaluating the statute we must assume that the courts will not write into the statute clauses which it does not contain.

The statute applies to a situation where the limitation expresses an intent "to create an estate for life with a remainder to the heirs of the life tenant." The Rule in Shelley's Case does not now apply therefore to a gift "to A for life and then to the heirs of A". Does a limitation which reads "to A for life, remainder to B for life, remainder to the heirs of A" come within the statute? It

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27| Act of July 9, 1897, P.L. 213, sec. 1.  
29| See, English's Estate, 270 Pa. 1, 112 A. 913 (1921).  
31| See Irwin, Legislative Limiting of the Rule in Shelley's Case in Pa., 40 Dick. L. Rev. 27 (1935).  
33| Note 5, supra, and cases cited.
is probable that even the narrowest-minded court would allow the statute to apply in this case since there is nothing requiring the remainder to immediately follow the life estate, but nevertheless the statute does not clearly express itself on the point.

Suppose there is a limitation "to A for life, and then to the 'issue' of A". Does the statute apply here? Certainly the terms of the statute do not embrace this situation and a court should not be condemned for refusing to apply a statute which speaks of "heirs" to limitations which speak of "issue" or even "descendants" or "children" when used as words of limitation.

The title of the Act of 1935 reads:

"To limit the operation of the Rule in Shelley's Case by providing that certain grants and devises in trust or otherwise will be construed not to create estates in fee."

The words "to limit" show that the legislature did not intend to abolish the rule in every instance of its former application. There is no reason why a court should apply its terms to any situation which it does not expressly cover.

There is another serious defect in the Act of 1935. It does not state what kinds of interests will remain if the Rule of Shelley's Case is not applied. It merely states that certain "grants or devises . . . shall not operate to give such life tenant an estate in fee." It has been assumed that the "heirs" will receive contingent remainders. But the Act is not specific on this point.

CONCLUSION

Prior to the Act of 1935 the Rule in Shelley's Case operated with monotonous regularity to give fees to devisees and grantees who received life estates with remainders to their heirs, or "issue" and even "descendants" or "children."

This was unfortunate since the intentions of numerous unskilled and misguided testators and grantors were cheerfully disregarded. It had one advantage, however, in that the law was at least comparatively clear. A lawyer could tell usually whether the Rule in Shelley's Case applied to a given limitation.

The Act of 1935 has "modified" the Rule and thereby muddied the pond. Under that Act it may take a good many years and a quantity of expensive litigation before we can know the present limitations of the Rule in Shelley's Case in Pennsylvania.

It would be well if the legislature would immediately consider the wisdom of amending the Act of 1935 or repealing it and replacing it with one better suited to accomplish its purposes.

Section 12 of the proposed Uniform Act is well-suited to abolish the Rule in Shelley's Case. There is only one situation which section 12 does not expressly cover, and that is the case where there is a gift to "A for life, but if A dies without issue, then to B in fee." In that limitation there is an implied gift to

84 See, Walker's Estate, 240 Pa. 1, 87 A. 281 (1913), and notes 18, 19 and 20, supra.
86 See 43 Dick. L. Rev. 244.
"issue". But as has already been noted the Act of 1897 has covered this situation.37

The proposed section would therefore be apt to cover every situation which might arise. It would completely abolish the Rule of Shelley's Case in Pennsylvania, while the present act only limits the Rule. It is difficult to see why the Rule should be only limited rather than abolished. It would seem that the Act of 1935 is the result of a desire for progressive modern law haltered by an inherent wish to cling to outmoded landmarks of the old common law.

It is strongly urged therefore that section 12 be adopted in its proposed form, so that once and for all the Rule in Shelley's Case might be eliminated from this Commonwealth.

Section 13. Effect of Conveyance to One and His Children—
The Doctrine Known as Rule in Wild's Case Abolished.

"When an otherwise effective conveyance of property is made in favor of a person and his 'children' or in favor of a person and his 'issue', or by other words of similar import designating the person and the descendants of the person, whether the conveyance is immediate or postponed, the conveyance creates a life interest in the person designated and a remainder in his designated descendants, unless an intent to create other interests is effectively manifested."

This section is designed to do away with an old rule of construction which was expressed by dictum in Wild's Case.¹ That case set up a rule with two aspects or resolutions.

Where a devise is made to A and his "children" or "issue": (1) If A had no children or issue at the time the deed or devise became effective, he took an estate tail "... for the intent of the devisor is manifest and certain that his children and issue should take, and as immediate devisees they cannot take, because they are not in rerum natura, and by way of remainder they cannot take for that was not his intent, for the gift was immediate, ..."² (2) If A had children or issue at the time the deed or devise became effective, they all took as joint tenants for life.

The present section rejects these two resolutions of Wild's Case by stating that such a conveyance or devise will create an estate for life in A with a remainder "to his designated descendants."

37See note 28, supra, and cases cited.
¹ 16 Coke 16, 41 Eliz. The case actually was "to A for life, remainder to B in fee tail, remainder to Wild and wife and 'after their decease' to their children." A died. B died without issue and Wild and wife died. It was held that Wild and wife had life estates and their children took remainder because testator's intent was clear that the children were not to take until the decease of Wild and his wife. The actual holding of the case is expressed in the little verse: "Devise after death of man and wife, To children, all, ev'n th' unborn take for life." COKE'S REPORTS IN VERSE (1823).
² 26 Coke 16 at 17.
THE FIRST RESOLUTION IN PENNSYLVANIA

Where there is a devise to "A and his children" and at the time it takes effect, A has no children, the first resolution of *Wild's Case* would give him a fee tail. Is this the result in Pennsylvania?

In *Oyster v. Knoll* the devise was to "A for his support, and if he should be spared to have family, I desire the above estate to go to the use of his children." A had no children and attempted to convey a fee. It was held that he had only a life estate with a remainder to the children. There was no discussion of *Wild's Case*.

In *Chambers v. Union Trust Co.* there was a devise "to A and to his children". A died and left a will devising the property to the defendants. The plaintiffs were heirs of the original testator. The court held for the plaintiffs and in a review of the authorities decided that the first resolution in *Wild's Case* did not apply in Pennsylvania. The court said:

"The theory was that, if there were no children in existence at the time of the devise the provision in their favor would fail altogether; unless the parent were given a fee tail; hence, and for that reason alone, the first resolution. But with us, where the children take in remainder, it is immaterial whether they are, or are not, in existence at the time of the devise, or at the time of the death of the testator.... Therefore it is not necessary to give an artificial meaning to the devise in order to care for the interests of the children, and there is no apparent reason for adhering to the first resolution in *Wild's Case*."5

It is clear therefore that the first resolution in *Wild's Case* has been strongly rejected in this Commonwealth.

THE SECOND RESOLUTION IN PENNSYLVANIA

The second resolution in *Wild's Case* declares that where there is a gift to A and his children and A has children at the time it takes effect, A and his children take joint life estates. This was brought to the attention of the Pennsylvania courts before the first resolution was passed upon, and was approved by early cases.6 However, in *Coursey v. Davis*7 there was a conveyance of land to "A and her children, exclusively, and their heirs and assigns." The Court held that there was a life estate in A with contingent remainders to the children as a class. This construction would not subject the land to curtesy for the husband of A, and would let in children born to A after the conveyance. This case was

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4235 Pa. 610, 84 A. 312 (1912).
followed in *Hague v. Hague*\(^8\) where there was a conveyance to "A and her children" and the same result was reached in *Crawford v. Forest Oil Co.*\(^9\) where there was a devise to A and his children on condition that A pay money to X and Y. It is plain therefore that the second resolution in *Wild's Case* has been rejected in Pennsylvania.

## CONCLUSION

The Pennsylvania rule where there is a grant or devise to A and his children seems to be that:

"... Whether A has children at the testator's death or not, the presumption is that a life estate in A, with a remainder in his children, has been created."\(^{10}\)

This result is the same rule that is laid down by section 13. Therefore the adoption of this section would be a piece of useless legislation which would only be desirable as part of a general property code. If the whole Act is adopted, section 13 would be a codification of the Pennsylvania law, and beyond that would establish nothing.

**Section 14. Testamentary Conveyance to the Heirs or Next of Kin of the Conveyor—Doctrine of Worthier Title Abolished.**

"When any property is limited, mediate or immediately, in an otherwise effective testamentary conveyance, in form or in effect, to the heirs or next of kin of the conveyor or to a person or persons who on the death of the conveyor are some or all of his heirs or next of kin, such conveyees acquire the property by purchase and not by descent."

**Section 15. Inter Vivos Conveyance to the Heirs or Next of Kin of the Conveyor.**

"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."

These two sections abolish two rules of the old feudal law which have been taken over into and have persisted in American law. The first doctrine is that "... Whenever a devise gives to the heir the same estate in quality as he would have by descent, he shall take by the latter..."\(^1\) The second rule is that where "... an owner of land in fee simple sought to convey a life estate or an estate

\(\text{\(8\)161 Pa. 643, 29 A. 261, 41 Am. St. Rep. 900 (1894).} \)

\(\text{\(9\)208 Pa. 5, 57 A. 47 (1904); also, Vaughan's Estate, 230 Pa. 554, 79 A. 750 (1911); Elliott v. Diamond Coal & Coke Co., 230 Pa. 423, 79 A. 708 (1911).} \)

\(\text{\(10\)2 Simes, Law of Future Interests, p. 210, sec. 408. And see Brown, 79 U. of Pa. L. Rev. 383, who suggests that the legislature should turn Pennsylvania back to the rule in Wild's Case.} \)

\(\text{\(1\)Co. Litt. 126 N. (2) by Hargrave (1787). See note, 46 Harv. L. Rev. 994.} \)
tail, with a remainder to the grantor's heirs, the remainder was void and the grantor had a reversion in fee simple. 2 These two rules, though in their nature somewhat different and in their application necessarily different, are so closely akin that writers have often considered them together 3 as different aspects of the same rule. It is necessary, however, to keep them separated since their present-day aptness to property law differs greatly.

Reasons for the Rules

Probably the primary reason for both of these doctrines was that under the feudal law an overlord or king received certain feudal rights and incidents when the land of a vassal passed by descent to his heirs, and these privileges were lacking when the land passed by grant or devise. 4 The early courts being in sympathy with the interests and traditions of the feudal system deemed that a grant or devise to an heir of what he would take by descent should pass by the "worthier" title, that of descent.

As regards grants it was also argued, with questionable validity, that a grant to the heirs of a living man was, in contemplation of law, a grant to the man himself, since "nemo est haeres viventis" and the heir is part of the ancestor—"haeres est pars antecessoris." 5

Both doctrines as a practical matter, originally had some justification in that creditors of the testator or grantor could subject intestate land to their claims while land which had been devised or granted away was not subject to their claims. 6 This reason is no longer important, as regards devises, since devised property is subject to the claims of creditors. 7

Originally these rules applied only to grants or devises of lands. But in both grants and devises there has been some tendency to extend the rule to personalty. 8

The rule as applied to devises is generally a rule of law. 9 This has now been relaxed to some extent in grants and is often applied as a rule of construction. 10

Application of the Rules—Devises

Whenever there is a devise either immediately or mediately to the heirs of

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2 Simes, Law of Future Interests, sec. 144.
4 1 Simes, Law of Future Interests, sec. 145; Restatement of Property, T.D. No. 11, sec. 314 (a) (1939); 46 Harv. L. Rev. 993, 994.
5 Co. Litt. 22b. 1 Simes, Law of Future Interests, sec. 145, no. 10.
6 See 1 Simes, Law of Future Interests, sec. 145.
7 3 and 4 Will. & M., C. 14 (1691); Act of June 7, 1917, P.L. 447, sec. 13 (a).
8 See, 46 Harv. L. Rev. 995, n. 13; Restatement of Property, T.D. No. 11, sec. 314 (a).
9 Harper and Heckel, The Doctrine of Worthier Title, 24 Ill. L. Rev. 634 (1930).
10 Restatement, n. 8, supra, and see, 1 Simes, Law of Future Interests, sec. 147.
the testator, the heirs take by descent and not through the devise, if the estate devised is the same in quality as the heirs take by descent.\(^{11}\)

Suppose T, the testator, left Blackacre "to the heirs of T." This is the simplest case. T's heirs take by descent.\(^{12}\)

Suppose the limitations to be "to A for life and then to the heirs of T." The rule would apply just as well where there is an intermediate estate as it does when the gift is immediate.

Again, where there is a devise mediately or immediately to A, and A is the heir of the testator, A will take by descent and not by purchase even though he is named specifically and there is no mention of the fact that he is the heir.\(^{13}\)

It must be borne in mind, however, in considering these limitations, that the estate which is left to the heir must be of the same quality as that which he would receive by intestacy, in order to have the doctrine apply.\(^{14}\)

"To make the heir take by devise," as observed by Lord Eldon in *Baily v. Elkins*,\(^{15}\) "there must be an alteration of the limitations of the estate from that which the law would make by descent"; as a devise of an estate tail to an heir; of land in fee to two daughters being testator's heirs; of gavelkind lands to several sons; of all testator's lands to one of two daughters.\(^{16}\)

Such was the rule that flourished in the common law as to devises to heirs. In what way did this rule differ from the rule which forbade a grant to the grantor's heirs to take effect as such?

**Grants Inter Vivos**

The chief difference between the two rules was merely one in application. A conveyance inter vivos takes effect while the grantor is still alive and therefore a great difference of application is necessary from that in a testamentary disposition.

Suppose there is an inter vivos conveyance to "A in fee", A receives the land by purchase, and this is not altered by the fact that A subsequently turns out to be the grantor's heir. This is also true where there is a remainder to a named person who subsequently becomes the heir of the grantor. Necessarily

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\(^{11}\)See note 1, *supra*.

\(^{12}\)Harper and Heckel, 24 Ill. L. Rev. 627, 643.

\(^{13}\)Harv. L. Rev. 995, n. 16, 17, 18, 19, 20.

\(^{14}\)Ibid.

\(^{15}\)"The test for the rule . . . is to strike out of the will the particular devise to the heir, and then, if without that he would take by descent exactly the same estate which the devise purports to give him, he is in by descent and not by purchase."

\(^{16}\)Note to Scott v. Scott, 1 Eden 458, 23 Eng. Rep. 762 (1759). This was considered in detail in 24 Ill. L. Rev. 638 et seq. Of the four examples, be it noted that: (1) An estate tail to an heir gives him less than the fee simple he would receive by intestacy; (2) daughters inherited intestate land as co-parceners as did (3) sons inherit gavelkind lands. But a devise of land gave it in joint tenancy, there was enough difference in the two methods of holding lands that the old law said the quality of the estates were different; (4) two daughters would receive land as co-parceners. Obviously if all was given to one daughter, she got more than she would by intestacy.
the application of the rule is different in this inter vivos grant than it would be in a similar devise. When the devise takes effect it is possible to know that A is the grantor’s heir. But the inter vivos conveyance takes effect while the grantor is living and it is impossible to know that A is the grantor’s heir.

Where, however, there is a grant to A for life and then to the heirs of the grantor, the rule will operate to nullify the remainder and give a reversion to the grantor. Thus, if, when the conveyance takes effect, there is a remainder limited to a class who would be grantor’s heirs if he died intestate, the rule is applied.17

There is an important consequence of the inter vivos rule which cannot arise from the testamentary rule. When there is an inter vivos grant with a remainder to the grantor’s heirs which becomes a reversion, the grantor, being still alive, can grant this reversion to strangers or dispose of it in his will. The “heirs” to whom the remainder was first limited may get nothing. On the other hand, where there is a devise to the testator’s heirs, they will take either by purchase or descent. This difference may be important as regards the validity of the two rules in interpreting the intent of the grantor or testator.19

Having ascertained the differences and similarities between the two rules dealt with by sections 14 and 15, it remains to be seen to what extent these doctrines of “Worthier Title” have been adopted by the common law of Pennsylvania and in what way has legislation affected them, if at all.

Devises and Bequests to Heirs of the Testator

The doctrine of Worthier Title as applied to wills does not affect personality in Pennsylvania.20 It has been acknowledged to exist and to apply to devises of realty. In Kinney v. Glasgow21 the testator devised land to his son subject to a charge in favor of his widow for life. It was held that the son, being the heir of the testator, took by descent and not by purchase, and this despite the charge.22 A number of other cases have approved the doctrine in dicta.23

There are a number of cases, however, which do not mention the doctrine when it might have been applied.24 This does not mean, however, that the doc-

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17 Restatement of Property, T.D. No. 11, sec. 314 (c) (1939).
18 Sims, Law of Future Interests, secs. 145, 146.
19 See Restatement of Property, T.D. No. 11, sec. 314 (a): “Where a person makes a gift in remainder to his own heirs (particularly where he also gives himself an estate for life) he seldom intends to create an indestructible interest in those persons who take his property by intestacy, but intends the same thing as if he had given the remainder ‘to my estate’.”
20 Hough’s Estate, 13 Phila. 279 (1879).
21 53 Pa. 141 (1866).
22 That charges and encumbrances did not make the heir take by purchase and not by descent was in accord with the English common law. See, Harper and Heckel, The Doctrine of Worthier Title, 24 Ill. L. Rev. 634 (1930).
23 Hartman’s Estate, 4 Rawle 39 (1833); Sefridge’s Appeal, 9 W. & S. 45 (1845); Waln’s Appeal, 4 Pa. 502 (1846); Hough’s Estate, 18 Phila. 279 (1879).
24 Donohue v. McNichol, 61 Pa. 73 (1869); Busby’s Appeal, 61 Pa. 111 (1869); Stewart’s Estate, 147 Pa. 383, 23 A. 399 (1892); Bache’s Estate, 246 Pa. 276, 92 A. 304 (1914); Totham’s Estate, 250 Pa. 269, 95 A. 320 (1915); Frisbie’s Estate, 266 Pa. 374, 109 A. 663 (1920).
trine of Worthier Title as applied to devises has disappeared in Pennsylvania. In all of these cases, it is doubtful that if the doctrine had been applied, the result would have been any different and it seems clear from the opinions that the doctrine was not called to the court’s attention. The most that can be said for these cases is that they indicate that the bench and bar do not have any great awareness of the existence of the rule. There is nothing to indicate, however, that the doctrine of Kinney v. Glasgow has been overthrown. It is more than probable that if any situation should arise in which the result would be materially affected by the doctrine of Worthier Title, and it was argued before the court, it would be reaffirmed without hesitation. At common law therefore the doctrine has not been overthrown in Pennsylvania.

INTER VIVOS GRANTS TO THE HEIRS OF THE GRANTOR

It has been established in Pennsylvania that where a grantor creates an ultimate limitation in favor of his heirs, the limitation will take effect as a reversion to himself rather than as contingent interests to his heirs. In Root’s Estate there was a grant in trust to hold for A for life, with a power of appointment in A, and in default of appointment, to convey to the heirs of the grantor. It was held that the heirs took by descent and not by purchase and that the property was liable for the debts of the grantor.

In Brolasky’s Estate the owner of land declared himself trustee of the land for his two adopted children, their children and descendants, and their mother; and if both of them die without children surviving or if such surviving children shall die under age, to hold in trust for the settlor’s right heirs. The settlor survived all parties in interest except one adopted child and then died intestate. Upon the death of the last child without surviving issue the land was claimed by those who were the heirs of the testator at his death. His estate also claimed the land, as did his heirs at the death of the last cestui. It was held that the last limitation to the heirs of the settlor was void and that the land would revert to the estate of the settlor. The doctrine of Worthier Title as applied to grants was clearly affirmed and contrary decisions were disapproved.

It is clear therefore that in the common law of Pennsylvania the doctrine of Worthier Title has been adopted and applied in both grants inter vivos and de-
vises. It remains now to be seen what statutory modifications have been made in the rule.

**Statutory Modifications of the Doctrine**

By the Act of 1923\(^{30}\) it was provided that when by a grant or devise of either realty or personalty, a life estate or other estate is created in "... any other person, charity, etc. ..." with an ultimate limitation to the heirs of the testator or grantor, "heirs" will be construed to mean "heirs" determined as of the termination of the preceding estate, rather than "heirs" as of the testator's or grantor's death. Thus an artificial meaning is set up for "heirs" in certain situations. How is this statute effective and to what situations does it apply?

"At common law, if the grantor or testator meant 'children' or those who would be his heirs at the death of the life tenant, or if in any other way he indicated a class of remaindermen which might differ from his heirs general, the doctrine of Worthier Title had no application."\(^{81}\)

The statute of 1923 makes a remainder to "heirs" a remainder to an artificial class, not the heirs general of the testator. This is enough to defeat the operation of the doctrine in every situation where the statute applies.

**Situations Where Act of 1923 Applies**

**Wills**

The Act of 1923 applies wherever there is some prior estate "... for the use and benefit of any other person, etc. ..." followed by a limitation to the heirs of the testator. It also is merely a statute setting up a rule of construction, which the testator's intention that "heirs" are to be considered as his heirs as of his death will defeat. Therefore, if the testator makes a devise "To A for life, remainder to the testator's heirs", the "heirs" will mean the heirs at the death of A rather than the testator's heirs at his own death. The doctrine of Worthier Title would not apply. If the testator limited a devise "To A for life, remainder to my heirs, determined at my death" the expressed intent of the testator would

\(^{30}\)Act of June 29, 1923, P.L. 914, 21 PS 11: "... hereafter when in and by the provisions of any deed or will or other instrument in writing, property, either real or personal, or both, shall be donated, granted, devised or bequeathed, either directly or in trust, for the use and benefit of any other person, charity or other use, for years or for life or upon condition, and which shall provide therein, upon the termination of the estate for years or for life or upon condition or other cause, the remainder over shall vest in the donor's or grantor's heirs or next of kin or the persons thereunto entitled under the intestate laws, or other similar or equivalent phrase, the same shall be construed as meaning the person or persons thereunto entitled at the time of the termination of the estate for years or for life or upon condition under the intestate laws of the Commonwealth as they shall exist at the time of such termination; and such phrase shall not be construed as meaning the person or persons who were the heirs or next of kin of the donor at the time the grant or donation was made or at the time the testator died; provided, however, that nothing herein contained shall be construed to prevent any donor or testator from expressly or by necessary implication directing otherwise; and provided, further, that the provisions of this act shall not apply to any case now pending."

\(^{81}\)Dick. L. Rev. 175, 181; see 1 Simes, Law of Future Interests, sec. 147.
defeat the operation of the Act of 1923 and the doctrine of Worthier Title would apply.

Since the Act of 1923 applies only where there are prior limitations it would not apply to a direct devise to the heirs of the testator. Thus a devise "to my heirs" or a devise "to A" where A was testator's sole heir, would not be affected by the Act and the doctrine of Worthier Title would apply.

INTER VIVOS CONVEYANCES

The Act of 1923 will have a considerable effect upon the doctrine that a grant to the heirs of the grantor is void. As in devises it must be borne in mind that the Act sets up a mere rule of construction and where the testator's intent is expressed or made clear by necessary implication, the Act will not apply and the doctrine of Worthier Title may be invoked, if there is a limitation to the heirs general of the grantor.

In the absence of such an indication of the testator's intent the Act will defeat the doctrine of Worthier Title wherever the grantor grants a prior estate to someone else with a limitation to his own heirs.

There are two limitations which the Act does not cover. The first is the situation of a direct grant to his own heirs. And the second is a grant in trust for himself for life with a remainder to his own heirs.

A direct grant to the heirs of the grantor does not fall under the statute since by its terms, it deals only with situations where there is a previous estate. However, is such a direct grant possible? A deed to the "heirs" of a living person is void for uncertainty. The only way that such a grant might be possible would be in a deed in trust for the heirs of the grantor. However, such heirs, disregarding for the moment the doctrine of Worthier Title, would be an unascertained group who could not take until the death of the grantor. There would be a resulting trust to the grantor for life, and the net result of the limitation would be the same as a deed in trust for the use of the grantor for life with remainder to his heirs, and this is the second situation with which we are dealing.

By its terms the Act deals with prior limitations "for the use of any other person", followed by a limitation to the grantor's heirs. It does not cover the situation where there is a prior estate to the grantor himself followed by a limitation to his own heirs. As far as the Act of 1923 is concerned, therefore, such a limitation is subject to the doctrine of Worthier Title.

However another statute, the Act of July 15, 1935, which modified the Rule in Shelley's Case, will apply here. It states "Grants or devises in trust or otherwise . . . which shall express an intent to create an estate for life with remainder to the heirs of the life tenant, shall not operate to give such life tenant
an estate in fee." This statute applies to all cases where there is a grant to a life tenant with remainder to the heirs of the life tenant. It certainly seems to cover a grant in trust for the grantor for life with a remainder to his heirs. What is the result of the statute? Such a limitation shall not operate "... to give such life tenant an estate in fee." This, however, is the very result if the doctrine of Worthier Title is applied. The ultimate limitations to the heirs of the grantor would be changed to a reversion in the grantor producing "an estate in fee" in the life tenant. It would seem therefore that in this situation the doctrine of Worthier Title as applied to inter vivos conveyances, no longer exists in Pennsylvania. The only strength which it still retains is where the grantor overcomes the statutory presumption of the Act of 1923 and indicates that by "heirs" he means his heirs general.

In speaking of the doctrine of Worthier Title, it was said in Brolasky's Estate,34 "... Being part of the English Common Law... (it) thereafter continued as part of our common law, until, by the Act of June 29, 1923, P. L. 914, a different rule was directed to be applied in the future." This dictum was broader than the statute warranted but nevertheless it indicates a readiness on the part of the court to accept broad changes.

**CONCLUSION**

The doctrine of Worthier Title exists in a modified form even today in the common law of Pennsylvania. The old reasons for its existence have totally disappeared.35 It remains to be seen if there is any valid modern reason for its existence. In regard to devises it seems difficult to find any reason for the existence of the doctrine. However, in inter vivos conveyances there may be some justification for the doctrine as a rule of construction. Thus, the reporters of the Restatement of Property36 take the view that a grantor by an ultimate limitation "to my heirs" is merely expressing his real intent "to my estate." However, in Pennsylvania, the Act of 1923 has modified the doctrine of Worthier Title. It seems inconvenient to allow it to remain in regard to inter vivos conveyances and destroy it in regard to devises. Finally, the doctrine makes the testator's words mean what they do not say, or rather it eliminates some of the testator's words. This is always undesirable, and any rule with that result should be abrogated.

"We are aware that this conclusion antagonizes a cardinal rule in the present day construction of written instruments, in that it wholly eliminates a portion of the language of the deed, to which portion an effect might readily be given; but we are also aware that through the centuries the conclusion reached in the cases cited has been a rule of property, to overturn which might unsettle many

34*Supra*, n. 27. 302 Pa. at 444.
35*See* 41 *DICK. L. REV.* at 177 and notes 15, 16, 17, 18, *supra*.
36*Supra*, n. 20.
titles; and hence the change should be made, if at all, by prospective legislation only."³⁷

The elimination of the doctrine is desirable and the court has here indicated that the only way that it can be eliminated is by legislation.

Therefore, it is recommended that section 14, of the proposed Act, which will do away with the doctrine of Worthier Title in testamentary gifts, should be adopted. It is further recommended that section 15 of the proposed Act should be also adopted in order to destroy the doctrine of Worthier Title in its application to conveyances inter vivos. Both of these sections are suitable to this purpose without change in their wording.

ERIE, PA.  

JOHN W. ENGLISH

(TO BE CONCLUDED IN THE MAY, 1942, ISSUE)

³⁷Mr. Justice Simpson in Brolasky’s Estate, 302 Pa. 339, at 347 (1931).