

The Doctrine of Worthier Title as Applied in Maryland (Herein of the Revocability of Certain Trusts)

Russell R. Reno

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Estates and Trusts Commons](#)

Recommended Citation

Russell R. Reno, *The Doctrine of Worthier Title as Applied in Maryland (Herein of the Revocability of Certain Trusts)*, 4 Md. L. Rev. 50 (1939)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol4/iss1/3>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

THE DOCTRINE OF WORTHIER TITLE AS APPLIED IN MARYLAND

(Herein of the Revocability of Certain Trusts)

By RUSSELL R. RENO*

THE DOCTRINE

Early in the history of the common law there developed a doctrine that "a man cannot raise a fee simple to his own right heirs by the name of heirs as a purchase neither by conveyance of land, nor by use, nor by devise".¹ This meant that by neither a deed nor a will could a grantor or testator create in his own heirs the same estate in quality and quantity that such heirs would inherit by descent. In other words a title acquired by descent was considered superior to or more worthy than a title acquired by purchase.² Therefore, if a deed or will purported to create in an heir the same estate in quality and quantity that such heir would inherit by descent if the limitation were declared void, the heir was considered to have taken by descent and not by purchase. Today we speak of this doctrine as the doctrine of "worthier title". As applied to wills the doctrine is often stated as follows: "Whenever a devise gives to the heir the same estate in quality as he would have by descent, he shall take by the latter . . ."³

The historical reasons for the development of this doctrine are obscure, but probably it developed for the protection of the rights of third persons in two situations where such protection did not exist if the heir took by purchase. There were certain valuable feudal obligations such as

* A. B., 1931, LL.B., 1927, University of Illinois; Assistant Professor of Law, University of Maryland School of Law.

¹ *Counden v. Clerke*, Hob. 30, 80 Eng. Repr. 180.

² By "purchase" is meant by deed or will. It has no reference to whether a valuable consideration was paid. The term "purchase" is here used in contradistinction to "descent". See Bouvier's Law Dictionary defining "purchase" as: "A term including every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law."

³ 1 Co. Litt. (1st Amer. Ed. from 19th Eng. Ed. 1853, by Hargrave & Butler) 12 b, n. (2).

wardship and marriage which existed in the overlord when the heir took by descent, but which did not exist if he took by purchase. It was probably for the protection of the overlord's feudal rights that the doctrine was first developed in England. In addition, prior to the enactment of the Statute of Fraudulent Devises,⁴ land which passed by devise was not subject to the payment of the ancestor's debts, while land which passed by descent was subject to such debts. The doctrine therefore operated to prevent a testator from defrauding his creditors by conveying the same estate to his heirs that they would have inherited by descent.

After the abolishment of the principal feudal obligations in 1660⁵ and the enactment of the Statute of Fraudulent Devises (making land which passes by devise subject to the debts of the testator) the reasons for the development of the doctrine ceased to exist. The doctrine was so deeply rooted in the common law, however, that it has survived in most jurisdictions to the present time. To what extent it presents a hazard to the modern draftsman will be the scope of inquiry of this article.

AS APPLIED TO WILLS

This doctrine has received its greatest application in the will cases, because of the common desire of a testator to leave some, if not all, of his property to those persons who are his right heirs. It was first pronounced by our Court of Appeals in *Medley v. Williams*⁶ as follows:

"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 devise".

⁴ 3 & 4 Will. & M., Ch. 14 (1691).

⁵ 12 Car. II, Ch. 24 (1660).

⁶ 7 G. & J. 61 (Md. 1835).

Same Quantity and Quality

In determining whether the "same quantity and quality of estate" is devised as the devisee would have acquired by descent, the limitation to the heir must be disregarded as if it had never been written. If under these circumstances the devisee would have inherited by descent an estate of the same quantity and quality, then the doctrine is applied and the heir takes by descent and not by purchase.⁷ In applying this formula care must be taken to disregard only the limitation to the heir himself, and not to disregard limitations to third persons, even though such limitations are coupled with the devise to the heir. The doctrine does not in any way affect the validity of any limitations to third persons. In applying the formula one must not fall into the error of determining what estate the heir would have inherited if the testator had died intestate.⁸

Under this formula for applying the doctrine it can readily be seen that the existence of a divesting limitation in the form of an executory interest over to a third person, imposed on a devise to an heir, will not prevent the application of the doctrine.⁹ Since the executory interest is valid irrespective of whether the heir takes by descent or by purchase, he will take the same estate by descent that he would by purchase, i. e., a fee simple subject to an executory interest. If he takes by descent the executory interest operates as a springing fee, while if he takes by purchase it operates as a shifting fee, but in either case the heir's estate is subject to a valid executory interest. The same result is reached if a charge is imposed upon a devise to an heir.¹⁰ The charge will be enforced against the land whether the heir takes by descent or by purchase, so his estate will be of the "same quantity and quality".

⁷ Kent, Commentaries, Part VI, 506.

⁸ This was the error of the court in *McDaniel v. Allen*, 64 Miss. 417, 1 So. 356 (1887) where the court in determining whether the heir would have inherited the "same quantity and quality of estate" proceeded to disregard all limitations to third persons and assume that the testator had died intestate.

⁹ *Manbridge v. Plummer*, 2 My. & K. 92, 39 Eng. Repr. 879 (1833).

¹⁰ *Clarke v. Smith*, 1 Comyns 73, 92 Eng. Repr. 965 (1698).

This manner of applying the doctrine was followed in *Mitchell v. Mitchell*,¹¹ where the devise was made subject to a charge of an annuity. The presence of this charge upon the devise did not prevent the Court applying the rule of worthier title, so that the devisee took by descent and not by purchase.

In applying this formula where the devise to the heir is preceded by an estate in a third person, a distinction must be drawn between the cases where the limitation to the heir operates as a remainder and those where it operates as an executory interest. Where the limitation to the heir operates as a remainder, the striking out of the limitation to the heir does not enlarge the preceding particular estate, and therefore the heir will take a reversion by descent of "the same quantity and quality" as the remainder devised in the will. In both *Philips v. Dashiell*¹² and *Mitchell v. Mitchell*¹³ the doctrine of worthier title was applied to a remainder following a life estate. On the other hand, if the devise to the heir operates as an executory interest divesting an estate in fee devised to a third person, the doctrine will not be applicable. In such a case the striking out of the limitation to the heir would operate to enlarge the preceding estate to the third person from fee simple subject to an executory interest into a fee simple absolute.¹⁴ This would leave no estate to pass by descent to the heir, and thus he would not take by descent an estate of "the same quantity or quality" that he would have taken by devise.¹⁵

¹¹ 21 Md. 244 (1864).

¹² 1 H. & J. 478 (Md. 1804).

¹³ *Supra* n. 11.

¹⁴ 2 Restatement, Property (1936) Sec. 229.

¹⁵ If the limitation to the third person can be construed to be a fee simple *with* an executory interest rather than a fee simple *subject* to an executory interest (see Sec. 47 Restatement of Property), then the striking out of the executory interest will not enlarge the preceding estate into a fee simple absolute, but will convert it into a determinable fee simple estate with a possibility of reverter in the testator's heirs by descent; and thus an estate of the "same quantity and quality" as he would have taken under the executory interest by devise. This is the type of estate set out in the example in 1 Simes, *Future Interests* (1936) Sec. 264. However, in *Starr v. Starr M. P. Church*, 112 Md. 171, 76 A. 595 (1910), the existence of a fee simple *with* an executory interest as distinguished from a fee simple *subject* to an executory interest was denied by inference.

Suppose the devise to the heir is part of a limitation to two or more heirs in equal shares, can the rule of worthier title be applied? The answer depends on whether a devise to two or more heirs creates an estate in each of "the same quantity and quality" as they would have inherited by descent. Clearly if the two or more devisees take in severalty, they do not take an estate of "the same quantity and quality" that they would have taken by descent, since in the latter case they would have taken under concurrent ownership and not in severalty. However, if they take in concurrent ownership under the devise, a more difficult problem arises in determining whether the doctrine applies. Certainly if their concurrent ownership is in joint tenancy, the presence of the right of survivorship, which will exist if they take by purchase but will not exist if they take by descent, will operate to make their estates of different quality. But, if they take as tenants in common, there arises the question as to whether tenancy in coparcenary¹⁶ is of "the same quantity and quality" as tenancy in common. This problem could not arise under English common law in respect to male heirs because of the rule of primogeniture, but it did arise in connection with a devise to two or more female heirs, since the rule of primogeniture did not apply to them and they would take as tenants in coparcenary in case of descent. The English cases¹⁷ took the position that the estate of coparcenary was a different estate in quality from tenancy in common, and therefore the doctrine of worthier title could never be applied to a devise to plural heirs. In this country because of the abandonment of primogeniture, the distinctions between tenancy in coparcenary and tenancy in common have tended to disappear, and as a result the majority of the American cases¹⁸ have applied the doctrine to plural heirs as well as to a single heir. However, in *Gilpin v. Hollings-*

¹⁶ Where two or more heirs take by descent they take not as tenants in common at common law but as tenants in coparcenary.

¹⁷ As in *Anonymous*, Cro. Eliz. 431, 78 Eng. Repr. 671 (1505).

¹⁸ *Wheeler v. Loesch*, 51 Ind. App. 262, 99 N. E. 502 (1912); *Moninger & Ringland v. Ramsey*, 48 Iowa 369 (1878).

worth¹⁹ the Court of Appeals refused to apply the doctrine to plural heirs because of the different quality of the estate involved, respectively, in tenancy in coparcenary and tenancy in common. It was conceded that for almost all practical purposes there is no real difference between these estates, yet the Court pointed out that in Maryland "they are different as legal estates, and their qualities and incidents are not the same". This decision was subsequently reaffirmed and followed in *Donnelly v. Turner*.²⁰ As a result of these cases the scope of the application of this doctrine has been greatly narrowed, so that it can only be applied where the ancestor leaves a single heir and not plural heirs.

Suppose in the case of a single heir, the devise is to such heir and a third person in concurrent ownership, will the heir take his undivided interest by descent under the doctrine? Here again, if the devise is in joint tenancy or tenancy by the entireties, the heir can not take by descent an estate of equal quality because the right of survivorship can not exist if his undivided interest is acquired by descent.²¹ If the devise purports to create tenancy in common, it can well be argued that the undivided interest of the heir will pass by descent to him, since his share would be held in tenancy in common whether arising by descent or purchase.²² Probably the correct solution would depend upon whether, by striking out the limitation to the heir, the third person would take the entire fee or an undivided interest only. Certainly if the devise of the entire fee is so worded that the deletion of the limitation to the heir would operate to give the entire estate to the third person, the doctrine has no application since the heir could take no estate by descent; but if the wording is such that the deletion of the limitation to the heir would not enlarge the other's share, then the doctrine should be applied.

¹⁹ 3 Md. 190 (1852).

²⁰ 60 Md. 81 (1883).

²¹ The four unities of time, title, interest, and possession are necessary to have joint tenancy or tenancy by the entireties. Likewise neither estate can be created by operation of law.

²² Mr. Fearne was of the opinion that the doctrine would apply to the heir's undivided interest. Fearne, *Posthumous Works*, 128 *et seq.*

Designation of the Heir

Since the doctrine must be applied on the date of the death of the testator, and since his heirs-at-law are then and there determined, the doctrine is applicable to a devise to an heir by his individual name as well as where the devise is to "heirs" as a class. In *Philips v. Dashiell*,²³ *Medley v. Williams*,²⁴ and *Posey v. Budd*²⁵ the devises were to the heirs under their individual names, yet the Court applied the doctrine of worthier title. The fact that the testator had designated his heir by name so as to indicate an intention that such heir should take by purchase was held to be immaterial, and the doctrine was applied as a rule of law without regard to the intention of the testator.

A question might arise as to whether the application of the Maryland lapse statute²⁶ to a devise to a presumptive heir who had pre-deceased the testator would prevent the doctrine of worthier title from being applied. Since the lapse statute does not pass the devised property to the deceased devisee's heirs by descent but substitutes them in his place as original takers,²⁷ the question of the application of the doctrine of worthier title in such a situation would depend upon whether the deceased devisee's heirs were also the heirs of the testator. If they were not the heirs of the testator then the doctrine has no application, and they take by purchase from the testator as they could not have taken by descent from him. On the other hand, if these heirs of the deceased devisee, who are substituted as original takers in the devise, are also heirs of the testator, then the doctrine should be applied, since if the devise is stricken from the will they would then take by descent.²⁸

Where the devise is to "heirs" as a class without indicating them by name, the doctrine is clearly applicable,

²³ 1 H. & J. 478 (Md. 1804).

²⁴ 7 G. & J. 61 (Md. 1835).

²⁵ 21 Md. 477 (1864).

²⁶ Md. Code (1924) Art 93, Sec. 335.

²⁷ See *Glenn v. Belt*, 7 G. & J. 362 (Md. 1835); and *McLaughlin v. McGee*, 131 Md. 156, 101 A. 682 (1917).

²⁸ *Sedgwick v. Minot*, 88 Mass. 171 (1863).

with the limitation in Maryland that it will not apply if the class shall consist of more than a single heir. In *Mitchell v. Mitchell*²⁹ the doctrine was applied to a devise to the testator's "right heirs" where there existed only a single heir. Likewise the fact that the devise was to a class under the description of testator's "children" or "issue" would not prevent the application of the rule. In *Gilpin v. Hollingsworth*³⁰ the Court assumed that the doctrine would have applied to a devise to "all my children" if the class had contained only a single heir and not plural heirs. However, if the class is to be ascertained at a date subsequent to the death of the testator, then the doctrine can have no application; for at that date the class may contain persons who were not heirs of the testator at his death, or may exclude persons who were heirs of the testator at his death.³¹ If the doctrine is to be applicable, it must be applied at the date that the instrument becomes effective, i. e., the time of testator's death, and not on the basis of subsequent developments.³² At that date the identity of the devisee as an heir must be determined.

Since a surviving spouse has been made a statutory heir, should the doctrine of worthier title be applied to a devise to a surviving spouse? The doctrine originated in connection with the common law heirs, who did not include a surviving spouse. If it is extended to apply to statutory heirs such as a surviving spouse, a difficulty is presented that does not exist in the case of common law heirs. A surviving spouse as a statutory heir is a "forced heir" in that he or she cannot be disinherited by the will. The very fact that such a spouse is given an election to take as a statutory heir or as a devisee or legatee under the will indicates an intention of the legislature not to have such statutory heirs subject to this common law doctrine.³³

²⁹ 21 Md. 244 (1864).

³⁰ 3 Md. 190 (1852).

³¹ *Sears v. Russell*, 74 Mass. 86 (1857).

³² *Landic v. Simms*, 1 App. D. C. 507 (1893).

³³ See Harper and Heckel, *The Doctrine of Worthier Title* (1930) 24 Ill. L. Rev. 627, for an excellent argument against the extension of the doctrine to "forced heirs".

Fortunately Maryland has never extended the doctrine to include such "forced heirs".³⁴

Effect Upon the Heir

Although the common law may have looked upon a title by descent as being more worthy than one by purchase, yet from the viewpoint of the heir a title by purchase may be more beneficial than one by descent. Under our rules for the settling of decedents' estates, land which passes as intestate property must first be used to pay debts before any land specifically devised is so used. Likewise intestate real property can be sold to raise sufficient funds to pay pecuniary legacies, while the same land if specifically devised would not be subject to such a sale. If the doctrine is to be applied as a rule of law where there is a devise to an heir, it logically follows that the land passes as intestate property and is therefore subject to prior use for the payment of debts and also for sale to pay pecuniary legacies. This result was reached in *Mitchell v. Mitchell*³⁵ where an annuity was charged against all of the testator's realty. Since part of the land had been devised to an heir, the Court held that the primary obligation to pay this annuity rested upon this land, which the heir took by descent under the doctrine of worthier title.

"In this case we consider the title of the appellant to 'Myrtle Grove' as simply a title by descent, standing upon the same ground as if it had not been mentioned in the will. And under the established law of this State, it must be held as chargeable with the whole annuity, to the exoneration of 'Hunting Fields', which was specifically devised."

It must be noted that in this case the devise to the heir was not a devise to her by name, but a devise to the testator's "right heirs". In its opinion the Court did not repudiate the English case of *Biederman v. Seymour*,³⁶ but con-

³⁴ Two jurisdictions have extended the doctrine to include "forced heirs". *Thompson v. Turner*, 173 Ind. 593, 89 N. E. 314 (1909); *Herring v. Herring*, 187 Iowa 593, 174 N. W. 364 (1919).

³⁵ 21 Md. 244 (1864).

³⁶ 3 Beavan 368, 49 Eng. Repr. 144 (1841).

tended that the case in question could be distinguished on the fact that the devise did not designate the heir by name but used the class description "right heirs". In the latter case the English court had held that the application of the doctrine of worthier title would not, as between the heir and the other devisees, require that the land devised to the former be applied in payment of debts in priority to land devised to the latter. The intention of a testator, as to the order in which his assets are to be marshalled in the payment of debts, can be followed even though a devisee takes his estate by descent; and the fact that the estate was specifically devised to an heir is proof of the intention of the testator that such land should only be required to bear its pro rata share of the debts along with all other lands specifically devised. The inference that can be drawn from the opinion in the Maryland case is that, if the devise is to the heir by name and not under the class description "heirs", then an intention of the testator to marshal his assets, so that the land devised to the heir will only have to bear its pro rata share of the debts along with other lands specifically devised, can be drawn from the will, even though the doctrine of worthier title is applied to the devise to the heir.

Probably the most frequent and clear results of the doctrine appeared in litigation over the descent of "ancestral estates". Prior to 1916 the Maryland statutes provided a different course of descent for lands acquired by descent than for lands acquired by purchase. Thus in case of intestacy the first question was whether the decedent had acquired his land by descent or by purchase. If he had acquired any land by devise from his own ancestor, the doctrine of worthier title might operate to vest it in him by descent, and thereby change the course of descent of this land at his death. In *Philips v. Dashiell*,³⁷ *Medley v. Williams*,³⁸ and *Posey v. Budd*³⁹ the doctrine was applied to lands held by a decedent so as to change the course of de-

³⁷ 1 H. & J. 478 (Md. 1804).

³⁸ 7 G. & J. 61 (Md. 1835).

³⁹ 21 Md. 477 (1864).

scient from that which would have applied if the decedent had held the lands by purchase.

It has been assumed that the abolishment of "ancestral estates" in the Statute of Descents of 1916⁴⁰ has eliminated the doctrine of worthier title from consideration in determining the course of descent in case of intestacy. This is true in the case of possessory estates. But as was pointed out in a previous article in this REVIEW,⁴¹ the course of descent of future interests in Maryland is still determined by the common law canon that "seisin or purchase shall be the stock of descent". Therefore, if the decedent is the owner of a future interest in land at his death intestate, the course of descent will depend upon whether he acquired such interest by descent or purchase. If he acquired it by descent, he cannot be a stock of descent, and the interest will pass not to his heirs but to the next heir of his ancestor. If he acquired it by purchase, the interest will pass by descent to his own heirs. Thus, as long as the course of descent of future interests in Maryland is determined by the common law, the doctrine of worthier title may still be applied to change the course of descent, where the heir subsequently dies intestate while owning a future interest. To date our Court of Appeals has not been confronted with an application of the doctrine while determining the course of descent of a future interest.

AS APPLIED TO CONVEYANCES INTER VIVOS

In the development of this doctrine in the early common law, its greatest application arose in will cases. However, the rule was stated by all of the early English textwriters as applying equally to conveyances inter vivos.⁴² With the development of the trust device as a means whereby a settlor could create a trust for himself and wife during their several lives, the doctrine became widely accepted and ap-

⁴⁰ Md. Code (1924) Art. 46, Secs. 1-4.

⁴¹ Reno, *Alienability and Transmissibility of Future Interests in Maryland* (1938) 2 Md. L. Rev. 89, 101 *et seq.*

⁴² See the statement of the doctrine by Hargrave in first sentence of this article.

plied in this country to remainders to the settlor's heirs-at-law in conveyances inter vivos.⁴³ The application of this doctrine to such conveyances was first raised in Maryland in *Gordon v. Small*.⁴⁴ In that case the Court recognized its applicability to a remainder to a settlor's heirs-at-law in a conveyance in trust, but held that it was not applicable in that particular case upon other grounds. Subsequently, in *Warner v. Sprigg*⁴⁵ and *Raffel v. Safe Deposit Co.*⁴⁶ the doctrine was applied so as to create a reversion in the settlor. In neither case did the Court expressly recognize the fact that they were dealing with the doctrine of worthier title, but in both cases a remainder to the settlor's heirs-at-law was construed to be a reversion left in the settlor himself.

Same Quantity and Quality

As previously pointed out in the will cases, the requirement that the estate be of the "same quantity and quality" has operated in Maryland to restrict its application to devises to single heirs. This restriction is based upon the recognized distinction between tenancy in common and tenancy in coparcenary. The same argument is equally pertinent in the application of the doctrine to conveyances inter vivos. Under a remainder to the grantor's heirs in a conveyance inter vivos, the heirs, if more than one, would take a remainder by purchase as tenants in common, while if they took a reversion by descent they would take in coparcenary. However, in none of the Maryland cases which discuss the application of the doctrine to a conveyance inter vivos has this limitation been recognized or even discussed.⁴⁷ It is doubtful whether such a limitation on the applicability of the doctrine is feasible, since the doctrine

⁴³ See Simes, *op. cit. supra* n. 15, Sec.146, n. 14, for a list of cases which have applied the doctrine to remainders to the settlor's heirs in conveyances inter vivos. Over two-thirds of these cases have been decided since 1900.

⁴⁴ 53 Md. 550 (1880). The doctrine had been applied by the trial court.

⁴⁵ 62 Md. 14 (1884).

⁴⁶ 100 Md. 141, 59 A. 702 (1905).

⁴⁷ In *Miller v. Fleming*, 7 Mackey 139 (D. C. 1889) this argument was advanced, but the District of Columbia court rejected it and held that the grantor took a reversion under the doctrine.

must be applied at the date of the execution of the conveyance and not at the death of the grantor. At that date it is impossible to know whether there will be a single heir or plural heirs. In the will cases this difficulty does not exist, since the doctrine is applied at the time the will takes effect. At that date the testator is dead and the number of heirs is ascertainable.

Designation of the Heir

In the will cases the doctrine was applied to a devise to an heir by his individual name, since the doctrine was applicable at the date that the will became effective, and at that date, the testator being dead, the named devisee would be his heir. However, in the deed cases it can have no application to a remainder to a named person, who is a presumptive heir of the grantor. Since the doctrine must be applied at the date of the execution of the deed, it cannot be said with certainty that the named person will be the heir of the grantor at his death. The death of such a presumptive heir prior to that of the grantor would change the class of persons who would take by descent a reversion,⁴⁸ and therefore it cannot be said that he would have taken an estate of the "same quantity and quality" by descent that he would by purchase.

This limits the application of the doctrine in cases of conveyances inter vivos to remainders to the grantor's heirs under the class description "heirs" or words of similar import. In *Raffel v. Safe Deposit Co.*⁴⁹ the remainder was to "vest in her next of kin or heirs according to law". Whether a class description not using the words "heirs" or "next of kin" would be sufficient to make the doctrine applicable, would depend upon whether the description would include all possible heirs of the grantor at his death and exclude any person who would not be an heir at that

⁴⁸ Persons taking by right of representation take as original heirs of the intestate, and not through their predeceased parent who was a presumptive heir.

⁴⁹ *Supra*, n. 46.

date.⁵⁰ In *Warner v. Sprigg*⁵¹ such a description existed where the remainder was "to go according to law, under the existing statutory provisions of Maryland". This expression is equivalent to the use of the term "heirs-at-law" in describing the class to take.⁵² In this connection it must be noted that the "heirs" must be ascertainable at the grantor's death and not at a date subsequent thereto,⁵³ and also under the statutes of descent in effect at that date and not at the date of the execution of the deed. If both factors are not present in the class description, then the persons to take by purchase might not be the same as those who would take by descent. In *Pope v. Safe Deposit and Trust Co.*⁵⁴ the doctrine was held not to be applicable because the heirs-at-law of the grantor were to be determined "under the laws of the State of Maryland, in force at the time of the execution and delivery of said original trust deed" and not at the death of the grantor. Likewise in *Kensett v. Safe Deposit and Trust Co.*⁵⁵ the doctrine was not applicable since the remainder was to "such persons as would by the now existing laws be the next of kin".

Since 1916 the devolution of title in case of intestacy is the same in respect to personalty and realty, so the terms "heirs-at-law" and "next of kin" are interchangeable, as they include the same class membership. But prior to that date the statutes of descent for the two types of property were not the same, so these terms might include different class members. Thus in *Gordon v. Small*⁵⁶ the doctrine of worthier title was held not applicable to a remainder to the

⁵⁰ In *Biwer v. Martin*, 294 Ill. 488, 128 N. E. 518 (1920), the doctrine was incorrectly applied to a remainder to the grantor's "lineal descendants, per stirpes". This class description would not include collaterals of the grantor, who would be his heirs-at-law if he died without lineal descendants surviving.

⁵¹ *Supra* n. 45.

⁵² *Quaere*. What is meant by the term "existing statutory provisions of Maryland"? See discussion *infra*.

⁵³ *Mercer v. Safe Deposit Co.*, 91 Md. 102, 45 A. 865 (1900) held that in a remainder to the grantor's "right heirs" the class was to be ascertained at the death of the grantor and not when the estate would fall into possession.

⁵⁴ 163 Md. 239, 161 A. 404 (1932).

⁵⁵ 116 Md. 526, 82 A. 981 (1911).

⁵⁶ 53 Md. 550 (1880).

grantor's "right heirs" where the subject-matter of the trust was personalty, since the same persons would not necessarily take by descent as would take by purchase.

Effect Upon the Heir

As has been pointed out in the will cases, the application of the doctrine to a devise to an heir operates to render the subject-matter of the devise intestate property, and therefore makes it subject to prior use in the payment of debts. However, since the testator is dead at the time of the application of the doctrine, it does not operate to defeat the estate of the heir, except in those cases where the entire property is exhausted in the payment of debts. On the other hand, the application of the doctrine to a deed operates to defeat entirely the estate of the heir. Instead of taking a remainder by purchase under the deed, he takes an expectancy in a reversion left in the grantor. Having only an expectancy in this reversion, he holds no interest in the property capable of protection either in law or equity. The grantor is the absolute owner of the reversion, and as such he has the power of disposition either by conveyance inter vivos or by will, so as to defeat entirely the heir's expectancy.

In several Maryland cases the principal problem at issue was whether the grantor held a reversion under the doctrine, so that by an inter vivos conveyance he could defeat the interest of the heir, who under the terms of the deed claimed a remainder by purchase. In *Warner v. Sprigg*⁵⁷ a conveyance inter vivos by the grantor was upheld as conveying a reversion left in himself by virtue of the gift of the remainder, following an equitable life estate in the grantor, "to go according to law, under the existing statutory provisions of Maryland". In this case the Court did not expressly recognize the fact that it was dealing with an application of the doctrine of worthier title, yet it held that the gift of the remainder to the grantor's heirs-at-law operated to create a reversion in the grantor and

⁵⁷ 62 Md. 14 (1884).

not a remainder by purchase in such heirs. This is nothing more than the application of the same doctrine of worthier title developed in the will cases.

As most of the cases concerning remainders to the grantor's heirs involve deeds in trust in which equitable life estates are expressly created in the grantors, there exists not only the problem of whether the grantor holds a reversion which he has power to dispose of by conveyance *inter vivos*, but also the problem of whether the existence of such a reversion gives him the additional power to revoke the trust. It is a well settled rule in Maryland that a trust may be terminated upon the request of all the beneficiaries.⁵⁸ It follows that if the grantor holds a reversion, following an equitable life estate in himself, then he as sole beneficiary has the power to revoke the trust and compel the trustee to execute a reconveyance. This was the problem at issue in *Raffel v. Safe Deposit Co.*⁵⁹ The grantor had executed a deed in trust creating an equitable life estate in herself with remainder to "her next of kin or heirs according to law". No power of revocation of the trust had been expressly reserved, but she was seeking to require a termination of the trust and reconveyance on the ground that as owner of the reversion she was the sole beneficiary. The Court, following *Warner v. Sprigg*,⁶⁰ held that she had not created a valid remainder, and therefore as holder of the reversion and the equitable life estate she was entitled to terminate the trust and have a reconveyance.

Not only may the expectancy of the heir in such a reversion be destroyed by a conveyance *inter vivos*, but also the grantor's will may operate to devise the reversion to a stranger, thereby defeating the expectancy of the heir. In *Warner v. Sprigg*⁶¹ the Court expressly pointed out the fact that the grantor's purported will would have operated to dispose of the reversion arising under the application of

⁵⁸ *Manders v. Mercantile Trust Co.*, 147 Md. 448, 128 A. 145 (1925).

⁵⁹ 100 Md. 141, 59 A. 702 (1905).

⁶⁰ *Supra* n. 57.

⁶¹ *Ibid.*

this doctrine, if he had not previously disposed of it by a valid conveyance inter vivos. From these cases it becomes apparent that the application of the doctrine to conveyances is much more detrimental to the interests of the heir than is normally the situation when applied to a will. It is of little wonder, then, that the Maryland cases, in construing a remainder to the grantor's heirs as creating a reversion in the grantor, have never expressly referred to the doctrine as the doctrine of worthier title. From the viewpoint of the heir, it cannot be realistically stated that a possible title by descent, a mere expectancy at the present, is more worthy than a present title by purchase.

Applicable as a Rule of Law or a Rule of Construction?

In the application of the doctrine to wills no American case has dissented from the statements in the early textbooks that it is a rule of law.⁶² This is illustrated by the willingness of the courts to apply the doctrine to a devise to an heir by his individual name.⁶³ If it were a rule of construction only, the fact that the testator used the heir's individual name would be sufficient evidence of an intention that such heir should take by purchase to prevent its application. However, in the application of the doctrine to conveyances inter vivos, there has developed a strong dissent to the effect that the doctrine is a rule of construction only and not a rule of law. Justice Cardozo very clearly stated this view in *Doctor v. Hughes* as follows:⁶⁴

"At common law, therefore, and under common law conveyances, this direction to transfer the estate to the heirs of the grantor would indubitably have been equivalent to the reservation of a reversion. In England, the rule has been changed by statute.

"But in the absence of modifying statute, the rule persists today, at least as a rule of construction. . . . But at least the ancient rule survives to this extent,

⁶² See the statement of the doctrine by Hargrave in the first sentence of this article.

⁶³ *Phillips v. Dashiell*, *supra*, n. 12; *Medley v. Williams*, *supra* n. 6; *Posey v. Budd*, *supra* n. 25.

⁶⁴ 225 N. Y. 305, 122 N. E. 221 (1919).

that, to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed. Here there is no clear expression of such a purpose, no doubt there are circumstances on which it is possible to build an argument."

Prior to its decision in *Peter v. Peter*⁶⁵ the Court of Appeals of Maryland had made no express pronouncement as to whether this doctrine should be applied to deeds as a rule of law or merely as a rule of construction. In that case the Court refused to apply the doctrine to a remainder to the grantor's "heirs at law" with the following statement:

"As to the third point, which was most ably and persuasively presented, it is unquestionably true that at common law a grantor could not by deed convey an estate in remainder to his own heirs, and a very high authority, the late Major Venable, in his syllabus on Real Property, declared that to be the law of this State in reference to common law conveyances. But, assuming that to be true, as to such conveyances, it does not follow that a settlor may not, by a deed of trust, create such an estate; and whatever the rule may be in other jurisdictions, such remainders have been upheld by this Court in at least three cases, and in another case the principle was recognized."

The opinion further points out that the *Sprigg* case and the *Raffel* case are not in conflict with this decision, because in those cases the Court found no express intention of the grantor to create a remainder by purchase in his heirs, and in those cases the Court did not intimate that a reversion arose because of a rule of law that a remainder to the grantor's heirs could not be validly created. The only reasonable interpretation of the *Peter* case is not that it overrules the *Sprigg* and *Raffel* cases and repudiates entirely the common law doctrine of worthier title, but that the doctrine as applied to deeds in trust should be applicable as a rule of construction, i. e., if there is no clear

⁶⁵ 136 Md. 157, 110 A. 211 (1920).

evidence of the grantor's intention to create a remainder by purchase in his heirs, a reversion in the grantor will result, but the grantor may by evidence of his intention create a remainder by purchase in his own heirs.

This interpretation of the *Peter* case was expressly followed and applied in the recent case of *Allen v. Safe Deposit and Trust Co.*⁶⁶ The case involved the right of the settlor to have a trust revoked as to one-half of the corpus as the sole beneficiary, upon the theory that a remainder of one-half of the corpus to the settlor's "next of kin" created a reversion. In denying its application to the deed involved, the Court clearly stated the doctrine as a rule of construction in the following words:

"The question, therefore, is whether the deed of trust has granted remainder interests to the next of kin. This question must be decided by construing its language to determine the intention of the settlor. If a settlor manifests no intention to grant a beneficial interest to any one else, then he is the sole beneficiary. . . ."

If this doctrine is to be applied as a rule of construction in the deed cases, it becomes important to determine what provisions in the deed are sufficient to indicate affirmatively an intention of the grantor that the heirs are to take a remainder by purchase. The New York Court of Appeals, following the opinion of Justice Cardozo in *Doctor v. Hughes*,⁶⁷ has held that the existence of a provision in the deed, giving the settlor a testamentary power of appointment, is sufficient evidence of an intention not to create a reversion to prevent the application of the doctrine and permit the heirs to take a remainder by purchase.⁶⁸ If the doctrine is applied, the settlor retains a reversion, and thus has power of disposition either by deed or will. The fact that he has by express provision retained a power of disposition by will can only be construed as showing an intention not to have power of disposition by deed, and there-

⁶⁶ 7 A. (2d) 180 (Md. 1939).

⁶⁷ *Supra* n. 64.

⁶⁸ *Whittemore v. Equitable Trust Co.*, 250 N. Y. 298, 165 N. E. 454 (1929).

fore the existence of an intention not to retain a reversion but to create a remainder in the heirs by purchase. However, none of the Maryland cases which have refused to apply this doctrine of worthier title to a remainder to the grantor's heirs has rested its decision upon the presence of a testamentary power of appointment, although the recent *Allen* case referred to this type of provision as one factor to be considered in determining whether the grantor intended to create a remainder by purchase in his heirs. In fact, in the *Sprigg* case and the *Raffel* case, both of which applied the doctrine, as well as in the *Peter* case and the *Allen* case, both of which refused to apply the doctrine, there existed a testamentary power of appointment in the settlor.

A careful examination of the Maryland cases, in which the remainder to the heirs of the grantor did satisfy the formal requirements of the doctrine of worthier title, but in which the Court found an intention to create a remainder in such heirs by purchase, discloses that the presence of a provision expressly and affirmatively denying to the grantor any inter vivos power of disposition or limiting such power has been the determinative factor in the decision. This is certainly the basis of the decision in the *Peter* case, which held that the heirs took a remainder by purchase. In that case the settlor attempted to set up a spendthrift trust for his own benefit, and the deed in trust contained the express provision that the settlor was to have no power "to alienate the same, or to direct the alienation thereof, by conveyance in fee or by way of mortgage or deed of trust". Certainly, such an express denial of any power of disposal inter vivos over either the income or the corpus of the trust showed affirmatively an intention of the settlor to create a remainder in his heirs and not a reversion in himself. Likewise, in the *Allen* case there was an express provision providing that the settlor could withdraw from the corpus sums of money not exceeding \$10,000 in the aggregate. Such an express limitation on the settlor's inter vivos control of the corpus is a clear indication of his

intention to create a remainder in his "next of kin" and not a reversion in himself. In *Numsen v. Lyon*⁶⁹ there was a provision expressly permitting the settlor to convey inter vivos the corpus only "with assent of the trustee testified by his uniting in the same deed". This express restriction on the grantor's power of disposal inter vivos negated any intention to retain a reversion. Only in *Mercer v. Hopkins*⁷⁰ has the Court of Appeals failed to apply the doctrine of worthier title to a deed which did not contain any express denial or limitation upon the grantor's power of disposal inter vivos. The exact wording of the deed is not set out in the opinion, and the doctrine was urged upon the Court under the theory of a resulting trust. Lack of argument by counsel for the grantor's devisee under the doctrine of worthier title may account for the Court's summary treatment of the problem.

On the other hand, in the two cases which did apply the doctrine so as to create a reversion in the grantor, the *Sprigg* case and the *Raffel* case, there was no provision in the deed which in any manner expressly limited or denied to the grantor a power of disposal by an inter vivos conveyance.⁷¹ From these cases it becomes apparent that the most determinative factor in the application of the doctrine of worthier title to the deed cases has been the presence or absence of a provision limiting or denying to the grantor a power of inter vivos disposal over the corpus of the trust property.

In several Maryland cases the remainder to the grantor's heirs has been contingent upon his dying without children, with a first alternative remainder to such children if he dies leaving children.⁷² In these cases the doctrine should not be applied to the final remainder to his heirs if it is a rule of construction only. As a rule of law

⁶⁹ 87 Md. 31, 39 A. 533 (1898).

⁷⁰ 88 Md. 292, 41 A. 156 (1898).

⁷¹ In the *Sprigg* case there was a provision similar to that found in *Numsen v. Lyon*, *supra* n. 69, in respect to the house and lot on Franklin Street, but no such provision in respect to the balance of the trust property.

⁷² This is sometimes described as a contingent remainder with a double aspect.

it would, of course, be applicable. The fact that the grantor has separated his heirs into two separate classes, his lineal heirs in the first class and his collateral heirs in the second class, and has described his lineal heirs by the term "children" so that the doctrine would not be applicable to that class, shows an intention to make the alternative gift to his collateral heirs also a remainder by purchase. It would be unreasonable to say that he intended the first class to take by purchase, but the second class to take by descent.⁷³ This was the situation in *Numsen v. Lyon*⁷⁴ and in *Mercer v. Hopkins*,⁷⁵ in both of which the doctrine was not applied.

Relation to the Rule in Shelley's Case

In its development the doctrine of worthier title had no connection with the Rule in Shelley's Case, although both originated from a desire to protect the feudal rights of the overlord. In the application of these two rules to wills, no confusion can result since they deal with different types of remainders, the former with a remainder to the testator's heirs and the latter with a remainder to the life tenant's heirs. It should be noted that the Rule in Shelley's Case only deals with remainders, while the doctrine of worthier title applies to any type of estate. However, when the doctrine of worthier title was extended to conveyances inter vivos, there was a tendency to confuse the two rules in those cases where the life tenant was the grantor. As previously mentioned, the most common type of remainder to the grantor's heirs, involving the doctrine of worthier title, arose in cases of a deed in trust in which the settlor created a trust for his own life. In these cases the life tenant is also the grantor, and therefore both the Rule in Shelley's Case and the doctrine of worthier title are applicable to a remainder to the settlor's heirs. By applying the Rule in

⁷³ A similar argument was approved in the Allen case, where one-half of the corpus was devised to the grantor's children or descendants and the other one-half in default of appointment to his "next of kin".

⁷⁴ 87 Md. 31, 39 A. 533 (1898).

⁷⁵ 88 Md. 292, 41 A. 156 (1898). See *Mercer v. Safe Deposit Co.*, 91 Md. 102, 45 A. 865 (1900), for the wording of the deed in trust.

Shelley's Case the settlor, as owner of the equitable life estate, will take an equitable fee simple, and as sole beneficiary he is entitled to terminate the trust and thus regain a legal estate in fee simple. This was the decision in *Brown v. Renshaw*,⁷⁶ where the Court applied the Rule in Shelley's Case so as to give the settlor an equitable fee simple, and then directed a reconveyance of the legal fee. On the other hand, the same result could have been reached by applying the doctrine of worthier title, since the settlor would then have owned a reversion in fee, either legal or equitable, which, merging with his equitable life estate, would create an equitable fee simple estate, entitling him to a reconveyance of the legal title. This was the express holding in both the *Sprigg* case and the *Raffel* case.

A question might be raised as to whether the enactment in 1912 of the Maryland statute abolishing the Rule in Shelley's Case⁷⁷ also operated to abolish the doctrine of worthier title in those cases where the settlor was also the life tenant. The statute provides that where a remainder is limited to the heirs of the life tenant, such heirs "shall take as purchaser". This wording could reasonably be construed to prevent the application of the doctrine of worthier title to remainders to the settlor's heirs where the settlor also held an equitable life estate, as was the situation in both the *Sprigg* case and the *Raffel* case. However, it should be noted that the New York Court of Appeals has construed its statute, worded identically as the Maryland statute,⁷⁸ as not preventing the application of the doctrine of worthier title to such a situation.⁷⁹

⁷⁶ 57 Md. 67 (1881).

⁷⁷ Md. Code (1924) Art. 93, Sec. 342.

⁷⁸ The Maryland statute was copied from that of New York. See Miller, *Construction of Wills* (1927) Sec. 364, n. 1.

⁷⁹ *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919).

CONCLUSION

From the preceding analysis of the Maryland cases, it is apparent that the application of the doctrine of worthier title as a rule of law in the will cases is a legal anachronism and should be abolished. It serves no useful purpose in the solution of modern problems in wills, and may operate to defeat the intention of the testator as to the order in which his assets should be used to pay his debts. For these reasons the Restatement of Property has taken the liberty of stating that this doctrine no longer exists, either as a rule of law or as a rule of construction, in respect to devises in wills.⁸⁰ Likewise Section 14 of the Uniform Property Act specifically abolishes this doctrine as applied to wills.

However, this same doctrine, when applied to conveyances inter vivos as a rule of construction, "is justified on the basis that it represents the probable intention of the average conveyer. Where a person makes a gift in remainder to his own heirs (particularly where he also gives himself an estate for life) he seldom intends to create an indestructible interest in those persons who take his property by intestacy, but intends the same thing as if he had given the remainder 'to my estate' ".⁸¹ For this reason the Restatement of Property has stated the doctrine as a rule of construction where applied to conveyances inter vivos.⁸² Section 15 of the Uniform Property Act, however, specifically abolishes this doctrine, both as a rule of law and as a rule of construction, as applied to conveyances inter vivos. Since the Maryland Court of Appeals has always applied the doctrine as a rule of construction in the deed cases, Section 15 should not be adopted in this State.⁸³ To adopt Section 15 would be to defeat the intention of the settlor in many cases where, in creating a trust for his own life, he had no intention to create an indestructible interest in his heirs.

⁸⁰ Restatement, Property, Tentative Draft No. 11, Sec. 314 (2).

⁸¹ *Ibid.*, Sec. 314, Comm. a.

⁸² *Ibid.*, Sec. 314 (1).

⁸³ For a general discussion of the Uniform Property Act see the other leading article appearing in this issue of the REVIEW—ED.