



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 14 | Number 1

Article 16

12-1-1935

Descent and Distribution -- Doctrine of Worthier Title in North Carolina

Thomas H. Leath

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Thomas H. Leath, *Descent and Distribution -- Doctrine of Worthier Title in North Carolina*, 14 N.C. L. REV. 90 (1935).

Available at: <http://scholarship.law.unc.edu/nclr/vol14/iss1/16>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

the agreement was a preliminary negotiation, which, upon execution, would obligate defendant to enter into a subsequent, detailed agency contract.

On the other hand, there can be little doubt that the tactics employed by plaintiff showed little business foresight. It was a corporation already engaged in the automobile business, and therefore presumably aware of the fact that it was assuming a disproportionate risk in raising \$40,000 in reliance upon a promise as indefinite as that of defendant. The situation of the parties would seem to indicate, not a substantial inequality in bargaining power, but rather foolhardiness on the part of the plaintiff. It would also seem difficult to find a basis upon which to calculate damages suffered for which the defendant should be liable.

J. D. MALLONEE, JR.

Descent and Distribution—Doctrine of Worthier Title in North Carolina.

Under the doctrine of worthier title, a devise to the heir is void if he takes the same nature and quality of estate by the will that he would have taken by descent had the testator died intestate, owing to the preference of the common law for title by descent.¹ At common law the doctrine was a rule of law; there was no election in the heir to take by descent or by purchase, because the descent was immediately cast upon him, and the devise was considered as having no operation at all, thus forcing the heir-devisee to take by descent.² This hoary dogma arose out of the efforts of medieval landlords to preserve their feudal rights,³ and of creditors of the ancestor to reach property which at that time, if taken by devise, would have been immune.⁴ This rule was abrogated by statute in England in 1833;⁵ it still exists in some of the

¹ 1 MORDECAI, LAW LECTURES (2d ed. 1916) 648; POWELL, AN ESSAY UPON THE LEARNING OF DEVISES (3d Am. ed. 1822) 284; 2 TIFFANY, REAL PROPERTY (2d ed. 1920) §487.

² University v. Holstead, 4 N. C. 289 (1812).

³ Campbell v. Herron, 1 N. C. 381 (1801). Where the owner of land was permitted to devise his land, the overlord was deprived of the fruits of his seigniority, the consequence of descent.

⁴ 1 MORDECAI, LAW LECTURES (2d ed. 1916) 648. "This rule was made for the protection of creditors, because after making bonds whereby they bound themselves and their heirs to pay money, the obligors would devise their lands to their heirs, and, as such devises constitute the heirs purchasers, so to speak, they got the land without having to pay the bond—not being liable on the bond of the ancestor except when they acquired real estate by descent from such ancestor. This pitiful evasion of an honest debt was upset by the rule above stated." It is no longer necessary to apply the rule for this purpose because present statutes make the property of the decedent liable for his debts whether devised or not.

⁵ 3 & 4 William IV, c. 106, §3 (1833). This statute declared that when any land should be devised by a testator dying after December 31, 1833 to his heir, the devise should operate and the heir should take as devisee by purchase and not by descent as heir.

American states,⁶ however, without the support in its operation of the reasons on which it was founded.⁷ The purpose of this note is to consider the application of the doctrine in North Carolina.

Where the devolution of ancestral property in North Carolina is concerned, it is necessary to determine whether the devisee takes by descent or by purchase. Purchased estates—in the technical sense of the word “purchase”⁸—descend to the nearest relations, irrespective of the paternal or maternal line; whereas, descended estates and certain purchased estates (such as the doctrine of worthier title converts into descended estates) descend to the nearest relations of the blood of the ancestor from whom the estate was transmitted.⁹ Thus, where the testatrix devised land, transmitted to her by descent from her father, to “her heirs at law,” the heirs took the same estate under the will that they would have taken by descent had the testatrix died intestate. Therefore, under the doctrine of worthier title, the devise was void and “her heirs at law” took by descent and not by purchase. Consequently the fourth canon of descent¹⁰ governed the devolution of this property, as though the testatrix had died intestate, to restrict the inheritance to those relations of the testatrix who were of the blood of the original ancestor.¹¹

If the testator devises his land to his sole heir at law, the devise will fail of operation and the heir will take by descent;¹² and it is not necessary that the entire estate be devised to the heir, as the operation of the rule depends upon the quality¹³ of the estate rather than the quantity.¹⁴

⁶ Harper & Heckel, *The Doctrine of Worthier Title* (1930) 24 ILL. L. REV. 627, 642. The doctrine has been “asserted, applied, or referred to in some phase or another, in the District of Columbia, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Mississippi, North Carolina, New Hampshire, New York, Ohio, Pennsylvania, South Carolina, and Tennessee.”

⁷ Campbell v. Herron, 1 N. C. 381, 384 (1801); 1 MORDECAI, LAW LECTURES (2d ed. 1916) 648, 649.

⁸ The word “purchase” is used in law in contradistinction to “descent,” and means any mode of acquiring real property other than by the common course of inheritance. One takes property by purchase through the act of parties as contradistinguished from taking by descent by operation of law.

⁹ Burgwyn v. Devereux, 23 N. C. 583, 586 (1841).

¹⁰ N. C. CODE (1935) §1654(4).

¹¹ Yelverton v. Yelverton, 192 N. C. 614, 135 S. E. 632 (1926).

¹² Caldwell v. Black, 27 N. C. 463 (1845); Poisson v. Pettaway, 159 N. C. 650, 75 S. E. 930 (1912).

¹³ By “quality” of estate is meant the manner of enjoyment whether solely, jointly, in common, or in coparcenary. See Yelverton v. Yelverton, 192 N. C. 614, 135 S. E. 632 (1926), cited note 11 *supra*.

¹⁴ Wilkerson v. Bracken, 24 N. C. 315 (1842). The testator devised to his wife and his daughter (the daughter being the sole heir at law) “between them equally to be divided.” The rule was held applicable although the daughter received only one half of the land instead of all of it as she would have received by descent had the testator died intestate. However, she took the same “quality” of estate, that is, as sole tenant.

Furthermore, if the testator devises to his wife for life with remainder in fee to his children, the children, instead of taking an estate in remainder under the devise, take an estate in reversion by descent, although the limitation to the heirs be charged with an encumbrance.¹⁵ Perhaps it may seem that the rule should not apply here because the wife gets a life estate in the whole property under the devise and the children get only a remainder; while, by descent, the wife would have gotten dower, a life estate in only one-third of the land, and the heirs would have received a present possessory interest in two-thirds of the land and a remainder in the balance. It must be noted that the test for the rule, however, 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 In the present case the heirs get the full title after the life estate just as though there had been no limitation over to them, in which event there is a reversion to the testator's estate and thence to his children by descent. So, according to the above test, the devise over gives the heirs what they would have got in the absence of the will and it is obvious that the rule should apply.

On the other hand, the doctrine does not apply in North Carolina where the testator alters the estate, limiting it in a different way from that in which it would have passed by descent,¹⁷ as where the testator devises to the heirs of his son, instead of to the son himself who survives the testator and who is his heir at law;¹⁸ or where the testator devises his entire estate to only one of his four children who are capable of taking.¹⁹ Similarly, a devise at common law to the second son instead of to the first son, who was the sole heir under the rule of primogeniture, was not affected by the rule;²⁰ likewise, a devise at common law to the wife for life with the remainder to the three daughters of the

¹⁵ *University v. Holstead*, 4 N. C. 289 (1812). Testator devised to his wife for life, remainder to be equally divided between his two daughters. By making the estate equally to be divided between his two daughters, they were bound to take as tenants in common, the same "quality" of estate which they would have taken by descent had the testator died intestate; therefore, they took by descent and not by purchase under the will.

¹⁶ 6 KENT, COMMENTARIES 506, citing CROSLY, TREATISE ON WILLS (London 1828) 101.

¹⁷ *University v. Holstead*, 4 N. C. 289, 291 (1812).

¹⁸ *McKay v. Hendon*, 7 N. C. 209 (1819); *Osborne v. Widenhouse*, 56 N. C. 238 (1857); *Peel v. Corey*, 196 N. C. 79, 144 S. E. 559 (1928).

¹⁹ *Ross v. Toms*, 9 N. C. 9 (1822). Testator devised to his wife for life, remainder to his son, *A*. Testator was survived by other children, *B*, *C*, and *D*. The rule did not apply because as devisee *A* did not get the same quality of estate that he would have gotten had testator died intestate. *A* received a sole tenancy by the devise whereas he would have received a tenancy in common by descent shared in by *B*, *C*, and *D*.

²⁰ *Burgwyn v. Devereux*, 23 N. C. 583 (1841).

testator was not within the scope of the rule because under the devise the daughters took as joint tenants²¹ instead of taking as coparceners, the quality of estate which they would have taken at common law had the testator died intestate.²² Not only must the heirs take the same estate in order to come under the rule, they must take that estate in the same subject-matter as well.²³ Thus, where the testator owns Blackacre and Whiteacre, and devises the first tract to *A* and the latter to *B*, they being his heirs, the rule does not apply because under the will *A* and *B* take as tenants in severalty whereas they would have taken as tenants in common of both the tracts had there been no will.²⁴

Instead of being abrogated by statute in North Carolina as in England,²⁵ the doctrine is incorporated into and extended by the fourth canon of descent to embrace estates derived by gift and settlement, as well as by devise.²⁶ In *Poisson v. Pettaway*²⁷ Judge Brown recited that "at common law, a devisee who takes the same quality and nature of estate that he would have taken by descent had the testator died intestate, takes by descent, owing to the preference of the common law for the title of descent," and then he declared that "our statute puts a similar devise between such parties on the same footing with the descent." It is thought that Judge Brown did not thereby restrict the operation of the doctrine to ancestral property, but simply called attention to the fact that so far as ancestral property was concerned where there are no lineal descendants, the doctrine has been made a part of the statutory law of this state. It seems clear that the statute did not confine the operation of the rule to land which the devisor himself had inherited, because, where a father *bought* land and devised it to his heir at law, the devise

²¹ This case was decided prior to the enactment of the statute which would have made the daughters take as tenants in common unless there was a clear intention expressed in the will to make them take a different quality of estate. See *University v. Holstead*, 4 N. C. 289, 291 (1812), cited note 4 *supra*.

²² *Campbell v. Herron*, 1 N. C. 381 (1801). It must be noticed that the distinction between this case and *University v. Holstead*, 4 N. C. 289 (1812), cited note 15 *supra*, is that, in the latter case, the testator was careful to provide that the land should be equally divided between his daughters, thus making them take as tenants in common; whereas in the present case, the devise was to testator's wife for life with remainder to the three daughters of testator, thus making them take as joint tenants instead of as coparceners, the quality of estate which they would have taken by descent at common law.

²³ 1 MORDECAI, LAW LECTURES (2d ed. 1916) 648.

²⁴ *Raiford v. Peden*, 32 N. C. 466 (1849).

²⁵ 3 & 4 William IV, c. 106, §3 (1833), cited note 5 *supra*.

²⁶ N. C. CODE (1935) §1654(4). "On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise, or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules."

²⁷ 159 N. C. 650, 651, 75 S. E. 930 (1912).

was void in that it gave the heir the same estate which he would have received by descent in the absence of the will.²⁸

It does not seem that a devise to *A* for life with remainder to the heirs of the testator would be affected by Consolidated Statutes, §1739,²⁹ which provides that a limitation by deed, will, or other writing to the heirs of a living person should be construed as a limitation to the children of such person. This statute is probably designed to cover a devise to the heirs of a living third person, and, in case of a deed, to the heirs of the grantor³⁰ as well as to the heirs of a living third person. It should not apply to the heirs of the testator himself because, when the will takes effect, the testator is necessarily dead and his children could not be classified as "the heirs of a living person." If for some reason, however, the statute should be held applicable to the heirs of the testator, it would not prevent the operation of the rule of worthier title because the testator's children would be his heirs and they would take the same estate by the devise that they would have taken by descent; and if, perchance, the testator should not be survived by children to take under the statute, the limitation over to them would fail under the operation of that statute,³¹ and the testator's collateral heirs would take the reversion by way of descent from the testator.

What effect does the operation of the doctrine of worthier title have upon Consolidated Statutes, §4138,³² which voids any devise or bequest

²⁸ *Wilkerson v. Bracken*, 24 N. C. 315 (1842); see *Raiford v. Peden*, 32 N. C. 466 (1849), cited note 24 *supra*, where the testator bought the lands and devised to his daughters in severalty. The doctrine of worthier title was not applied in this case due to the fact that under the devise the heirs took a different estate in quality from that which they would have taken by descent in the absence of a will; not because the land had not been inherited by their father as ancestral property.

²⁹ N. C. CODE (1935) §1739.

³⁰ *Thompson v. Batts*, 168 N. C. 333, 84 S. E. 347 (1915). *T* conveyed land to his wife for life with remainder to the heirs of her body by him, and provided that, in the event of no such issue, the remainder should be to the heirs of the grantor. Section 1739 was applied to make the children of the grantor by a former marriage (upon the non-happening of the contingency) take as purchasers of the remainder under the deed. It is readily seen that the statute should apply in a conveyance to the heirs of the "grantor" because it is quite possible for his children to be the "heirs of a living person," whereas a devise by the "testator" to his heirs would not come under the statute because the children of the testator could not possibly be the "heirs of a living person," the testator being dead when the will takes effect.

³¹ Under the statute, *supra* note 29, a limitation, whether by deed or will in North Carolina to the heirs of a living third person would fail if that person should not have children to take the estate. By analogy, supposing that the statute should apply to the heirs of the testator; a devise to such heirs under the statute would fail if the testator had no children. This being true, there would be a reversion in the testator just as though he had not made a limitation over after the life estate, and the heirs at law of the testator would take this reversion by descent unless it had been disposed of by a residuary clause in the will.

³² N. C. CODE (1935) §4138.

to any person who is an attesting witness? It would not affect bequests because the doctrine is not concerned with personal property; yet it is conceivable that the doctrine would affect that part of the statute dealing with devises to the heirs of the testator. Suppose, for instance, that the testator is survived by his two sons, *A* and *B*, his sole heirs, and that he devised Blackacre to them as tenants in common. Let us suppose also that his son *A* was an attesting witness. Under the ancient dogma, which is a rule of law and not of construction,³³ the devise to both *A* and *B* would be void because they take the same quality of estate by the devise that they would have taken by descent had the testator died intestate. Since *A* was a witness, the statute in question would void the devise to him although it would permit him to prove the will. Which would prevail in this situation, the statute or the doctrine of worthier title? It is the opinion of the writer that, under the doctrine of worthier title, the devise was void *ab initio*, and, therefore, there would be no devise upon which the statute could operate. Although the will might be proved, it seems that both *A* and *B* should take Blackacre by descent just as though the testator had died intestate. It is submitted that this would be a most excellent application of the doctrine in order to protect those heirs who, in ignorance of the above statute, attested the wills of their ancestors with no thought other than to accommodate the testator. Certainly no harm would result because the heir would receive only that to which he was entitled by descent and which the testator attempted to give him by devise; if the heir received more, whether by the exercise of undue influence or not, the rule would not apply to protect him from the operation of the statute.

No North Carolina cases have been found in which the doctrine of worthier title was invoked to determine the rights of third parties. Problems of this nature have arisen in other jurisdictions and will likely arise in this state, especially in the administration of decedents' estates. For instance, suppose a testator devised Blackacre to his heir at law and Whiteacre to his friend, and that there is a deficiency of personal assets with which to pay the debts of the deceased. It would follow logically under the doctrine of worthier title that Blackacre should be resorted to first for the payment of debts, in exoneration of the estate in Whiteacre devised to the friend.³⁴ A Massachusetts court so held, treating Black-

³³ *University v. Holstead*, 4 N. C. 289 (1812).

³⁴ The following statutes would be involved in such a situation in North Carolina: N. C. CODE (1935) §87 ("When any part of the real estate of the testator descends to his heirs by reason of its not being devised or disposed of by the will, such undeviseed real estate shall be first chargeable with payment of the debts, in exoneration, as far as it will go, of the real estate that is devised, unless from the will it appears otherwise to be the wish of the testator"); and §88 ("If, upon the hearing of any petition for the sale of real estate to pay debts, under this chapter,

acre, devised to the heir, as undevised realty on the ground that the heir took the same estate by devise that he would have taken by descent.⁸⁵ However, a more equitable result was reached by an English court which, although it recognized that creditors may proceed against the land devised to the heir in priority to the other devise, held that the doctrine "does not afford a sufficient reason for saying that the burden of the debts should not be borne ratably by the devisees, although one of them is heir," and further, that "the heir is entitled to contribution from the other devisee to the extent in which his estate may be exhausted by debts."⁸⁶ The court justified this departure from the strict logic of the rule on the ground that the devise to the heir was not a mere nullity as between the heir and the other devisee, and that effect should be given to the intention of the testator so far as possible to protect the natural object of the testator's bounty as against the other devisee, who, under a strict application of the doctrine, would profit simply because he was not the heir of the testator. The doctrine may be resorted to as a bar to certain will contests. For instance, where the heir takes the same estate by devise that he would have taken by descent in the absence of a will, it has been held that the heir lacks an interest sufficient to permit him to contest the will because such heir could neither gain nor lose if he succeeded in upsetting the will.⁸⁷ Similarly, where the will disposed of the entire estate to the heirs in the same manner in which it would have descended, the will has been held a nullity as to the disposition of the property and therefore not subject to contest.⁸⁸

It is apparent that the doctrine of worthier title, shorn of the purposes which brought it into existence, prevails in North Carolina in its common law form and that it has been incorporated into and extended

the court decrees a sale of any part that may have been specifically devised, the devisee shall be entitled to contribution from other devisees, according to the principles of equity in respect to contribution among legatees. And the children and issue provided for in this chapter shall be regarded as specific devisees in such contribution.") According to the effect of these statutes, if the problem alluded to in the body of this note should arise in North Carolina, it seems that the result reached by the English Court in *Biederman v. Seymour*, 3 Beav. 368 (Rolls Ct. 1841), *supra* note 36, would apparently obtain.

⁸⁵ *Ellis v. Page*, 61 Mass. 161 (1851). This court resorted to the realty devised to the heir, in such fashion as to make it subject to the doctrine of worthier title, for the payment of cash legacies as well as for payment of the debts of the decedent.

⁸⁶ *Biederman v. Seymour*, 3 Beav. 368 (Rolls Ct. 1841). The testator died before the doctrine of worthier title was abolished by statute in England in 1833, *supra* note 5.

⁸⁷ *Thompson v. Turner*, 173 Ind. 593, 89 N. E. 314 (1909).

⁸⁸ *Wheeler v. Loesch*, 51 Ind. App. 262, 99 N. E. 502 (1912). Although the will is spoken of as a nullity, only the devises to the heirs are nullities and the will is perfectly valid to pass title to the personalty and to the land devised in a different way than it would have gone by descent had the testator died intestate, and for the appointment of the executor.

by our fourth canon of descent.³⁹ It has been applied most often in determining the devolution of ancestral property where the heir took the same estate by devise that he would have taken by descent, and then died intestate, survived only by collateral relatives of equal degree on both the paternal and maternal side and both claiming the estate as heirs at law. If the heir took by purchase, all the relations would take; if he took by descent under the operation of the doctrine of worthier title, only those heirs of the blood of the transmitting ancestor would take.

THOMAS H. LEATH.

Federal Practice—Judgment Non Obstante Verdicto on the Evidence.

Plaintiff brought an action in a federal court in New York to recover damages for personal injuries incurred while he was in the defendant's employ. At the close of the evidence, the defendant moved for a dismissal of the complaint because the evidence was insufficient to support a verdict for the plaintiff, and also moved for a directed verdict in its favor on the same ground. The trial court reserved its decision on both motions, submitted the case to the jury subject to its opinion on the questions reserved, and received a verdict for the plaintiff. Thereafter, the court held the evidence sufficient, the motions ill-grounded, and entered judgment for the plaintiff on the verdict. On appeal the Circuit Court of Appeals held the evidence insufficient and reversed the judgment with a direction for a new trial.¹ Defendant obtained certiorari in the Supreme Court² which modified the judgment of the Circuit Court to direct a dismissal on the merits, and the judgment as so modified was affirmed.³ The practice of reserving rulings on questions of law and taking verdicts subject to the rulings was a well-established practice at common law and carried with it the authority to make such ultimate disposition of the cause as the court might see fit. Thus, since the Seventh Amendment⁴ to the Federal Constitution refers to the rules of the common law in 1791, at the enactment of the Amend-

³⁹ N. C. CODE (1935) §1654(4).

¹ *Redman v. Baltimore & Carolina Line, Inc.*, 70 F. (2d) 635 (C. C. A. 2nd, 1934).

² *Baltimore & Carolina Line, Inc. v. Redman*, 293 U. S. 541, 55 Sup. Ct. 89, 79 L. ed. 88 (1934).

³ *Baltimore & Carolina Line, Inc. v. Redman*, 55 Sup. Ct. 890 (U. S. 1935).

⁴ U. S. CONST. Amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.").