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THE DOCTRINE OF WORTHIER TITLE

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I

The Doctrine and Its "Reasons"

It is said, in the old books, that "a devise to the heir is void."[1] More modern phrasing of this rule will put it that "where a title by descent and a title by devise concurred in the same individual, the former predominated, and the heir was in by descent and not by purchase."[2] The rule was abrogated in England, by statute,[3] in 1837, but was, and still is, followed in America in many jurisdictions,[4] with many curious and anomalous effects, some of which will be discussed later.

Several considerations have been suggested as the explanation for the origin of this doctrine. It has been supposed to be the application of the principle that a man shall not have by gift that which is his own without the gift.[5] On the other hand it is urged that the doctrine is supported exclusively by grounds determined by the benefit of third persons, "of the lord for the preservation of his tenure" and of creditors "for the payment of their debts," that is, the creditors of the ancestor.[6] Again, it is contended, simply, that it is more convenient that the property should be assets in the hands of the heir.[7]

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1. *Rolle's* "Abr.," 626.
2. *Jarman* on "Wills" (6th ed.) I, 96.
3. 3 & 4 Will. 14 ch. 106, sec. 3, by which an heir, to whom lands are devised, takes as devisee to all purposes. See *Strickland* v. *Strickland* (1839) 10 Sim. 374, 59 Eng. Repr. 659.
4. See infra, notes 66-80.
5. See *Biederman* v. *Seymour* (1840) 3 Beav. 368, 49 Eng. Repr. 144, 145.
6. Cf. 2 *Blackstone* "Commentaries" 242.
7. *Chaplin* v. *Leroux* (1816) 5 M. & S. 15, 105 Eng. Repr. 957.

Undoubtedly there were several considerations which will account for the development of this dogma. But chief among them must be placed the feudal doctrine of primogeniture. It was to the lord's interest that the fief be impartible.[8] Consequently when the rules affecting military tenure were extended to free tenures, primogeniture became the rule[9] and all doctrines depending upon and correlative to primogeniture became equally applicable.

Arising out of these economic considerations, were those of the social tradition to account for the long survival of the doctrine. To inherit property was more "worthy" than to acquire it by purchase, and the family pride of English landowners is nowhere better evidenced than in the persistence with which real property was kept within the blood. Thus there were strong social forces which demanded that devises fail when without the devise there would be an inheritance. So deep rooted in the common law was the doctrine of "worthier title," that only statutory enactment could alter it, and nothing could prevail to prevent the courts from pushing it to the extreme limit of its application. The limit, however, when reached, was preserved with the scrupulousness with which all dogmas affecting the disposition of land were guarded. But it is by no means certain that modern American courts have been so accurate, nor yet so clear as to the extent to which the doctrine is properly and reasonably applicable.

Development of the Doctrine

In 1555 the case of *Hinde* v. *Lyon*[10] was decided. In this case, the action was debt against the heir, who pleaded riens per descent. It appeared that the ancestor had devised the whole land "to his wife till the heir should be of age of twenty-four years, and at that age the heir should have the whole to himself and his heirs forever; and that when he should come to the age of twenty-four years, the wife should have the third part during her life; and if the heir died before the age of twenty-four years, that then the land should remain to the wife during her life, and after her death (if the heir had no issue) remainder to A the daughter of the devisor in tail, remainder to the right heirs of the devisor." It was held that the land was assets in the hands of the heir, the wife dying after he became of age, *for the fee simple had descended to the son.*

No authority is cited in this case, and no reasons given. Sev-

8. 3 *Holdsworth* "History of English Law" 172.
9. Ibid. 173 and notes.
10. (1555) 2 Dy. 124a, 73 Eng. Repr. 271.

eral other cases followed, in which it was similarly held that a devise to the heir, such as this, was void,[11] and the heir took by descent. From the early cases, and those which followed, the doctrine developed into a dogma of the common law, and it was repeatedly said that where the same estate is devised to the heir that he will take under the law, the devise is void, for he takes by his more worthy title, as heir.[12]

But in 1629, a more complicated case came before the court. In *Gilpin's* case[13] the ancestor had devised land in fee to his son and heir, but the devise was charged with the payment of his debts within a year. In a suit against the heir for the ancestor's debt, it was held that the heir took the fee as purchaser and not as heir, since the devise was tied with a condition. This condition, presumably, made the estate devised different from that which the heir would have taken at law, had there been no devise to him, consequently the doctrine was rejected, and the heir regarded as a purchaser.

In *Britain* v. *Charnock*[14] which was debt upon a bond against the defendant, as heir, riens per descent was pleaded and it was found that the father had devised to his eldest son and his heirs within four years after his decease, provided the son pay twenty pounds to the executrix toward the payment of the testator's debts, other lands also being devised for the payment of debts. The father died and the son paid the twenty pounds. It was held, however, that "where the heir takes by a will with a charge, as in this case, he doth not take by descent, but by purchase."[15]

Thus, it seemed, the limitation of the doctrine of the worthier title had been reached. The devise must not be fettered with a charge or a condition. If it were, the estate devised differed from that which would descend, and the devise was good. But in 1698, the theory of *Gilpin's* case was definitely overthrown, and the worthier title doctrine extended. Here,[16] though there was the possibility of a charge if the wife, who had a life estate, should make an appointment, "it was resolved by the whole court, that judgment should be for the plaintiff, for the heir took by descent, and not by

11. See cases cited in *Coke* "Institutes" 12b and 2 *Blackstone* "Commentaries" 242 (note).

12. See *Coke* "Institutes" 12b, note 63.

13. (1629) Cro. Car. 162, 79 Eng. Repr. 740.

14. (1677) 2 Mod. 286, 86 Eng. Repr. 1076.

15. Cf. *Pybus* v. *Milford* (1674) 1 Freem. K. B. 369, 89 Eng. Repr. 275.

16. *Clerk* v. *Smith* (1698) 1 Comyns 73, 92 Eng. Repr. 965; see 1 Salk. 241, 91 Eng. Repr. 214.

the will; and it would be mischievous if every little legacy should alter the course of descent . . ."

Thus it developed that a charge upon the estate did not break the descent, for it did not alter the estate devised. It is apparent that the quantity, in the sense of the amount which the heir gets, is materially lessened under the devise. The quality, however, or nature of the tenure is the same. Hence, we find the rule stated, in 1702, as depending upon the identity in quality only.[17] Lord Holt here said:

"For the difference is, where the devise makes an alteration of the limitation of the estate, from that which the law would make by descent; and where the devise conveys the same estate, as the law would make by descent; but charges it with incumbrances. In the former case the heir takes by purchase, in the latter by descent."

From *Clark* v. *Smith,* in 1698, there is no doubt about the proposition that charges do not break the descent. The *quality* of the estates being the same, it is said, the devise is void and the doctrine applies.[18]

The next serious problem in the applications of this doctrine arose in 1759, in *Scott* v. *Scott.*[19] In this case, there was involved the construction and effect of a will, devising lands to the heir, subject to an executory devise. It appeared that A having covenanted to settle lands upon his wife of the value of one hundred pounds for life, devised to her an estate of the annual value of fifty pounds, and directed his executors to purchase sufficient land to make up the annual value to one hundred pounds. Thereafter he devised all his real estate, not thereinbefore devised, to B, his eldest son, his heirs and assigns, but in case he should die without issue before twenty-one, over. B took, it was said, by devise and therefore the legatees were not entitled to resort to the lands so devised for so much of the personal estate as should be exhausted in making up the estate for the wife.

This was regarded as a new case, and the heir was held to take by devise because the estate given was *different in quality* from the estate which would have descended. As was said, in argument, "here the devise, though a devise of a fee, is subject to and fettered with an executory devise. The heir has, therefore, not the same estate as would have descended to him." This case for some years

17. *Emerson* v. *Inchbird* (1702) 1 Ld. Ry. 728, 91 Eng. Repr. 1386.

18. "It is a positive rule of law, that wherever a devise gives to the heir the same estate in quality as he would have by descent, he shall take by the latter." Note to *Scott* v. *Scott,* infra note 19.

19. (1759) 1 Eden. 458, 28 Eng. Repr. 762.

was regarded as marking the limitation of the worthier title doctrine. There was such an alteration, by the condition, as to break the descent. " 'The better opinion,' as observed by Preston[20] in reference to the present case, 'is, that he takes under the will, as the quality of the estate is altered, as he takes a fee with a qualification, instead of a fee absolutely.' "

But how can this decision be squared with the early case of *Hinde* v. *Lyon,*[21] two hundred years before, where a devise to the wife till the heir was twenty-four, remainder over in case the heir died before twenty-four, was held not to break the descent? The lord keeper, in the *Scott* case had no difficulty with this situation.

"There are two kinds of executory devises, one where the testator devises his estate to his heir, and to go over on a contingency, which is to take place within a reasonable time; the other where he devises it over on a future contingency, and being silent as to what shall happen to it in the meantime, thereby permits it to descend to his heir."

In *Hinde* v. *Lyon,* the fee was not devised at all except upon a future contingency. It was a devise to the wife until the son became twenty-four. If the son died before twenty-four without heirs, over. While the son was living and before he attained the age of twenty-four, the fee was not disposed of at all, hence it may be "permitted to descend." Under such reasoning, if the son reached the age of twenty-four, it may well be argued that the fee does not become his by the devise, for he has already inherited it, and he cannot become thus a purchaser.[22]

From this viewpoint, *Scott* v. *Scott* shows a very different situation. Here the fee was devised immediately to the heir, but to go over on the happening of a contingency. Such an estate is re-

20. 3 *Preston* "Conveyances" 261.

21. Supra, note 10.

22. The devise to the wife here was that of an estate for years. The attempted devise to the heir could not be a contingent remainder as the particular estate here is less than a freehold. See *Tiffany* "Real Property" sec. 140 and *Tiedeman* "Real Property" sec. 397. If it had been made to a person other than the heir, it would have been good as an executory devise. *Gray* "Rule against Perpetuities" sec. 60, states: ". . . it has been repeatedly held that a future contingent devise after an estate for years is a good executory devise, and not a bad remainder." See also *Tiffany* supra sec. 173, note 35. The seisin until such third party became twenty-four years of age would not be in abeyance but would be considered in the heir at law. See *Tiffany* supra, sec. 160. See also, *Gray* "Perpetuities" sec. 17, note 2. Here, if upheld, the attempted devise would result in an executory devise to the heir, subject to a reversionary fee in the same person, the sum of which would amount to the reversion that the heir would take by descent, if the devise to him in the will were omitted. It was an attempt to devise by will exactly the same estate that the heir would have taken as a representative of the devisor by descent, and therefore void. See *Tiffany* sec. 130.

garded as vested subject to being divested. The condition of the limitation over in *Hinde* v. *Lyon* was a condition precedent, while that involved in *Scott* v. *Scott* was a condition subsequent to the heir's estate. In the former case, the heir's estate never vested until he became of age; in the latter situation, his estate terminated if he died prior to arriving at the prescribed age.

Thus we can account for the distinctions made by the court between the facts in *Scott* v. *Scott* and earlier cases. In 1818, however, *Doe* v. *Timmins*[23] overruled the doctrine of the *Scott* case and again the worthier title was extended to include devises involving an executory devise. Heroic attempts were made to account for the *Scott* case and to reconcile it with subsequent decisions. Thus it was said:

> "The determination in this case (*Scott* v. *Scott*) is right, but the reason given for it is wrong . . . Though a devise to the testator's heir, if not restrained to a less estate than a fee simple, is void, as to passing the estate, yet the devise to the heir will in many instances influence the construction of the will, as was holden by Lord Holt . . ."[24]

The argument here seems to be that although a devise to an heir is void, as a devise, still it may be effective as indicating the intention of the testator as to the relative claims of the heir and other legatees. As Lord Eldon said of a charge in *Bailey* v. *Ekens*,[25] it is a declaration of intention "upon which a court of equity will fasten." The devise, with the limitation attached, is operative to the extent that it is subject to an executory devise, but "for the purpose of making the heir take otherwise than by descent, the devise is said to be void."[26]

There is the further analogy of a general legatee and a specific legatee. The writer of the note, supra, pointed out "since the testator had devised the lands, that they ought to be exempted, for it was as much the testator's intention that the devisee should have this land, as that the others should have the legacies, and a specific legacy is never broke into in order to make good a pecuniary one." Thus, the result in the *Scott* case may be accounted for without involving the worthier title dogma at all. To be sure, this is not a legal "reason," while the worthier title doctrine, were it properly applied, would be such a "reason." The analogy of the general and specific legatees fails as a logical reason in that it presupposes that

23. (1818) 1 B. & Ald. 531, 106 Eng. Repr. 195.
24. *Hill's* Note in Ambler, 383, 27 Eng. Repr. 255.
25. (1802) 7 Ves. Jr. 319, 32 Eng. Repr. 130.
26. *Biederman* v. *Seymour*, supra note 5.

the heir is a devisee, which is the very question to be determined. However, it does furnish an analogy, and it might be plausibly argued that since the testator has attempted to do what the law will not permit him to do, i.e. make his heir a purchaser, nevertheless he had expressed his intention that he wanted his heir to take the specific lands, and consequently there is such a declaration of intention as a "court of equity will fasten upon."

Counsel in *Chaplin* v. *Leroux*[27] attempted to reconcile the cases by maintaining that *Scott* v. *Scott* was decided upon the ground that the eldest son took an estate tail. This is patently absurd, and but suggests the length to which the common law lawyer would sometimes go to square a precedent which he feared might stand in the way of a desirable extension of a dogma. But the extension was made. The worthier title doctrine had never rested upon any proposition except the identity in *quality* of estates under the will and under the law. The social tradition still demanded and the courts respected the preservation of estates inherited by and through blood. There may have been sufficient considerations, although relics of feudal England, at the beginning of the nineteenth century, to create a social pressure which the courts were neither able, nor disposed, to oppose. The real reasons behind the extension, as behind the origin of the doctrine, were social and economic. So long as these forces continued, the doctrine would be pushed to its limits.

And the doctrine was pushed to its limits. It became firmly established. In 1833, the whole doctrine was reviewed and further rationalized.[28] The Master of Rolls explained:

> "It has always been the established doctrine, that a charge upon an estate devised to the heir does not break the descent; how then, will a condition operate? The charge partially affects the devise, the condition wholly affects it; and it being determined that a charge, which carries off a part does not break the descent, neither does a condition, which in a particular event would carry off the whole, break the descent."

This reasoning is clear when we remember that it had already been determined that a charge upon the estate would be enforced although the devise to which the charge was fastened was inoperative to pass the estate; the heir took by the law. In fact, *Chaplin* v. *Leroux*[29] was a case involving a devise which not only put a charge upon the estate granted to the heir, but made a failure to

27. (1816) 5 M. & S. 15, 105 Eng. Repr. 957.
28. *Mainbridge* v. *Plumer* (1833) 2 My. & K. 92, 39 Eng. Repr. 879.
29. Supra, note 27.

discharge these charges, a condition precedent to the termination of the heir's estate. In a sense, then, here was both a charge and an executory devise. Nevertheless, the estate passed by law, for it was the same *in quality,* as the estate devised. Upon the failure of the heir's estate, by a default in payment of the charges, there was a grant to G. T. in trust "to enforce the charges and in trust for the said son."

"If the estate devised to the trustee be an executory devise, the law will cast the estate of the heir on him by descent, until the contingency happens; if the trustee's estate be not an executory devise, I do not see that there is necessarily such an estate of freehold given to him as to break in upon and alter the quality of the estate which the heir would otherwise take."

This was the fully developed doctrine which the common law had moulded out of the theory of the worthier title when the statute brought an end to its more than three hundred years of life in England. As we shall see, we have it still in America.

The Test for the Doctrine

There seems to be a confused idea in some of the early cases that there is involved here a theory of election. Thus *Smith* v. *Triggs*[30] considered the rights of one Jane Day in a copyhold estate. She was both the heir of the testator and his devisee. Under the will, a surrender and admittance was necessary to complete her estate. Under the law this was not necessary. There had been no admittance, so under the devise, Jane's estate must fail. The court allowed her to prevail on the theory that the devise was void. It was said: "If Jane Day were to claim by the will, that title was never complete for want of an admittance. *That plainly shows her election to be in of her more worthy title by descent.* That was a complete and perfect title, but the other was not."

But this theory is unsound, by the very principles involved in the doctrine of worthier title. There is no question of election here at all. Jane could not take by the devise. The real question was whether or not Jane's estate under the will was the same in quality as her estate by inheritance. It was, notwithstanding an admittance were necessary if she took by devise. The tenure was unchanged. Consequently, she must take under the law, for she will not be permitted to be a purchaser. No election on her part could change the rule of law which forbids the heir to be a purchaser, where the estate is the same as allowed by the law.

30. (1735) 1 Strange 486.

So, in *Preston* v. *Holmes*[31] it was held "that the devise is void, and that it is not in the power of John, the son, to make the election to take by descent or by purchase at his pleasure, but he must of necessity take the land as the law directs, which is by descent; and it is against a maxim in law to give a thing to such a person to whom the law gives it, if it had not been so given."[32]

"The test for the rule, says Mr. Crosley, 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."[33]

In *Preston* v. *Holmes*[34] the simple situation was presented of a devise to the testator's wife for life and after her death to I, his eldest son and to his heirs. The question was whether I took by devise or by descent. Here it is quite clear that if that portion of the devise which fixed I's interest were omitted, he would take, as heir, exactly the same estate as the testator proposed to give him in the will. In either case, his estate was subject to the life estate of the wife. I must therefore take by descent, for, it was said, the devise to the heir is void.

In *Manbridge* v. *Plummer*[35] a more difficult situation was presented. Here there was a life estate to the wife, and, after her decease, to the testator's granddaughter, her heirs and assigns. The granddaughter was the only child of a deceased daughter and the testator's sole heir at law. There was, however, an executory devise in case the granddaughter should die under twenty-one without issue. It was held that the granddaughter, at the death of the tenant for life, took by descent rather than by purchase. Applying the test, it is seen that if the devise to the heir were eliminated from the will, as heir, she would take the same quality of estate and to exactly the same extent. She would take the fee, subject to the life interest of the wife, and subject to the condition that her estate would be defeated in case she died before twenty-one without issue. This condition is still

31. (1648) Sty. 149, 82 Eng. Repr. 601.

32. "The cases on this subject proceed on the supposition that there is no election in the heir to take by descent or purchase, for the descent is immediately cast on him, and the devise is considered as having no operation at all.

"For if the heir might, at his choice, have taken by purchase, the lord would have lost many emoluments of his seigniory and the specialty creditor of the ancestor, the fund which was answerable for their demands, for until the Stat. Will. III., the devisee was not liable." Taylor, C. J., in *University* v. *Holstead* (1816) 4 N. C. 289, 290-291.

33. 6 *Kent* "Commentaries" 506, citing *Crosley's* "Treatise on Wills" 101 (London, 1828).

34. Supra, note 31.

35. (1833) 2 My. & K. 93, 39 Eng. Repr. 879.

attached to her estate, for it was a part of the "remainder over," as well as a condition to her estate under the will. Thus only that portion of the devise which vests an estate in her is regarded as void. It is still operative as fixing the limitation over to the remainder man.

Lord Eldon explained this, in *Bailey* v. *Ekens*[36] as follows: "But, when it is said, the heir takes by his better title, still the question is whether he takes, as he would, if that devise had not been made; taking the circumstances of the devise together. A mere charge is no legal interest. It is not a devise to any one, but that declaration of intention upon which a court of equity will fasten."

In *Ambler's* note to *Scott* v. *Scott supra,* it was said, "It amounts to the same as if there had been no devise to him, but only a devise from him upon a contingency; and, therefore, if the contingency in which the devise from him is to take effect never happens, the heir takes by descent and not by purchase."

Thus the many cases which hold that a charge upon the devisee's estate does not change the quality thereof so as to prevent the application of the worthier title doctrine, are made intelligible.[37] The court is not applying what might appear to be an anomalous doctrine of following a devise which it declares at the same time to be void. It is simply following out the testator's declared intentions as to the other beneficiaries for whom the charge is imposed. To do otherwise and allow the heir to take by descent, free from the charges, would be to invalidate not only the devise to the heir, but to the other legatees and devisees as well.

So, in *Hainsworth* v. *Pretty,*[38] where a man made a bequest of twenty pounds to his youngest son, and then devised his lands to his eldest son "upon condition he should pay the said twenty pounds and if he refuse, that then the youngest son shall have the land," it was held that the condition was enforcible on behalf of the youngest son, although the eldest son took nothing by the devise. He took by descent. "And all the justices . . . resolved that the defendant's entry was lawful; for this devise to the eldest son, and his heirs, is void by the way of devise; but it is an immediate devise or limitation to the younger children if the eldest son performs not the condition . . ."[39] Thus, although as a devise

36. (1802) 7 Ves. Jr. 319, 32 Eng. Repr. 130.
37. *Clerk* v. *Smith* (1698) 1 Salk. 241.
38. (1602) Cro. Eliz. 919, 78 Eng. Repr. 1140.
39. Ibid. 1141.

to the heir the will was ineffective, it was valid enough as a limitation to the youngest son, which intention being clearly expressed was enforcible.

Consequently, it is clear how all charges and conditions attached to a devise were upheld, although the heir was deemed to take *his* estate by the worthier title of descent. But in so far as there was a limitation over, the will was still good. Therefore, in applying the test whether the heir would take exactly by the law as under the will, the devise to the heir must be considered in its capacity as fixing the limitation over, if there be such. A hypothetical situation will indicate the rule further. A testator devises land to his wife for life, and at her death to his eldest son (then *in esse*) for life, remainder to X. By the will, the son takes subject to the wife's estate and for life only. Under the law, were that portion which vests an estate in the heir omitted, he would take subject to the wife's estate and for life only because X gets the land at the heir's death, for the clause which devises to the son is operative to determine the limitation to the stranger. It is only void in so far as it devises to the heir.[40]

Unfortunately an ambiguity crept into the cases from the requirement that the quantity of estate devised must be the same as that which would have descended at law. In *Doe* v. *Timmins*[41] the testator devised copyhold lands and freeholds to a trustee, subject to an annuity of eight pounds yearly in copyhold lands to J for life and an annuity of twenty pounds to his wife for life, with the right to the wife, if annuity was not paid, to enter and sell the copyholds; if his grandson, who was the heir at law, reached the age of twenty-one, he was to be put in possession in fee subject to the payment of the annuities. If the heir did not reach the age of twenty-one, limitations over to nieces of the testator. It was here held that the grandson and heir took by descent and not by purchase,[42] the *quantity* and *quality* being the same whether he took by descent or by devise; the *quantity* because in both cases he takes

40. In *Leroux* v. *Chaplin* supra, if the devise to the trustee be regarded, as no doubt it should be regarded, as an executory devise, it is clear that the quality of the estate which goes to the heir is precisely what it would have been if the testator had devised to the wife and then to the daughter and her heirs, with the provision that G. T. take as trustee in the event the charges were in default. The son would take the residue of the estate, subject to the testementary charges and the contingent estate of the trustee. Hence, having an estate under the will, identical in quality with what the law would give him anyway, he takes by his worthier title and is in by descent and not by purchase.

41. (1818) 1 B. & Ald. 531, 106 Eng. Repr. 195.

42. Cf. *Swaine* v. *Burton* (1808) 15 Ves. Jr. 315, 33 Eng. Repr. 792.

in fee, and the *quality* because he takes in severalty. But here the court is in fact speaking of the *quantum,* not the amount of the estate. What is called "quantity and quality" means simply the *kind* of estate which the heir holds and the *way* in which he holds it. In neither case is the amount of the estate significant.[43]

Exceptions to the Operation of the Doctrine

The extent and significance of the worthier title doctrine, as well as its operation may be understood from a consideration of the situations to which it was not applicable. "To make the heir take by devise, as observed by Lord Eldon in *Bailey* v. *Ekins,*[44] there must be 'an alteration of the limitation 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 testators land to one of two daughters, etc."[45] It will be helpful to examine these illustrations separately.

Illustration 1.—"devise of an estate tail to an heir." As is well known the estate tail arose as a creature of the Statute *De Donis.*[46] Prior to that statute considerable confusion had apparently existed as to the various results of a gift of a conditional fee, i.e., a gift to one and the heirs of his body.[47] But it seems that it became fairly well settled that a gift to a man and the heirs of his body created an estate which was conditional upon the birth of issue. "Hence if no issue were born," says Holdsworth, "the condition was not fulfilled, and the donor could recover the land; but if issue was born, the condition was fulfilled, and the donee got in substance a fee simple, which he could alienate as he pleased. If, however, he did not alienate, and died without issue, the estate reverted, just as if no issue had been born."[48]

43. 2 *Blackstone* ch. 15, *Chitty's* note: "With respect to what shall be assets by descent, it is laid down as a general rule that, though the ancestor devise the estate to his heir, yet, if he take the same estate in quantity and quality that the law would have given him, the devise is a nullity, and the heir is seized by descent, and the estate assets in his hands."

Thus we see that it became accepted that both the "quality and quantity" of the estates must be identical to invoke the operation of the doctrine. But it is significant that the rule, as thus laid down, had reference to the quantum of the estate and not, as confused in subsequent cases, to the amount or proportional share.

44. Supra, note 36.

45. Note to *Scott* v. *Scott* supra.

46. 13 Edw. I, ch. 1, St. Westminster II—1285; see *Kent* supra, IV, 12, 13.

47. See *Holdsworth* supra, note 8, at 112-113.

48. Op. Cit. at 17-18.

The statute provided a protection to the issue and prevented alienation by the donee during his lifetime, the writ of formedon in descender being the appropriate remedy.[49] The writ of formedon in reverter accomplished the same protection for the donor.[50] Thus the donee's interest, upon the grant of such a conditional fee, was known as an estate tail. The donor had a fee simple expectant upon the estate tail—a sort of reversionary interest It is obvious, then, that if the devise to an heir conveyed a fee tail, the *quality* of the estate is different than if there had been no such devise and the heir had taken by descent, although it might have resulted prior to the statute upon the devisees death with living issue, that the result to the heir were the same, both as to the quantity and quality of the estate remaining. At the time of the testator's death, however, there were many possibilities which might occur, which would make the estate tail a very different *kind* of estate from one in fee, devolving to the heir by descent. This difference in *quantum* was sufficient to prevent the application of the worthier title doctrine, and the devisee takes by purchase instead of descent.[51]

Illustration 2.—"of land in fee to two daughters being testator's heirs." An estate in coparcenary was one which arose from descent, when there was none but female heirs. The rule of primogeniture, of course, applied only to male issue, and it has been pointed out how it was the interest of the lord that made both for coparcenary estates among the daughters and for the rule of primogeniture among sons.[52] In fact, it seems that in some respects the eldest daughter was regarded as the proper person to take certain indivisible portions of the estate, although she must account to her sisters for their share of its value.[53] Thus, where a man died intestate with no male issue, but with two or more daughters or other female heirs of remoter degree, the heirs took the estate in coparcenary.[54] This estate differed from that of joint tenants, primarily in the absence of the feature of survivorship, each coparcener having the power to alienate her share, her grantee holding as tenant in common with the other coparceners.[55]

But a devise usually conveyed an estate in joint tenancy,[56] and was much favored by the early law for reasons similar to the

49. See 13 Edw. I, ch. 1; see *Holdsworth* op. cit. 18.
50. *Holdsworth* op. cit. 114.
51. See dictum in (1579) Plowd. 545, 75 Eng. Repr. 804.
52. *Holdsworth* supra, note 8, at 174-175.
53. 2 *Pollock & Maitland* "History of English Law" 275.
54. *Kent* IV, 366.
55. Ibid. 367
56. See 2 *Blackstone* 180.

considerations underlying the rule of primogeniture, in that the right of survivorship tended to reduce the division of tenures.[57] Consequently, a devise to two daughters, being heirs of the testator, would be sufficient to prevent the application of the worthier title doctrine inasmuch as the daughters, although they be the sole heirs, take now as joint tenants whereas the law of descent gives them the estate in coparcenary, and thus differs materially in *quality* from the devise.

Accordingly it was early held, where such a devise was made "that they shall have it as joint tenants; for the devise giveth it them in another degree than the common law would have given it them, and for the benefit of the survivorship between them."[58]

Illustration 3.—"of gavelkind lands to several sons" Gavelkind, a species of socage tenure peculiar to the county of Kent,[59] and insuring against forfeiture to the state in case of execution for a felony, descended to all the sons equally.[60] Thus, were a devise to provide for the division of such an estate among the sons there might seem to be no reason why the worthier title doctrine should not apply. But again, it is the nature of the estate which the sons take which determines the application of the rule. If the sons take by the will, they will hold the gavelkind lands as joint tenants, but if by descent, the tenancy is one of coparcenary. This difference is one of *quality,* and sufficient to prevent the worthier title doctrine from defeating the purchase.[61]

Illustration 4.—"of all testator's lands to one of two daughters." Here, it is clear that there is a difference between the estates under the will and under the law. The daughters, under the law, would inherit equally and hold as coparceners; under the devise, the devisee takes the fee. There is more than a difference in the devisee's proportion of the estate; there is a significant difference in the tenure which determines the *quality,* the result of which is that the devisee takes as a purchaser.

Reading v. *Royston*[62] raises this question directly as well as presents another interesting phase of the doctrine. Here H had two daughters, one of whom died. H thereupon devised all his lands to the deceased daughter's son. The question was presented

57. Cf. *Fisher* v. *Wigg* (1700) 1 Salk. 391, 91 Eng. Repr. 339.
58. Anon. (1595) Cro. Eliz. 431, 78 Eng. Repr. 671.
59. 2 *Pollock & Maitland* supra 271.
60. 1 *Tiffany* "Real Property" 20-21.
61. *Bear's Case* (1588) 1 Leon. 113, 74 Eng. Repr. 105.
62. (1703) 1 Salk. 242, 91 Eng. Repr. 214; 1 Comyns 123, 92 Eng. Repr. 994. Cf. also *M'Kay* v. *Hendon* (1819) 7 N. C. 209, citing *Reading* v. *Royston* supra. Cf. also *Kinney* v. *Glasgow* (1866) 53 Pa. 141.

whether the grandson should take all by devise or the one moiety by descent and one by devise. It was held here that he took all by devise because this was not a devise to an heir. "Both coparceners make the heir," it was said. "The one is not an heir without the other; and supposing the devise void as to one moiety, the other moiety must descend to both."

The court is here declaring that there is no devise to an heir at all, and consequently no situation for the application of the worthier title doctrine. In view of the common law theory of coparcenary estates, this reasoning seems sound enough. In such an estate there is a unity of title, interest and possession, the seisin of the one coparcener being regarded generally as the seisin of the other and the possession of the one, for most purposes, the possession of the others.[63] The early history of the coparcenary estate makes this unity clearer. Originally it seems that the eldest daughter held of the lord and her sisters held of the eldest and did service through her. Although subsequently the legal rights of the younger daughters were recognized by law, the fiction of unity of estate was retained.[64] Hence it is logical to regard a devise to one of two or more coparceners as failing to fulfil the requirements of a "devise to the heir."

But supposing in *Reading* v. *Royston supra*, the testator had devised one moiety to the grandson and one to the daughter. Now there is a "devise to the heir." Nevertheless, it seems, there is reason here to require both to take by devise rather than by descent, since, under the will they take as joint-tenants and, had there been no devise, they would have taken as coparceners A fifth illustration might be added, above, namely, "or all testator's lands equally to two daughters."[65] Here the kind or *quality* of the estate being different under the will from that which would descend to the heirs at law, they take by devise and not be descent.

Summarization

The worthier title doctrine, as developed in the common law and by courts of equity, prior to the statute which abrogated that doctrine, in 1837, may be summarized as follows:

(a) When a testator devised an estate in lands to his heir, which was the same in quality and of the same quantum as that estate in the lands which he would have taken by descent, had there

63. *Kent* supra, IV, 367.
64. *Holdsworth* supra, note 8, at 174-175.
65. (1594) Owen, 65, 74 Eng. Repr. 903.

been no devise to him, the provision in the will is void in so far as it attempted to make of him a purchaser instead of an heir.

(b) This was a rule of law, primarily based upon the feudal system and calculated to benefit (1) the lord of the manor, (2) creditors of the testator; secondarily based upon the social tradition which favored the descent of property to blood heirs, as being "worthier" and more consistent with the prestige of the land-owning class.

(c) Charges upon the land did not invalidate the rule nor defeat its operation; neither did limitations by way of executory devise. The quality was not thereby altered.

(d) It was a rule of property, binding upon the heir; and irrespective of any consent or election on his part, and irrespective of the intent of the testator.

(e) The *quality* and *quantum* of the estate are the determining elements; not the quantity in the sense of proportion or amount or value thereof. The principal test is whether the estates are identical in quality; if so, the devise to the heir is inoperative, if the *quantum* in each case is the same.

(f) The doctrine, obviously, had no application to heirs who could not be disinherited or to "forced heirs." It applied only to an heir who would have inherited something if the particular devise to that heir had been omitted. This is of importance in following the application of the doctrine by American courts.

II

Orthodox American Cases

The worthier title dogma, while, as said by a Virginia court, many of its reasons have ceased to exist,[66] still tenaciously holds its place in American case law. It has been asserted, applied, or referred to in some phase or another, in the District of Columbia, [67] Illinois,[68] Indiana,[69] Iowa,[70] Kentucky,[71] Maryland,[72] Massachu-

66. See Hinton, J., in *Biedler* v. *Biedler* (1891) 87 Va. 300, 12 S. E. 753.

67. *Landic* v. *Simms* (1893) 1 App. D. C. 507; see *Jost* v. *Jost* (1882) 1 Mack. 487.

68. *Cooper* v. *Martin* (1923) 308 Ill. 224, 139 N. E. 68; *McCormick* v. *Sanford* (1925) 318 Ill. 544, 149 N. E. 476; *Wiltfang* v. *Dirksen* (1920) 295 Ill. 362, 129 N. E. 159; *Darst* v. *Swearingen* (1906) 224 Ill. 229, 79 N. E. 635.

69. *Dillman* v. *Fulwider* (1914) 57 Ind. App. 632, 105 N. E. 124; *Wheeler* v. *Loesch* (1912) 51 Ind. App. 262, 99 N. E. 502; *Thompson* v. *Turner* (1909) 173 Ind. 593, 89 N. E. 314; *Rowley* v. *Sanns* (1881) 141 Ind. 179, 40 N. E. 674; *Stilwell* v. *Knapper* (1880) 69 Ind. 558, 35 Am. Rep. 240. See also *Denny* v. *Denny* (1890) 123 Ind. 240, 23 N. E. 519.

70. Re *Davis Estate* (Iowa 1927) 213 N. W. 395; In re *Schultz's*

setts,[73] Mississippi,[74] North Carolina,[75] New Hampshire,[76] New York,[77] Ohio,[78] Pennsylvania,[79] South Carolina,[80] and Tennessee.[81]

Sometimes there is uncertainty in the application of the doctrine when the will involves a limitation over after a life estate has been carved out. Where the limitation over is simply to testator's "heirs," it is usually held that he intended to mean his heirs at the time of his death, rather than his heirs at the time of the termination of the present estate,[82] although if, on a consideration of the whole will, a contrary intent is clearly manifest, it will be given effect.[83]

The simplest situation, where property is devised to one for life, remainder to the testator's heirs or children, has usually been determined without difficulty.[84] Similarly, where the "rest and residue" of an estate is devised to children or heirs or "relatives," after the payment of debts[85] or after a lesser immediate estate,[86]

Estate (1921) 192 Iowa 436, 185 N. W. 24; Re *Will of Watenpaugh* (1922) 192 Iowa 1178, 186 N. W. 198; *Herring* v. *Herring* (1919) 187 Iowa 593, 174 N. W. 364; *Tennant* v. *Smith* (1915) 173 Iowa 264, 155 N. W. 267; *Rice* v. *Burkhart* (1906) 130 Iowa 520, 107 N. W. 308; *First Nat. Bank* v. *Willie* (1901) 115 Iowa 77, 87 N. W. 734.

71. *McIlwaine* v. *Robson* (1914) 161 Ky. 616, 171 S. W. 413; *Taylor* v. *Fidelity & Columbia Trust Co.* (1914) 158 Ky. 280, 164 S. W. 939.

72. *Donnelly* v. *Turner* (1883) 60 Md. 81; *Gilpin* v. *Hollinsworth* (1852) 3 Md. 190; *Medley* v. *Williams* (1835) 7 G. & J. (Md.) 61.

73. *Thompson* v. *Thornton* (1908) 197 Mass. 273, 83 N. E. 880; *Sedgwick* v. *Minot* (1863) 6 Allen (Mass.) 171; *Ellis* v. *Page* (1851) 61 Mass. 161; *Whitney* v. *Whitney* (1817) 14 Mass. 88.

74. *McDaniel* v. *Allen* (1887) 64 Miss. 417, 1 So. 356.

75. *M'Kay* v. *Hendon* (1819) 7 N. C. 209; *University* v. *Holstead* (1816) 4 N. C. 289; *Campbell* v. *Herron* (1801) 1 N. C. 468.

76. *M'Afee* v. *Gilmore* (1828) 4 N. H. 391.

77. *Williams* v. *Conrad* (1859) 30 Barb. (N. Y.) 524; *Buckley* v. *Buckley* (1850) 11 Barb. (N. Y.) 43.

78. *Huber* v. *Carew* (1904) 26 Ohio C. C. 389; *Chambers* v. *Forsythe* (1885) 1 Ohio C. C. 282.

79. *Donohue* v. *McNichol* (1869) 61 Pa. 73. See also Re *Hough's Estate* (1879) 13 Phil. 279.

80. *Executors of Searbrook* v. *Searbrook* (1841) 1 McMullan's Eq. (S. C.) 201.

81. *Hoover's Lessee* v. *Gregory* (1837) 18 Tenn. 444.

82. See *Donohue* v. *McNichol* (1869) 61 Pa. 73; *Kellett* v. *Shepard* (1891) 139 Ill. 433, 28 N. E. 751. See also *Jarman* on "Wills" (5th Am. ed.) 670 ff.

83. In *Sears* v. *Russell* (1857) 74 Mass. 86 a similar limitation was held to refer to the heirs at law of the testator at the time of the happening of the contingency, and was therefore void for remoteness. There were other considerations in the will to show the testator's intent. See ibid., pp. 94-95.

84. See e. g., *Williams* v. *Conrad* (1859) 30 Barb. (N. Y.) 524.

85. *Hoover's Lessee* v. *Gregory* (1837) 18 Tenn. 444. If the devise over be a "residue," it amounts to the grant of a reversion and consequently the applicability of the worthier title doctrine is clear. "The gift of a 'residue' implies that the former gift is completed." See *Gray* "Rule against Perpetuities" 93 and cases cited. Cf. *Chitty's* note, *Blackstone* 242;

the heirs take by descent rather than by purchase, and this is true even though the future estate smacks of an executory devise.[87] The ancient test was accurately applied in *Medly* v. *Williams,* the court observing:

"M. J. Williams had therefore the same estate precisely, and to be held, and enjoyed in the same manner, as if those previous devises and bequests, having been made, the will of her father had been silent as to the land devised by the residuary clause. In other words as if he had died intestate as to this land. It is a case then in which the same quantity and quality of estate is devised as the devisee would have acquired by descent, and in such a case, it is a clear rule of the common law that the title shall vest by the worthier title—by descent and not by purchase."[88]

So also, the doctrine has been logically applied where by the law of the state, distinctions exist between joint tenancy, coparcenary, and tenancy in common and the heir would hold under one tenure by the law and under a different one under the will. Thus in Maryland where an estate was devised to several children "in equal shares and portions" to take "share and share alike," the worthier title doctrine did not apply because, under the will, the devisees took as tenants in common.[89] As heirs at law they would have taken as coparceners.[90] The court expressly repudiated Chancellor Kent's opinion[91] that in this country because of the abandonment of primogeniture there were no distinctions between coparcenary estates and estates in common.[92] Presumably where

"So where one devises to another for life, remainder to his heir in fee, the heir shall take the reversion by descent."

86. *Buckley* v. *Buckley* (1850) 11 Barb. (N. Y.) 43; *Thompson* v. *Thornton* (1908) 197 Mass. 273, 83 N. E. 880; *Medley* v. *Williams.* (1835) 7 G. & J. (Md.) 61; *Taylor* v. *Fidelity & Columbia Trust Co.* (1914) 158 Ky. 280. 164 S. W. 939.

87. *Searbrook* v. *Searbrook* (1841) 1 McMullans Eq. (S. C.) 201.

88. (1835) 7 G. & J. (Md.) 61, 70. Cf. *Whitney* v. *Whitney* (1817) 14 Mass. 88, 90: "Or if, after several mesne estates, he should limit the ultimate remainder to his own right heirs, the remainder would be void, and the reversion would descend as if no limitation ever had been made. For whether they should take a remainder or reversion, they would have an absolute fee, after the termination of the mesne estates; and the title by descent is, in estimation of law, the worthier title."

Cf. also *Stilwell* v. *Knapper* (1880) 69 Ind. 558, 565, 35 Am. Rep. 240: "If the will had stopped after having devised the property to Mary Steely 'to be hers during her natural life or widowhood'; and had not disposed of the remainder at all, the children of the testator would have inherited the reversion equally; and this is what the will attempts to devise to them."

89. *Gilpin* v. *Holinsworth* (1852) 3 Md. 190; see also *Donnelly* v. *Turner* (1883) 60 Md. 81.

90. *Hoffar* v. *Dement* (1847) 5 Gill (Md.) 132.

91. 4 *Kent* "Commentaries" 367.

92. 3 Md. 195.

such distinctions are not observed by the property law of the state, the worthier title theory would work a different result in such a situation.

In North Carolina, a devise which gave lands to three daughters as joint tenants, was good since they would have taken under the law as coparceners.[93] But where it was thought that the devise gave an estate to devisees as tenants in common, the same court held the devise void and the heirs in by descent.[94]

It is also clear from some of the better considered cases that where the immediate devisee has predeceased the testator, and the property is to go, by the devise, to devisee's heirs who happen to be at the same time the heirs of the testator, the doctrine will operate and the heirs take by descent from the remote, rather than the immediate ancestor.[95] In this and several other types of case, the American courts have followed the well beaten path of the common law and have gotten into little difficulty,[96] some opinions indicating a thorough understanding of the whole doctrine.[97] In other instances as we shall see, radical and violent twistings have taken place with rather far reaching results.

Some Local Variations

The Mississippi court got into trouble with the simple situation of a devise of lands to a wife for life and at her death to the heirs of the testator's body.[98] Here, the result should be obvious. At the death of the widow, the heirs are in by descent, and not by purchase under the will. Still, the court thought the heirs took under the will. "As heir at law," it was said "he (one of the devisees) would have taken an undivided interest with the widow of the testator and the other heirs at law (Code 1880, No. 1271) and this would have given him an estate in possession, to be

93. *Campbell* v. *Herron* (1801) 1 N. C. 468. Cf. also *M'Afee* v. *Gilmore* (1828) 4 N. H. 391.

94. *University* v. *Holstead* (1816) 4 N. C. 289.

95. *Whitney* v. *Whitney* (1817) 14 Mass. 88; *Sedgwick* v. *Minot* (1863) 6 Allen (Mass.) 171. In the latter case, there was a devise to trustees to pay the income to daughters of the testator for life, and at their death, in fee to their appointees, or, in case of no appointment to their heirs at law. It appeared that the children of one of the daughters were heirs at law of their grandmother, and as such would have been entitled to the same share of the estate, as they now will receive under the will. It was held that they took by descent from the remote ancestor.

96. *McIlwaine* v. *Robson* (1914) 161 Ky. 616, 171 S. W. 413; *Davidson* v. *Koehler* (1881) 76 Ind. 398; *Wheeler* v. *Loesch* (1912) 51 Ind. App. 262, 99 N. E. 502, correct result.

97. See e. g., *Ellis* v. *Page* (1851) 61 Mass. 161.

98. *McDaniel* v. *Allen* (1887) 64 Miss. 417, 1 So. 356.

presently enjoyed. By the will, the widow was given an estate for life in the whole land, instead of a portion in fee, and a remainder in the whole was limited to the heirs at law. The estate, therefore, given by the will, is different both in character and in the subject-matter than would have been passed by descent, and in such cases the heir at law takes under the will, not by descent."[99]

The error here is apparent. The court applied the wrong test. Since the devisee would have got something different under the law, had there been no will at all, the worthier title doctrine did not apply. But this is patently fallacious. The test should have been whether the devisee would have taken the same quality estate had there been no particular devise to him, all other portions of the will remaining as they stand. Under this test, the result, of course, is clear. The estates are the same (barring distinctions between coparcenary and tenancy in common) and the devise is void.

In re *Schultz's Estate*[100] would be ground for wonder were it not for the hopeless situation which the other Iowa cases divulge in that state. Here a testator gave his children his real estate, share and share alike, subject to the payment of his debts. He gave his wife eight thousand dollars insurance. Without explanation the court ruled that the children took under the will and not by descent, although Iowa purports to apply the doctrine of the worthier title. The case is intelligible, although the reasoning is not, when we examine an earlier case, *First National Bank* v. *Willie*.[101] Here it was said that the "defendant in this case does not acquire under the will the same share which he would have had by descent, but a greater share, by reason of the fact that by the will the estate is given to three of testator's children excluding entirely the issue of a fourth child."[102]

The fallacy here, is in part the same one observed above in the Mississippi case. The court compares what the devisee gets under the will with what he would have taken had there been no will at all. In addition, the court is bothered by the quantity in the sense of amount or value of the respective shares which the devisee takes by will and by law. This has been the stumbling block in many cases where it should not properly be a consideration.

In *Landic* v. *Sims*,[103] it was decided that although the heir took the same estate either under the will or the law, the fact that

99. 1 So. 357.
100. (1921) 192 Iowa 436, 185 N. W. 24.
101. (1901) 115 Iowa 77, 87 N. W. 734.
102. 87 N. W. 735.
103. (1893) 1 App. D. C. 507.

under the will she took a contingent remainder or executory devise, while under the law a vested remainder or reversion, was sufficient to break the descent. Land was given to a wife for life and at her death, to be sold and divided equally among three children—if one only survives, she to take the fee. One daughter survived, and she took, it was said, by the devise. A conditional limitation was sufficient to break the descent. "Now, a contingent remainder or an executory devise is not the equivalent of a vested right either in quantity or quality; nor is a vested remainder in a larger or smaller share of the property than would have come by descent the equivalent of a reversion; nor is descent through intermediate persons the equivalent of descent from a more remote ancestor."[104] Arguing in this vein, the opinion continues:

"If we eliminate from the will the clause under which she is supposed to have taken the estate as devisee, she would have taken the reversion of the estate upon the death of her brothers, one-third by inheritance from her father, and two-thirds by inheritance from her brothers. Assuredly, while the property happens to be the same that descended in the first instance from the father to the three children, Elizabeth Landic never could have taken more than one-third of the estate by descent from her father and a reversion or vested remainder in one-third is not the legal equivalent in any respect of a contingent remainder or executory devise of the whole, which is what she had under the will."[105]

But since the daughter has actually survived the other children, the condition precedent to the vesting of her estate has already occurred and she will get the same quality estate under either the will or the law.[106] The case does not take account of the later

104. Ibid. 513.

105. Ibid. 514.

106. The court states in part: "Now, a contingent remainder or an executory devise is not the equivalent of a vested right either in quantity or quality." We may well quarrel with the above statement when applied to the facts in this case. Since the life tenant had a free hold estate, we have here an attempt to give to each of the heirs at law, a contingent remainder in an undivided one-third of the estate. Pending the vesting of such contingent remainder, the reversion in fee was not in abeyance, but in the heirs at law. See *Tiffany* "Real Property" sec. 141, note 51, and *Gray* "Rule against Perpetuities' sec. 11, note 1. Either from the standpoint of quality or quantity, it is hard to see where a contingent remainder in an undivided one-third of the estate with a reversionary fee of like quantity in the same person differs from the reversionary fee of the same amount that would be acquired by descent. Had the estate devised to each of the heirs been a vested instead of a contingent remainder, there is no question but what such devise would be void as it would be an attempt to give the heir at law exactly what he would take by descent. "The heir or heirs have, as the representatives of the ancestor, an estate in reversion, and they cannot, by his will, be given the same estate by way of remainder." See *Tiffany* "Real Property" sec. 130, note 10. The reversion in fee arising on the crea-

development of the worthier title doctrine whereby conditions were regarded as no different from charges upon the estate, neither being sufficient to break the descent. The result in *Landic* v. *Simms* is, therefore erroneous, as measured by the true doctrine which the court purported to follow.

It was said in *Biedler* v. *Biedler*[107] that the rule of the worthier title did not apply except where the devisee is sole heir to the land devised.[108] This was, most surely, the usual situation which raised the question at the early law. Under the rule of primogeniture, this exact case was presented. The question of quantity, in the sense of amount or value could not here be raised. If the particular devise were eliminated, the other devises being good, it is clear that the sole heir would take the exact amount of property that he could take under the will. This situation is easy, and the simple dogma was developed that "a devise to the heir is void."

But where the devisee was not sole heir, as in some of the later cases and in many of the American cases, the question of quantity offers a serious obstacle. Apparently, whereas the early English courts used "quantity and quality" as a descriptive phrase, indicating the kind and nature of the estates, the American courts have employed "quantity" not only to indicate the quantum or extent of the estate, but the actual amount or share involved. Thus, the proportion which the devisee takes under the will must be identical with the proportion under the law.

Often, "quantity" is used ambiguously, now meaning quantum, now meaning proportional share. Thus, in Illinois, it was said:[109]

"But this rule is not applicable where there is a difference in *kind* or *quality* of the estate or property to be passed under the devise from that which would descend under the statute. Where there is a difference in either the *amount* or *quality* of the interest taken the rule is not applicable."

In Massachusetts the court has indicated how it has misconstrued the term "quantity and quality":

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tion of the contingent remainder owes its origin to a rule of substantive law providing that the seisin cannot be in abeyance. If the contingency happens, where the devise is to a party other than an heir, we have such contingent remainder vesting and the reversionary fee in the heir ceases to exist. Where, as in this case, the attempt is to create a contingent remainder in the heir at law, when the contingency happens, the devisee would have the same estate that he would have taken by descent. Since the exact question only arises in connection with the claim of a devisee who has satisfied the contingency, such claimant has at all times had precisely the same estate that he would have acquired by descent.

107. (1891) 87 Va. 300, 12 S. E. 753.

108. The court cited 2 *Minor* "Institutes" 1054.

109. *Darst* v. *Swearingen* (1906) 224 Ill. 229, 79 N. E. 635, 636.

"If the nature or quality of the estate is changed when it comes to the heirs, or if they take it in different shares or proportions, the descent will be broken, and they must come in as purchasers under the will."[110]

So, it seems that whereas originally "quantity and quality" meant the quantum and tenure of the estate, it has now come to mean the kind, tenure, and amount in the sense of proportional share of the whole.

THE IOWA ADAPTATION

Should the doctrine of worthier title be applied to a situation where the devisee was a forced heir or one who, under the law, could not be cut off from a share in the property of the testator, it at once appears that the new significance of quantity becomes the paramount question. No case can be found where this was done, in English law. Obviously the entire doctrine grew out of a situation and was applied to circumstances where the heir could be disinherited. It was a question of the legal preference of the devolution of property by descent rather than by purchase, and arose out of practical considerations of policy already noted.

In Iowa, it is thoroughly established that the doctrine is applicable where the devisee is a spouse entitled to a distributive share under the statute.[111] Quantity is the big question in these cases. Thus, a few dollars difference in value, between the two estates, breaks the descent.[112] If the devise gives more than the distributive share, it is good;[113] if slightly less, it is good,[114] but if exactly and precisely the same in value, the devise is void.[115]

It seems that this novel application, most unlike that doctrine by the same name in the English law, came from Indiana. It was

110. *Sears* v. *Russell* (1857) 74 Mass. 86, 93-94. But cf. Bigelow, J., in *Ellis* v. *Page* (1851) 61 Mass. 161, 164: "In considering this question, it is to be remembered that one of the great tests by which to try the application of the rule, is to ascertain whether the *tenure* or *quality* of the estate which the heirs take is changed by the devise, i. e., whether they take an estate different in *quantity* or *quality* from that which they would have taken if the estate had not been devised, but had been left to descend to them." (Italics ours.) Here "quantity" is accurately employed in is technical sense to refer to the quantum of the estate.

111. Re *Davis Estate* (Iowa 1927) 213 N. W. 395; Re *Will of Watenpaugh* (1922) 192 Iowa 1178, 186 N. W. 198; *Herring* v. *Herring* (1919) 187 Iowa 593, 174 N. W. 364; *Tennant* v. *Smith* (1915) 173 Iowa 264, 155 N. W. 267.

112. Re *Davis Estate* supra.

113. Re *Watenpaugh's Will* supra.

114. Re *Davis Estate* supra.

115. *Herring* v. *Herring* supra.

first suggested, by way of dictum, in 1890.[116] In 1895, in *Rawly* v. *Sams,*[117] it was assumed that the doctrine was applicable to a surviving spouse. In *Thompson* v. *Turner,*[118] in 1909, it was actually so applied. The court here said, after discussing the position of a devisee who is also heir: "It seems to us the widow plaintiff occupies this situation. While it may be she does not technically take as heir to her husband, there is no such distinction between the manner of her taking and that of the heir as to affect the reason of the rule."[119]

But the court overlooks the *necessity* of the wife taking, as against the heir. The heir can be disinherited whereas the wife cannot. The result is to lend all the emphasis to the amount of the proportional shares devised and set aside by law, which, in substance, establishes a rule which has little if any connection with the original doctrine of worthier title. Obviously, the theory should never have been applied to a forced heir or one who is insured against being cut off by will.

The greatest difficulties that have been involved in the implications of this fictitious application of an out-of-date dogma have arisen in a group of recent Iowa cases. Re *Davis Estate*[120] is typical. It must be remembered that the general rule at the common law is that all devises are deemed to have lapsed if the devisee dies within the lifetime of the testator.[121] In many states, of which Iowa is one,[122] survival statutes substitute the heirs or issue of the devisee for the deceased devisee, so that the devise does not lapse, unless it is the expressed intention of the testator that it should lapse. The statute was enacted, as said by the Iowa court, "to obviate that result, (lapsing) and to substitute in place of the devisee those persons 'who would presumably have enjoyed the benefits of such devise had the devisee survived the death of the testator and died immediately afterwards.' "[123]

The facts in the *Davis* case were these: A testator directed first that all his property, both real and personal, be converted into money. He thereafter directed his executors to pay his debts, and then to pay to his wife one-third of all money remaining in his

116. See *Denny* v. *Denny* (1890) 123 Ind. 240, 23 N. E. 519, 521.
117. (1890) 141 Ind. 179, 40 N. E. 674.
118. (1909) 173 Ind. 593, 89 N. E. 314.
119. This application of the doctrine to a spouse was expressly reaffirmed in *Dillman* v. *Fulwider* (1914) 57 Ind. App. 632, 105 N. E. 124, citing *Thompson* v. *Turner* supra, and *Denny* v. *Denny* supra.
120. See supra, note 111.
121. See *Ballard* v. *Ballard* (1836) 18 Pick. (Mass.) 41, 43.
122. Iowa Code 1924, 11861.
123. *McAllister* v. *McAllister* (1918) 183 Iowa 245, 167 N. W. 78, 79.

hands. The remaining two-thirds of his property was distributed equally among his nine children including the representatives of one deceased. The wife predeceased her husband, leaving one child by a former marriage who claimed his mother's devise under the survival statute. The other devisees resisted on the ground that the devise, being the same in "quantity and quality" as the wife's distributive share, was void. The court held otherwise, since by law the wife would have been entitled to one-third of the realty, irrespective of the testator's debts. Had the estate consisted wholly of personalty, the devise and the distributive share would have been identical. Thus a stranger to the testator's blood took one-third of his net estate, while his nine children divided the other two-thirds. A monstrous situation, indeed, and yet the court was so much a victim of its own peculiar version of the worthier title doctrine, that it saw no escape.

The case was argued ingeniously upon the theory of equitable conversion. All testator's property was to be regarded as personalty, as of the time of his death,[124] which thus made the wife's distributive share identical in "quantity" with the devise. But the court overruled this contention, rightly enough. The testator could "convert" his property into personalty but not to deprive his spouse of her distributive share had she survived him. "He had no power to work such equitable conversion as against his surviving wife."[125]

The dissenting opinion, though vague, indicates the real trouble. It asserted that the so-called "worthier title" doctrine did not apply, though the reasons were not set forth. The reason is clear. *The doctrine never should have been applied to a spouse entitled, by law, to dower rights or to distributive share.*

The correct result in the *Davis* case is obtainable by the simple application of well defined principles of law with no resort whatever to dubious and fictitious theories which have long since outgrown their usefulness. It is a clear case calling for the application of the theory of election.

The court has repeatedly committed itself to the position of construing a will in such a situation as if the wife had survived the testator. The problem is to determine what her rights would be in such a case.[126]

124. The following Iowa cases may be cited: *Dever* v. *Turner* (1925) 200 Iowa 926, 205 N. W. 755; *Ingram* v. *Chandler* (1917) 179 Iowa 304, 161 N. W. 434; In re *Estate of Sanford* (1919) 188 Iowa 833, 175 N. W. 506.

125. See 213 N. W. 396.

126. Re *Hulett's Estate* (1903) 121 Iowa 423, 96 N. W. 952; Re *Davis Estate* supra, note 111.

In such a situation the wife would be confronted with a will devising to her an estate less in value and different in quality from her distributive share under the law. Under these circumstances she is privileged by law to elect but the will cannot affect her distributive share unless she consents to the same. The statute so provides in terms.[127]

However, if she refuses or fails to make the election which the statute provides as her necessary consent, she will be conclusively presumed to take under the terms of the will *provided only that necessary steps are taken to compel her to elect.*[128]

Before this statute was enacted the wife was presumed to take under the law rather than under the will, because she had failed to give the consent required by the statute. And this was true even though the devise was greater than the statutory share. A fortiori would this be true where the devise is less than the statutory share, because the interference with her distributive share is the more real and obvious.[129]

In the absence then of such a statute, this devise must fail and devisee's son can take nothing, because there has been no consent expressly required by statute to the interference with the wife's distributive share. This is further supported by the logic of the situation which would presumably compel the wife, had she survived, to elect to take under the law in this case because such rights were substantially greater than those under the will. The law does not assume that she would do anything other than elect to enforce her greater rights allowed by law.

The statute creating the presumption of consent was by its terms framed by the legislature with but one situation in view, namely, where the wife *actually* survives the husband. This is clear from its language—

"in case such *surviving spouse* does not make such election within six months . . . or if such *surviving spouse shall be the executor of the will,* and fails . . . to refuse to take under the provisions of the will of the deceased it shall be conclusively presumed that such survivor consents to the provisions of the will and elects to take thereunder."[130]

Obviously, this statute could never have been intended to control a situation like the present one, where the wife actually pre-

127. Iowa Code 1924, 12006. See In re *Steven's Estate* (1913) 163 Iowa 364, 144 N. W. 644.

128. See Iowa Code 1924, 12010.

129. *Everett* v. *Croskrey* (1894) 92 Iowa 333, 60 N. W. 732. See also *Page* on "Wills" (2nd ed.) sec. 1212.

130. Italics ours.

deceased the testator, inasmuch as it is based on the theory of consent, and here the wife by her predecease never had an opportunity to consent. The term "surviving spouse" and the provision that if the surviving spouse is "the executor of the will," plainly indicate that the legislature in no way contemplated the application of this statute to a case where there was, because of a predecease, no actual surviving spouse.

The right to elect is a personal right and cannot pass to the heirs or personal representatives after the death of the one entitled to elect.[131] A failure to renounce the will in some states is regarded by statute as equivalent to an assent to the disposition of the property as fixed by the will.[132] This is not true in Iowa, however, for the statute expressly provides for the service of process upon the surviving spouse before he or she can be put to an election.[133] The statute is regarded as being exclusively for the benefit of such other parties as may be interested in the property devised, and to avail themselves of its provisions they must comply with such requirements, and the fact that such requirements are impossible in this case, because of the wife's predecease, would plausibly indicate the inapplicability of the statute creating the presumption of assent to the will. In the absence of such service upon the widow the devise is of no effect whatever, and must be regarded as absolutely null and void. It requires the widow's assent to make it valid.[134]

Since such service compelling the widow to elect has not, and could not be made, no act short of a voluntary election can be sufficient to make the devise good. It interferes with her distributive share without her consent contrary to the statute. It is consequently nugatory.[135]

That this result is inevitable is clearly deduced from the language used in *Arnold* v. *Livingston* supra. The court declared that a devise to a widow is in the nature of an offer or tender to her of the thing devised in lieu of her statutory rights. Being only an offer or tender made to her by her husband in his will it cannot become effectual as to her until accepted by her, that is, until she

131. *Fergus* v. *Schiable* (1912) 91 Neb. 80, 135 N. W. 448; *Nordquist's Estate* v. *Sahlbom* (1911) 114 Minn. 329, 131 N. W. 323.

132. Re *Arnold's Estate* (1915) 249 Pa. 348, 94 Atl. 1076.

133. *Newberry* v. *Newberry* (1901) 114 Iowa 704, 87 N. W. 658; *Albright* v. *Albright* (1911) 53 Iowa 397, 133 N. W. 737; *Arnold* v. *Livingston* (1913) 157 Iowa 677, 139 N. W. 927.

134. *Arnold* v. *Livingston* supra.

135. *Thorpe* v. *Lyones* (1913) 160 Iowa 415, 142 N. W. 82; Re *Stevens' Estate* supra, note 127.

elects to take the devise instead of her other primary rights allowed by law.

The court here demonstrates how impossible it would be to apply the statute creating the presumption to take under the will to such a case as this one. It said: "The right is given them (the other parties interested in the estate) at any time to force the widow to an election, and to require her to make her election of record, and it is only after this notice has been served upon her that the conclusive presumption arises against her." It is thus arguable that a conclusive presumption has never arisen against the deceased spouse and that consequently this devise by which her child and heir claims, has never been, and, now, can never be of any effect and validity whatsoever.

It is absurd to impute consent to a spouse who never had an opportunity to give or withhold such consent. By former decisions of the Iowa court such consent is not presumed by law even though it would be advantageous to those concerned. The statute presuming consent to the will by its terms contemplates an actual refusal by the surviving spouse to elect and hence is inapplicable in the instant case. But since no devise to a spouse can in any way affect her distributive share without such consent, it follows irresistibly that the devise here fails, and consequently her heir takes nothing under the statute substituting the heir for the ancestor devisee.

An analogous situation, with a result which supports the above solution, has recently arisen under an Illinois statute providing that where an intestate dies leaving a widow or surviving husband and a child or children, the surviving spouse shall be entitled to receive one-third of all real estate of which the intestate died seized in which such surviving spouse shall waive his right of dower.[136] Such waiver may be effected either by recording an instrument within one year, expressing such an intention or by failing to record, within the year, an election to take dower.

Under this statute it was held that a spouse who survived an intestate for eight days without having filed the waiver of dower, took a dower estate and his heirs could therefore take no interest under him in his wife's land.[137] The court argued as follows:

"The waiver of the right of dower is a condition precedent to the right of the widow or surviving husband to claim one-third of the real

136. Illinois Descent Act, ch. 39, sec. 1, as amended 1923.

137. *Braidwood* v. *Charles* (1927) 327 Ill. 500, 159 N. E. 39, concerning which see (1927) 23 ILLINOIS LAW REVIEW 169.

estate in fee, and in order to establish her or his right to the interest in a fee a waiver of dower in a manner provided by the statute must be alleged and proved . . . The statute gave him the right to renounce his dower for an ampler estate, but until he exercised that right by either or both of the methods prescribed he merely retained his dower and did not acquire an interest in fee simple."[138]

So, in the *Davis* case supra. The statute gives the surviving spouse only the right to consent to an interference with her statutory share, such consent being a condition precedent to the vesting of any interest under the will. Technically, it was a *power,* which, not having been *exercised,* could not support the claim of one obliged to claim through such power. Had she actually survived her husband for eight days, such consent could not be presumed, with nothing more.[139] A fortiori it cannot be presumed where she actually predeceases him.

The fate of the worthier title at the hands of the Iowa courts probably represents the most violence which that hoary dogma has sustained. And yet, it must be clear that it holds many more potentialities of danger when injudiciously and illogically applied. Obviously the real pragmatic considerations which occasioned its development have long since ceased to exist. But a vestige, a survival of ancient legal theory, it serves no genuine social purpose, if accurately applied. So long as courts continue to pay it lip service, in blind and complacent adulation, we may expect many such incongruous and unsatisfactory situations of which the ones observed are but illustrative.

138. 159 N. E. 39, 41.

139. In re *Hoye's Estate* (1924) 158 Minn. 402, 197 N. W. 852.