STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

The Doctrine of Worthier Title

January 1959

LETTER OF TRANSMITTAL

To His Excellency Edmund G. Brown
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether the doctrine of worthier title should be abolished in California. The Commission herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Professor Harold E. Verrall of the School of Law, University of California at Los Angeles.

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January 1959

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to the Doctrine of Worthier Title

The so-called doctrine of worthier title originated in feudal England as a rule of property which made void an attempted testamentary or inter vivos transfer of real property to the transferor's own heirs. The rule originated in feudal policy and was abolished by statute in England in 1833 when feudalism had passed into history.

What might be called the American doctrine of worthier title exists in most states today. However, as generally applied this doctrine differs in three important respects from its English antecedent. First, it is not applied to testamentary transfers. Second, it is generally applied to inter vivos transfers of personal as well as real property. Third, it is not applied as a rule of property which disables a person from making an effective grant of property to his own heirs or next of kin, but as a presumption or rule of construction that a grantor does not ordinarily intend by executing such a grant to divest himself of his interest in the property. As is shown in the research consultant's report, *infra*, the California Supreme Court held in *Bixby* v. *California Trust Co.*[1], decided in 1949, that the American doctrine of worthier title is a part of the law of this State.

The Commission recommends that the doctrine of worthier title be abolished as to both inter vivos and testamentary transfers through the enactment of new sections of the Civil Code and the Probate Code, set forth below. The Probate Code provision is recommended only out of an abundance of caution since it is generally agreed that the American doctrine of worthier title does not apply to testamentary transfers.

There are three basic reasons for the Commission's recommendation:

1. The Commission believes that the doctrine of worthier title is based on a false premise—*i.e.*, the assumption that a person granting property to his own heirs or next of kin does not really intend to give the property to them or understand that he has done so but rather intends to retain a reversion in the property with full power to dispose of it again in the future. Thus, the doctrine frustrates rather than effectuates the actual intention of grantors in the cases in which it is decisive.

2. As the research consultant's analysis of the New York decisions applying the American doctrine of worthier title shows, the doctrine breeds litigation. Since the doctrine is merely a presumption or rule of construction to be applied in ascertaining the intention of the grantor, it can be overcome by showing that the grantor actually meant what he said—*i.e.*, that the property should go to his heirs or next of kin. In New York litigants have frequently attempted to make such a showing, with a record of success which has encouraged others to do so. While there has been no such history of litigation in California in the few years which have elapsed since the *Bixby* case was decided, there is no

[1] 33 Cal.2d 495, 202 P.2d 1018 (1949).

reason to believe that the citizens of this State will prove to be less litigious than those of New York as situations arise over the years in which the doctrine is applicable.

3. As the research consultant's study shows, the doctrine of worthier title can easily operate as an estate and inheritance tax trap by creating a reversionary interest in the estate of a grantor who intended to avoid such taxes by making an inter vivos transfer of the property to his heirs or next of kin.

The Commission believes that the statute abolishing the doctrine of worthier title should be applied to legal instruments in existence on its effective date as well as those subsequently executed. A legal doctrine which defeats rather than effectuates intention, breeds litigation and operates as a potential tax trap should be eliminated from our law as soon as possible. Moreover, the Commission does not believe that grantors have relied upon the *Bixby* rule in drawing inter vivos instruments; one wishing to retain a reversion rather than to create a remainder would surely do so directly rather than to say the opposite of what he means and rely upon a disputable presumption or rule of construction to accomplish the result which he desires. For these reasons, a provision making the abolition of the doctrine retroactive except as to instruments the meaning of which has been finally adjudicated is included in the statute which the Commission is recommending.

The Commission recognizes, however, that there is some doubt whether a statute abolishing the doctrine of worthier title can constitutionally be made applicable in cases involving instruments in effect prior to its enactment. While the decisions of the United States Supreme Court seem to make it clear that the retroactive application of a statute changing a presumption or a rule relating to burden of proof does not violate the United States Constitution,[2] several California decisions suggest that the retroactive application of such a statute may violate the Constitution of this State.[3] Because of the doubt engendered by the latter decisions the Commission has included a separability clause in the legislation which it is recommending.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to add Section 1073 to the Civil Code and to add Section 109 to the Probate Code, relating to a grant, devise or bequest to a grantor's or testator's own heirs or next of kin.

The people of the State of California do enact as follows:

SECTION 1. Section 1073 is added to the Civil Code to read:

1073. The law of this State does not include (1) the common law rule of worthier title that a grantor cannot convey an interest to his

[2] Easterling Lumber Co. v. Pierce, 235 U.S. 380 (1914); Luria v. United States, 231 U.S. 9 (1913); Reitler v. Harris, 223 U.S. 437 (1911).

[3] Nilson v. Sarment, 153 Cal. 524, 96 Pac. 315 (1908); Lewis v. Burns, 122 Cal. 358, 55 Pac. 132 (1898); Jordan v. Fay, 98 Cal. 264, 33 Pac. 95 (1893); Estate of Giordano, 85 Cal. App.2d 588, 193 P.2d 771 (1948); Estate of Thramm, 80 Cal. App.2d 756, 183 P.2d 97 (1947).

own heirs or (2) a presumption or rule of interpretation that a grantor does not intend, by a grant to his own heirs or next of kin, to transfer an interest to them. The meaning of a grant of a legal or equitable interest to a grantor's own heirs or next of kin, however designated, shall be determined by the general rules applicable to the interpretation of grants. This section shall be applied in all cases in which final judgment has not been entered on its effective date.

SEC. 2. Section 109 is added to the Probate Code to read:

109. The law of this State does not include (1) the common law rule of worthier title that a testator cannot devise an interest to his own heirs or (2) a presumption or rule of interpretation that a testator does not intend, by a devise or bequest to his own heirs or next of kin, to transfer an interest to them. The meaning of a devise or bequest of a legal or equitable interest to a testator's own heirs or next of kin, however designated, shall be determined by the general rules applicable to the interpretation of wills. This section shall be applied in all cases in which final judgment has not been entered on its effective date.

SEC. 3. If the application of Section 1073 of the Civil Code or of Section 109 of the Probate Code to any instrument is held invalid, its application to other instruments to which it may validly be applied shall not be affected thereby.

A STUDY TO DETERMINE WHETHER THE DOCTRINE OF WORTHIER TITLE SHOULD BE ABOLISHED IN CALIFORNIA *

INTRODUCTION

Among the rules of the common law respecting real property was the so-called "Doctrine of Worthier Title." In the language of the Royal Commissioners Appointed to Inquire Into the Law of England Respecting Real Property in 1833:

> By a Rule confined to Real Estate, a devise to a person who, in consequence of being the Heir of the Testator, would be entitled if the Testator had died intestate, is void. In like manner, an ultimate limitation to the grantor in a settlement [inter vivos transfer] is considered to have no operation, and to leave him the reversion as part of his old estate. Various reasons are assigned for these rules; one is the greater advantage to which lords of manors were formerly entitled, where their tenants acquired their estates by descent; another, that descent is the title most favoured and protected by the Law; and a third, that it is unnecessary to allege a gift of that which passes by Law, according to the maxim, *Fortior est dispositio legis quam conventio hominum.*[1]

The rule which came to be referred to as the "Doctrine of Worthier Title" thus designates two rules developed in feudal England. One applied where a *devise* limited property to a person who would take the same property had there been no devise. This person was going to take and the question was only by what "title" he was to take. Due to differences in the incidents of the title by devise and of the title by inheritance, feudal policy dictated that he take by the worthier title, inheritance. With the obsolescence of the feudal institution and the subjection of the assets of a testate decedent to the payment of his debts the reason for the rule disappeared and in England it was abolished in 1833.[2] The second of the two rules applied to an *inter vivos conveyance* containing a limitation "to the heirs" of the conveyor or a limitation having a similar meaning. This rule declared void the limitation to the heirs of the conveyor. The principal support for this again was feudal policy and again with the obsolescence of the feudal institution the rule was abolished in England.[3]

In America from the very beginning the incidents of titles by devise and titles by inheritance were practically the same. As a result there was little occasion to invoke the doctrine of worthier title as applied in will cases. It was considered obsolete and no old or new reasons

* This study was made at the direction of the Law Revision Commission by Professor Harold E. Verrall of the School of Law, University of California at Los Angeles.

[1] Fourth Report Made to His Majesty by the Commissioners, Appointed to Inquire Into the Law of England Respecting Real Property, Gt. Brit., H. of C., Sess. Paper 226, p. 74 (1833).

[2] Stat. 1833, 3 & 4 Wm. IV, c. 106, § 3, p. 1002.

[3] *Ibid.*

pressed for its continued recognition. The American Law Institute therefore found that the wills branch of the doctrine was not part of American common law.[4] This does not have the support of all American jurisdictions. In a few states some recognition of the rule in wills cases is found.[5] Because the doctrine had been so recognized and because of the fact that it had been so frequently mentioned in cases, the American Law Institute and the Commissioners on Uniform State Laws recommended legislation expressly providing that the doctrine as applied to wills cases is not part of American law.[6]

The doctrine of worthier title as applied in inter vivos cases did not have a similar history. It was widely accepted as part of the American common law although the feudal reasons for the rule no longer had merit and no new reasons were found to support the rule. Yet the rule was actually applied in relatively few cases until conveyances in trust began to grow in numbers during this century. As is demonstrated below, in these modern cases the rule has been given a new character and a new supporting reason; it has been molded into a rule of construction and held to be supported by an assumed intention of the conveyor.[7]

DEFINITION OF THE DOCTRINE

The modern doctrine of worthier title is stated in the Restatement of Property, Section 314:

> (1) When a person makes an otherwise effective inter vivos conveyance of an interest in land to his heirs, or of an interest in things other than land, to his next of kin, then, unless a contrary intent is found from additional language or circumstances, such conveyance to his heirs or next of kin is a nullity in the sense that it designates neither a conveyee nor the type of interest of a conveyee.
>
> (2) Neither a rule of construction corresponding to that stated in Subsection (1), nor a rule of law analogous thereto, applies to a devise of an interest in land or in personalty.

Comment on Subsection (1):

> a. . . . In the early stages of the development of the rule stated in Subsection (1), it was a rule of law applicable only to conveyances of land. Due to the prevalence in modern times of a policy to effectuate the intention of the conveyor when no good reason requires its frustration, the modern authorities have relaxed this rule of law into a rule of construction. The rule thus diluted has been extended to interests in personalty with a resultant symmetry in the law.

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[4] 3 RESTATEMENT, PROPERTY § 314(2) (1940).

[5] See *In re* Estate of Warren, 211 Ia. 940, 234 N.W. 835 (1931); Mitchell v. Mitchell, 21 Md. 244 (1864); Ellis v. Page, 61 Mass. 161 (1851).
A complete consideration of the doctrine is found in Harper and Heckel, *The Doctrine of Worthier Title,* 24 ILL. L. REV. 627 (1930).

[6] "A statute approved by the Commissioners on Uniform State Laws and by the American Law Institute has been drafted to accomplish such abolition." 3 RESTATEMENT, PROPERTY, Special Note § 314, comment *i* at 1785 (1940). See also HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW AND PROCEEDINGS 260 (1938).

[7] A rather complete collection of the cases, the old as well as the new since the dilution of the rule into one of construction, can be found in Annot., *Reversion or Remainder to Heir,* 16 A.L.R.2d 691 (1951); Annot., *Reversion or Remainder—Heirs of Grantor,* 125 A.L.R. 548 (1940).

> The continuance of the rule stated in Subsection (1) as a rule of construction is justified on the basis that it represents the probable intention of the average conveyor. 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" . . . .

Under the influence of the New York Court of Appeals and the American Law Institute's Restatement of the Law of Property, the recent cases have generally considered the doctrine of worthier title in inter vivos cases to be a rule of construction.[8] In some states, however, it was early stated and applied as a rule of law and it is entirely possible that the courts in these states may feel bound by the early precedents and thus not follow the modern trend.[9]

The principal development of the modern rule of worthier title in deed cases has been in New York. Cases in other jurisdictions have in general followed or attempted to follow the New York developments. New York alone has had enough experience to warrant a detailed consideration of its decisions. These decisions will be considered in some detail in the following part of this study.

DEVELOPMENT OF THE DOCTRINE IN NEW YORK

A Rule of Construction

It was in 1919 in *Doctor* v. *Hughes*[10] that Judge Cardozo suggested that the doctrine of worthier title as applied in deed cases persisted, if at all, only as a rule of construction. Prior to that it had been held or assumed that the doctrine was a rule of law, *i.e.*, that a person could not create a remainder in his heirs no matter how clearly he manifested his intention to do so. Admittedly, some of the earlier cases can be read as stating the rule as one of construction but the real support for this view started with the Cardozo decision. This device of diluting a rule of law into a rule of construction has been employed by many courts as a first step in ridding the law of an unwanted and unsupportable rule of law. Thereafter the rule may wither and die or live on without harm. This might well have been Judge Cardozo's intention with respect to the doctrine of worthier title. Such, however, was not what happened with the inter vivos branch of the doctrine in New York.

The Leading Case: *Doctor v. Hughes*

This was an action by creditors of a settlor's heir apparent to reach his interest in the trust assets. The trust provided for the payment of income from realty to the settlor and upon his death for the conveyance of the title to his heirs at law. The court held that a daughter of the settlor, one of his two sole descendants, did not have any interest which creditors could reach because the settlor did not intend to give a remainder interest to anyone. Judge Cardozo in his opinion first noticed the English doctrine of worthier title and the English legislation abolishing the doctrine and then continued:

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[8] See SIMES AND SMITH, FUTURE INTERESTS § 1605 (2d ed. 1956).
[9] *Ibid.*
[10] 225 N.Y. 305, 122 N.E. 221 (1919).

> But in the absence of modifying statute, the rule persists to-day, at least as a rule of construction, if not as one of property. . . . At the outset, probably, like the rule in *Shelley's* case (*Webb* v. *Sweet*, 187 N.Y. 172, 176), it was a rule, not of construction, but of property. But it was never applied in all its rigor to executory trusts,[11] [citations omitted], which were "moulded by the court as best to answer the intent of the person creating them" [citations omitted]. We may assume that this is the principle that would control the courts to-day. Executory limitations are no longer distinguished from remainders, but are grouped with them as future estates . . . , and deeds, like wills, must be so construed as to effectuate the purpose of the grantor (Real Prop. Law, sec. 240, subd. 3). There may be times, therefore, when a reference to the heirs of the grantor will be regarded as the gift of a remainder, and will vest title in the heirs presumptive as upon a gift to the heirs of others. . . . But at least the ancient rule survives to this extent, that to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed. Here there is no clear expression of such a purpose. . . . There is no adequate disclosure of a purpose in the mind of this grantor to vest his presumptive heirs with rights which it would be beyond his power to defeat. No one is heir to the living; and seldom do the living mean to forego the power of disposition during life by the direction that upon death there shall be a transfer to their heirs.[12]

Subsequent New York Cases

In the thirty years following *Doctor* v. *Hughes*, the New York Court of Appeals, in addition to several decisions without opinion, wrote opinions in eleven cases attempting to make usable the doctrine of worthier title as a rule of construction as applied to inter vivos transfers. That these efforts were not crowned with success may well be indicated by the fact that only in three of these cases did the Court of Appeals affirm the holding below. It seems rather obvious either that the rule was not understood by the lower New York courts or that it was not a rule possible of successful administration. In three of the eleven cases the limitations were to the settlor or to the legal representative of the settlor and for that reason really were not decided on the doctrine of worthier title. It might be significant that in six of the remaining eight cases, the Court of Appeals found a remainder was intended and only in two cases found the limitation to heirs resulted in a reversion in the conveyor. This should be kept in mind in reviewing the factors the court considered material in finding an intent to create a remainder and also in noticing the transition of the law from (1) an unwanted rule of law to (2) a rule of construction in the form of a strong presumption that a grantor does not intend the normal meaning of the words of gift to his heirs which presumption would yield only to a "clear expression" of such a purpose to (3) an unwanted rule of

[11] "Executory trusts," to the extent that they have been found in American conveyancing, have little similarity to the executory interests or the remainders involved in the cases considering the doctrine of worthier title. As involved in cases of the rule in Shelley's case, see Note 29 L.R.A. (n.s.) 963, 1136 (1911). See LEWIN, TRUSTS 64 (15th ed. 1950).

[12] Doctor v. Hughes, 225 N.Y. 305, 311, 122 N.E. 221, 222 (1919).

construction which "has lost much of its force" and which the Legislature might well abrogate completely.

A short statement of the eleven cases in which the Court of Appeals wrote opinions is essential to an understanding of the New York rule of construction. They follow in chronological order.

Guaranty Trust Co. v. *Halsted.*[13] A trust provided income payments for wife and children for life with surplus income payments to the settlor, or if the trust should outlast the settlor then to his testamentary appointees and in default of such appointees "to those who may at the time of his death be his next of kin under and in accordance with the then statutes of distribution of the State of New York." In an action brought by the trustees to determine the person entitled to the surplus, the court, reversing the lower court, merely said this case was not like *Doctor* v. *Hughes* because here there was a remainder limited to the next of kin. Judge Cardozo was a member of this court.

Livingston v. *Ward.*[14] A trust provided income benefits to the settlor, James Thomson, and then to his wife if she survived him and "from and after the decease of the said Anne D. Parsons to convey the said land and premises to the said James Thomson, his heirs and assigns forever." After the death of the settlor and his widow the heirs of the settlor claimed the trust assets. Their claim was contested by persons claiming under the will of the settlor. The court, reversing the lower court, held the language directing payment to the settlor, his heirs and assigns was merely a statement of his intention that subject to the life benefits given he retained the reversion. In so holding the court merely said:

> It does not show any intent by the grantor to divest himself of any part of his estate or to transfer it to his heirs. A similar situation was presented in the case of *Doctor* v. *Hughes* (225 N.Y. 305). All that we said there applies with equal force to the trust deed now under consideration.[15]

Whittemore v. *Equitable Trust Co.*[16] A trust set up by three settlors for a married woman and her husband provided that upon the deaths of those two life beneficiaries the trustees were to convey the corpus back to the settlors, if living, in equal parts but if any be dead his share to his testamentary appointees and in default of appointment to such person or persons and in such shares as the same would be distributed had the settlor been the owner and died intestate. An action was brought to revoke the trust. The court, reversing the lower court, held this language created a remainder in the settlor's heirs. The court pointed out that similar language concerning the heirs of a third person would have created a remainder and said that there was no reason to deny its effect merely because it referred to heirs of a settlor:

> The settlor, as above stated, makes rather full and formal disposition of the principal of the trust estate in case he dies before the life beneficiary. The words used, as already explained, indicate an intention to give a remainder to the spouse and children [the

[13] 245 N.Y. 447, 157 N.E. 739 (1927).
[14] 247 N.Y. 97, 159 N.E. 875 (1928); noted in 75 U. PA. L. REV. 190 (1926).
[15] Livingston v. Ward, 247 N.Y. 97, 105, 159 N.E. 875, 876 (1928).
[16] 250 N.Y. 298, 165 N.E. 454 (1929); noted in 29 COLUM. L. REV. 837 (1929); 7 N.Y.U.L.Q. REV. 543 (1929).

heirs], as the case may be, subject to change by the settlor's will. The creator of the trust reserves power of disposition only by will; he does something more than merely set up a trust for a life beneficiary; he disposes of the property at the termination of the life interests in case of his previous death.[17]

Schoellkopf v. *Marine Trust Co.*[18] A trust was created to last for the lives of two grandchildren with the corpus to go to the person entitled to income benefits at the termination of the trust. Income benefits were given to two grandsons, then to appointees of the survivor of the two grandsons, and in default of such appointment, to the heirs of the settlor as determined by the laws of succession of New York. An action was brought to determine the settlor's power to revoke. The court held that the intended time to determine the heirs of the settlor was at the death of the survivor of the two grandsons without appointment, rather than at the death of the settlor and, therefore, the settlor evidenced an intention to create a contingent remainder. The court in affirming the lower court cited as supporting authority the *Whittemore* case.

McEvoy v. *Central Hanover Bank & Tr. Co.*[19] A trust set up for a life beneficiary provided that upon the death of the beneficiary the corpus was to be surrendered to the settlor, his heirs, executors, administrators and assigns. The trust permitted the settlor an election to substitute other assets for those originally transferred in which case income benefits were changed and other provisions were made for corpus distribution. The settlor brought an action to revoke the trust. The court found that the settlor had never acted to bring the alternative trust into operation and under the first trust the provision for corpus distribution was no more than a reservation of a reversion.

City Bank Farmers Trust Co. v. *Miller.*[20] The trust provided for fixed payments to settlor out of income or principal so long as the corpus exceeded $5,000, but if the corpus fell below that amount the trust was to end. The trust provided that if the settlor died during the continuance of the trust the residue of the corpus was to be paid to the settlor's testamentary appointees and in default of appointment to the persons who would be her distributees under the laws of New York. An action was brought for construction of the trust instrument. The court, reversing the appellate division, held that the provision for corpus distribution was merely a superficial expression of a duty imposed upon the trustee by law, that it did not evidence an intent to create beneficial interests by way of remainder, and that the settlor retained a reversion.

Engel v. *Guaranty Trust Co.*[21] The trust gave a life income to the settlor with a power to withdraw $15,000 of the corpus. On his death the corpus was to go to his wife if she survived him; if not, to his testamentary appointees; and in default of appointment to such person or persons and in such proportions as the same would have been distributed if he had been the owner and had died intestate. An action

[17] Whittemore v. Equitable Trust Co., 250 N.Y. 298, 303, 165 N.E. 454, 456 (1929).
[18] 267 N.Y. 358, 196 N.E. 288 (1935); noted in 20 CORNELL L.Q. 116 (1934); 13 N.Y.U.L.Q. REV. 317 (1936).
[19] 274 N.Y. 27, 8 N.E.2d 265 (1937).
[20] 278 N.Y. 134, 15 N.E.2d 553 (1938); noted in 48 YALE L.J. 874 (1939).
[21] 280 N.Y. 43, 19 N.E.2d 673 (1939); noted in 8 BROOKLYN L. REV. 449 (1939); 17 N.Y.U.L.Q. REV. 146 (1939); 87 U. PA. L. REV. 1018 (1939); 25 VA. L. REV. 992 (1939).

was brought to revoke the trust. By a divided court, the appellate division judgment was reversed and the court held that a remainder was created in the settlor's heirs, citing the *Whittemore* case.

Smith v. *Title Guarantee & Trust Co.*[22] The trust was to last for the settlor's life. Income was given to the daughter and on termination of the trust the corpus was to go to the daughter if living, to the settlor's son if the daughter did not survive the settlor, and if the son was dead then to his issue, and in default of such issue to the legal representative of the settlor. The settlor brought an action to revoke the trust. The court held the end limitation to the legal representatives of the settlor was not intended to create any gift to them but merely evidenced the settlor's intention to reserve a reversion.

Matter of Scholtz v. *Central Hanover Bk. & Tr. Co.*[23] The trust provided life benefits to the settlor's son with a gift of the corpus to the issue of the son but if no issue survived the son then the corpus was to go to the settlor's next of kin to be determined at the son's death under the laws of New York in force at that time. An action was brought to revoke the trust. The court, reversing the appellate division, held that under the rule of *Doctor* v. *Hughes* a reversion was left in the settlor because he had not clearly expressed an intention to limit a remainder to his next of kin.

Richardson v. *Richardson.*[24] The trust provided life benefits to the settlor and upon his death the trust was to terminate and the corpus was to be paid over to the testamentary appointees of the settlor; in default of appointment to settlor's mother if living and if not living, then to such persons as would be entitled to the same under the intestacy laws of the State of New York. An action was brought to revoke the trust. The court, reversing the appellate division, held the settlor had created a remainder in his heirs.

Matter of Burchell.[25] The two trusts provided life income to the settlor and directed that upon his death the principal be paid to his testamentary appointees and in default of appointment to his heirs at law. The end limitations in the two trusts were worded slightly differently but the difference in wording was not considered of any significance. In connection with the administration of the estate of one settlor, proceedings were commenced to determine the meaning of the end limitation. The settlor of the other trust brought an action to revoke it. The two cases were joined on appeal. The court held that the limitation created remainders in the settlor's heirs.

Factors Stressed by the New York Court of Appeals

The seriatim statement of the eleven cases decided by the Court of Appeals hardly suggests a clear-cut pattern of decision. Did the court nevertheless make clear what factors are critical in determining whether an end limitation to heirs results in a remainder rather than a reversion under the rule of *Doctor* v. *Hughes*? In *Richardson* v. *Richard-*

[22] 287 N.Y. 500, 41 N.E.2d 72 (1942); noted in 17 ST. JOHN'S L. REV. 44 (1942).
[23] 295 N.Y. 488, 68 N.E.2d 503 (1946); noted in 13 BROOKLYN L. REV. 83 (1947); 60 HARV. L. REV. 147 (1946); 22 N.Y.U.L.Q. REV. 342 (1947).
[24] 298 N.Y. 135, 81 N.E.2d 54 (1948); noted in 37 CALIF. L. REV. 283 (1949); 62 HARV. L. REV. 313 (1948); 24 IND. L.J. 292 (1949); 24 N.Y.U.L.Q. REV. 450 (1949); 1 SYRACUSE L. REV. 96 (1949).
[25] 299 N.Y. 351, 87 N.E.2d 293 (1949); noted in 49 MICH. L. REV. 139 (1950); 1 SYRACUSE L. REV. 319 (1949); 35 VA. L. REV. 794 (1949).

son,[26] in which a remainder was found to have been created the Court of Appeals stated that in New York a mere statement of a gift to the heirs of a conveyor would not create a remainder. The court said:

> There must be additional factors, i.e., other indications of intention in order that there may be found "sufficient" or "clear expression" of intention on the part of the settlor to create a remainder to his next of kin.
>
> In our decisions we have attached considerable importance to at least three factors which are present in the instant case, viz.: (1) that the settlor has made a full and formal disposition of the *corpus* of the estate, i.e., disposed of the principal on several contingencies other than having it revert to himself, (2) that the settlor has made no reservation of a power to grant or assign an interest in the property in his lifetime, and (3) that he has reserved only a testamentary power of appointment.[27]
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> * * *
>
> To summarize, therefore, we believe the settlor evidenced her intention to give a remainder to her next of kin because she (1) made a full and formal disposition of the principal of the trust property, (2) made no reservation of a power to grant or assign an interest in the property during her lifetime, (3) surrendered all control over the trust property except the power to make testamentary disposition thereof and the right to appoint a substitute trustee, and (4) made no provision for the return of any part of the principal to herself during her lifetime.[28]

Admittedly these factors cannot have mechanical application and cannot have uniform weight attached to them. Nevertheless, a short analysis of their application in the cases will show the limited strength of the *Doctor* v. *Hughes* presumption that a limitation to the grantor's heirs is not ordinarily intended to create a remainder and will also indicate the type and weight of evidence held sufficient to support a finding that the settlor did intend to create a remainder.

Completeness of Provisions Disposing of the Principal. In the *Whittemore* case,[29] the court stressed as the material factor showing an intent to create a remainder in the heirs the completeness of the intended disposition of the trust assets. The dispositive scheme in order of preference was to the settlors, to the testamentary appointees of the settlors and to the heirs of the settlors. However, equal completeness of disposition was found in *Berlenbach* v. *Chemical Bank & Trust Co.*,[30] where on termination of the trust the principal was to be paid to the settlor, but if he was dead to his testamentary appointees and in default of appointment to those taking his residuary estate or if he died intestate to those who would take his personal property by succession. Yet in a suit brought to revoke the trust the Court of Appeals affirmed without opinion the holding that there was no remainder created. Con-

[26] 298 N.Y. 135, 81 N.E.2d 54 (1948).
[27] *Id.* at 139-40, 81 N.E.2d at 56.
[28] *Id.* at 144, 81 N.E.2d at 59.
[29] See note 16 *supra*.
[30] 235 App. Div. 170, 256 N.Y. Supp. 563 (1932), *aff'd*, 260 N.Y. 539, 184 N.E. 83 (1932).

versely, a year later in *Hussey* v. *City Bank Farmers Trust Co.*,[31] it affirmed, again without opinion, a holding that a remainder was created where the trust provided for distribution of the corpus to the life tenant's testamentary appointees and in default of appointment to the settlor if alive but if dead then to his next of kin according to the laws of the state of his residence at death. Still later, however, in the *Scholtz* case in which one disposition was "complete" we again find a holding against a remainder.[32] These four cases hardly make clear the meaning of "complete disposition" and its weight in determining a conveyor's intention. Even when still later, in *Richardson* v. *Richardson*,[33] the court again adverted to this factor and the position taken in the *Whittemore*[34] and *Hussey*[35] cases and said: "In our decisions we have attached considerable importance to . . . [the fact] that the settlor has made a full and formal disposition of the *corpus* of the estate, i.e., disposed of the principal on several contingencies other than having it revert to himself,"[36] the confusion was not cleared up, at least insofar as the appellate division was concerned. One cannot read the 1952 case of *Kolb* v. *Empire Trust Co.*,[37] decided by that court without feeling that the court was confused. The trust provided life benefits for the settlor and her daughter with a power of revocation as to one half at settlor's age of 30 and as to the rest at her age of 40. The provision as to the corpus disposition was most complete: to the daughter's issue if the daughter survived her mother; in default of issue or if settlor survived daughter, to the settlor's testamentary appointees; in default of that appointment to the daughter's testamentary appointees; in default thereof to be paid over as if the corpus belonged to the settlor under the laws of descent and distribution of the State of New York. In determining the effect of an attempted revocation other than by use of the reserved power the court held the settlor had a reversion and could revoke the trust with the daughter's consent. The court noticed the *Richardson* case and its test but said there was "a patent intent to create a reversion" only and "plaintiff did not make a full and formal disposition of the principal of the trust property."[38]

The court in the *Richardson* case did little to give content to the phrase "a full and formal disposition of the corpus" or to indicate its weight when found in a conveyance. However, from a reading of that case and the earlier cases noticed in the last paragraph it seems clear the court did not mean to infer that complex provisions for disposition of the corpus are required as contrasted with simple provisions. Rather, it seemed to think it significant that the end limitation to heirs is stated as an *alternative* to other provisions controlling corpus disposition which are obviously remainder or at least are obviously not reversionary in character. But the importance of this factor is difficult to assess. In some of the cases it was recognized as of material weight; in others it was not mentioned and apparently was not considered as having

[31] 236 App. Div. 117, 258 N.Y. Supp. 396 (1932), *aff'd*, 261 N.Y. 533, 185 N.E. 726 (1933).
[32] See note 23 *supra*.
[33] See note 24 *supra*.
[34] See note 16 *supra*.
[35] See note 31 *supra*.
[36] Richardson v. Richardson, 298 N.Y. 135, 140, 81 N.E.2d 54, 56 (1948).
[37] 280 App. Div. 870, 113 N.Y.S.2d 550 (1952).
[38] *Id.* at 872, 113 N.Y.S.2d at 553.

weight. It is not surprising, then, that the appellate division was confused in the *Kolb* case and that other courts as well as lawyers too have been confused. But at least this much can be said: To the extent that the factor of "complete disposition" has been given weight in finding an intention to create a remainder, when the theory of *Doctor* v. *Hughes* was that such intention had to be "clearly expressed" and that a finding of such intention had to have some support outside of the expression of the end limitation itself, it seems clear that the court is making a decided effort to take cases out of the rule of reversions. In other words the weight given this factor leaves the impression that the *Doctor* v. *Hughes* presumption, that an end limitation to heirs is intended to be no more than a reservation of a reversion, is given little weight in modern times.

The Inclusion of a Testamentary Power of Appointment Over the Principal. The reservation of a testamentary power of appointment in a conveyor with a gift in default to the conveyor's heirs may well be considered a special case of the type considered in the next preceding section, *i.e.*, one involving a "full and complete" disposition of the corpus. However, it has been frequently considered as a separate material factor and is so stated in the summary of the law made in the *Richardson* case.[39] The stated theory of the case is that the reservation of this limited control over the corpus evidences an intention not to keep any other control and raises an inference that the conveyor really means the provision for his heirs to create a class gift to them. As stated in *Matter of Burchell*:[40]

> The fact that the trust agreement reserved a power of appointment is evidence that the settlor believed she had created an interest in the property on the part of others and reserved the power in order to defeat that interest or to postpone until a later date the naming of specific takers.[41]

This factor alone —*i.e.*, the reservation of a testamentary power of appointment over the principal — seems to have been the support for the finding of a remainder in the *Halsted*,[42] *Engel*[43] and *Burchell*[44] cases, and along with other factors, for the finding of a remainder in the *Whittemore*[45] and *Richardson*[46] cases. However in the *Miller*,[47] *Armstrong*,[48] and *Berlenbach*[49] cases the factor was present but was not

[39] See note 24 *supra*.
[40] See note 25 *supra*.
[41] Matter of Burchell, 299 N.Y. 351, 360, 87 N.E.2d 293, 297 (1949).
It may be noticed that the court did not restrict the quoted statement to testamentary powers. However, that was the type of power involved in the *Burchell* case and in the cases cited therein. In addition in one of the cited cases there was an *inter vivos* power. In the *Richardson* case, a year earlier than the *Burchell* case, the court stressed that the settlor reserved a testamentary power *only* and concluded that had the settlor intended to create a reversion the reservation of the power would have been superfluous. By parity of reasoning had the settlor intended to create a reversion, the reservation of an *inter vivos* power would have been superfluous but the court said in the *Burchell* case that the reservation of such a power would have indicated that the settlor had retained a reversion and that it was the absence of an *inter vivos* power that was the material factor.
[42] Guaranty Trust Co. v. Halsted, 245 N.Y. 447, 157 N.E. 739 (1927).
[43] See note 21 *supra*.
[44] See note 25 *supra*.
[45] See note 16 *supra*.
[46] See note 24 *supra*.
[47] See note 20 *supra*.
[48] Guaranty Trust Co. v. Armstrong, 43 N.Y.S. 2d 897 (1943), *aff'd*, 268 App. Div. 763, 49 N.Y.S.2d 286 (1944), *aff'd without opinion*, 294 N.Y. 666, 60 N.E.2d 757 (1945).
[49] Berlenbach v. Chemical Bank & Trust Co., 235 App. Div. 170 256 N.Y. Supp. 563 (1932), *aff'd*, 260 N.Y. 539, 184 N.E. 83 (1932).

thought sufficient to indicate an intention to create a remainder. Just why is not clear. Admittedly in *Matter of Burchell* the court stated that these cases were explainable on the ground that there was in them a provision for passing of principal to the settlor upon some contingency or a provision for some inter vivos control over the corpus.[50] Thus, it was pointed out that in the *Miller* case there was a trust for an annuity to be paid to the settlor out of income and principal and when the principal fell below $5,000 the trust was to end by payment of the remaining sum to the settlor. But why should this fact negate the inference of a remainder drawn from the reservation of a testamentary power, assuming for the moment that the inference is otherwise justified? In the *Berlenbach* case the trust was to end after twenty years with payment of the corpus to the settlor; thus the case was similar to the *Miller* case. However, no such provision or retained control other than the testamentary power is found in the reported facts of the *Armstrong* case.

The assumption of the cases which have relied upon the retention of a testamentary power of appointment in finding that a remainder was created is apparently that, while a settlor is presumed not to intend to make a gift by stating an end limitation to his heirs, he does evidence an intention to make such a gift where he reserves a testamentary power to make a gift of the principal. If so little is required to overcome the basic assumption, its validity seems subject to challenge. This thought is nicely expressed by two Illinois attorneys who are specialists in conveyancing. In considering the arguments concerning the inferences to be drawn from the reservation of a testamentary power, they said, "whether this reasoning [that it evidences an intention to create a remainder] is sound upon an interpretive basis or whether it is a subterfuge for destroying a rule that now has nothing to recommend it may be open to question."[51]

The Absence of a Provision for the Return of the Principal to the Settlor During His Lifetime. The absence of any provision for the return of the principal to the settlor in his lifetime was listed in the *Richardson* case as one of the factors material to a determination of a settlor's intent in stating an end limitation to his heirs. The idea seems to be that a provision for the return of the principal during his lifetime indicates that the settlor retains so many property interests that he cannot have intended to invest his heirs with any property rights. Reserved powers of control over the corpus, such as an inter vivos power of appointment, would fall within this line of reasoning.

Among the New York cases in which a provision for return of the principal to the settlor during his lifetime appeared are *City Bank Farmers Trust Co.* v. *Miller*[52] and *Berlenbach* v. *Chemical Bank & Trust Co.*[53] In both cases the court held that a reversion was retained by the settlor. In the *Miller* case the court did not discuss the reasons for its conclusion that no remainder was intended but said merely that the settlor had in mind a trust for her own benefit and in mentioning testamentary appointees and heirs was really doing no more than to

[50] Matter of Burchell, 299 N.Y. 351, 360, 87 N.E.2d 293, 297 (1949). This factor is considered in the following section.
[51] CAREY AND SCHUYLER, ILLINOIS LAW OF FUTURE INTERESTS § 124 (1941).
[52] See note 20 *supra*.
[53] 235 App. Div. 170, 256 N.Y. Supp. 563 (1932), *aff'd*, 260 N.Y. 539, 184 N.E. 83 (1932).

state the normal consequences assigned by law to such a trust. In the *Berlenbach* case the Court of Appeals merely affirmed without opinion the appellate division judgment. The appellate division opinion referred to the provision for a return of the principal if the trust ended by the lapse of twenty years in the lifetime of the settlor and also to the provision limiting the trustees' power to invest and reinvest and continued:

> If the grantor had intended to strip himself of all rights and to create a remainder in his next of kin which could be divested only by the exercise of the power of appointment, he would have omitted some of those provisions and inserted such as would unmistakably have so stated. His intent was that the property was to return to the donor if he live long enough, and if not, that it should then go to his legatees or next of kin, and that in either event it would go as his property. The next of kin would take by descent and not by purchase. No remainder was created. [54]

The Court of Appeals in its review of the doctrine in the leading case of *Richardson* v. *Richardson* [55] explained the *Miller* and *Berlenbach* cases on the ground that in both there was a provision for return of the principal to the settlor during his lifetime. It repeated this explanation in *Matter of Burchell* one year later. However, in both these recent cases the court also cited with approval the leading cases of *Whittemore* v. *Equitable Trust Co.*[56] and *Engel* v. *Guaranty Trust Co.*,[57] in both of which provision was made for return of principal to the settlor under some circumstances and in both of which remainders were found. In the *Engel* case the court considered this factor in a different way than stated in the summaries of the *Richardson* and *Burchell* cases. It said:

> Significant, too, is the omission of any provision for return of the trust principal to this grantor beyond the $15,000 which he expressly retained the right to draw down. In this last aspect (though the total value of the *corpus* does not appear), the purpose of the grantor fully to divest himself of any other reversionary interest in this trust is clearer to a degree than was the like intent of the settlors which the court found in the *Whittemore* case — for there the settlors were to have the principal again on their survival of both life beneficiaries.[58]

It would seem that about the only fair conclusion is that under some circumstances this factor may have some weight.

"Heirs" To Be Determined at Some Time Other Than Conveyor's Death. While it was not listed in its summary enumerating factors to be given weight in determining whether a remainder was intended, the court in the *Richardson* case noticed this factor as one of significance. But its view is open to question. When a conveyor uses the phrase "my heirs" to designate persons to take property at some future time he may or may not be thinking in terms of a present gift to them. Whether the time for satisfaction of the classification is when he dies or at some later time seems of speculative value in determining his intent to make

[54] *Id.* at 173, 256 N.Y. Supp. at 566.
[55] See note 24 *supra.*
[56] See note 16 *supra.*
[57] See note 21 *supra.*
[58] Engel v. Guaranty Trust Co., 280 N.Y. 43, 47, 19 N.E.2d 673, 674 (1939).

or not to make such a gift. Of course, when a remainder is limited to a group described in terms of "heirs" of a conveyor but other words used show that the group referred to is not composed of "heirs" the doctrine has no application at all. Thus, if the remainder is limited to the settlor's "heirs now living in Chicago" and he has children or relatives living there, the gift is to such "children" or "nephews and nieces" or others as the case may be. But where the remainder is limited to "heirs" to be determined at a certain date, such as on the termination of the trust rather than at the normal time to determine a settlor's heirs, namely at the moment of his death, it is by no means clear that the case does not involve a reversion rather than a remainder when the doctrine of worthier title is applied as a rule of construction. However, the American Law Institute would not approve the inclusion within the ambit of the doctrine — *i.e.*, as a reversion — a case in which there is an end limitation to heirs of a grantor to be determined at some moment other than at his death.[59] The same opinion has been voiced by some writers who also consider the inclusion of this type case within the doctrine as plain error.[60]

And in *Schoellkopf* v. *Marine Trust Co.*,[61] the court found that the fact that the persons to take were described as the settlor's "heirs" as of a time other than his death indicated an intention to make them beneficiaries. Yet in the later case of *Matter of Scholtz* v. *Central Hanover Bk. & Tr. Co.*,[62] the court held that a reversion was created even though such a description of heirs was used, holding that this factor was not the "clearly expressed" intention required to take the case out of the rule. When these conflicting opinions were brought to the attention of the court in *Richardson* v. *Richardson*,[63] it did not question either decision but merely pointed out that in the *Scholtz* case the court thought this not a sufficient indication of intention. Its review of the cases leaves the impression that this factor is not entitled to the weight so frequently voiced for it.

Conclusion—Summary of New York Experience

The doctrine of worthier title in inter vivos cases in New York has followed a course which might well be characterized as one from bad to worse. Faced with an antiquated and unwanted rule of law courts often have started the process of ridding the law of the rule by diluting it into a rule of construction and noticing in its support that now it does not operate to defeat intention. As a rule of construction it can then be given such weight as it merits and can be allowed to wither and die if this is desirable. This was the course apparently adopted with respect to the doctrine of worthier title by the New York Court of Appeals in *Doctor* v. *Hughes*. As a rule of construction it had to have some support in the assumed intention of the grantor. This Judge Cardozo said it had. He also said that this assumption would yield to clearly expressed intention. His language was seized upon as indicating that the rule was one of a very strong presumption that a reversion is intended by a limitation to heirs. Ten years later with Judge Cardozo and another great

[59] 3 RESTATEMENT, PROPERTY § 314, comment *c* (1940).
[60] SIMES AND SMITH, *op. cit. supra* note 8, § 1608; Morris, *The Inter Vivos Branch of the Worthier Title Doctrine*, 2 OKLA. L. REV. 133 (1949).
[61] See note 18 *supra*.
[62] See note 23 *supra*.
[63] See note 24 *supra*.

jurist, Judge Pound, still on the court the Court of Appeals unanimously found in the *Whittemore* case [64] that a gift to the heirs of a settlor was a remainder. Apparently all the judges approved the theory of the opinion written by Judge Crane. No longer did the doctrine embody a strong presumption of reversion; rather it raised only an inference sufficient to make out a prima facie case in the absence of other evidence. Substantially an end limitation to the heirs of a grantor or settlor was to be construed as were other class gifts.

But even after the *Whittemore* decision the doctrine did not wither and die in New York. Neither did it live on either in its original form as stated in *Doctor* v. *Hughes* or in its more diluted form as voiced in the *Whittemore* case. Rather, it lived on as a rule of confusion and as a breeder of litigation. What else could have been expected when the court repeatedly stated the rule as in *Doctor* v. *Hughes* and at the same time found in case after case a remainder intended on little or speculative evidence as to the settlor's intention?

Ten years after the *Whittemore* case the Court of Appeals attempted to end the confusion by pointing out the change in the theory of the rule since *Doctor* v. *Hughes*. In the *Engel* case it said:

> It is true that our opinion in the *Whittemore* case assumed that transfers of personal property are embraced by the ancient rule "that a reservation to the heirs of the grantor is equivalent to the reservation of a reversion to the grantor himself." (*Doctor* v. *Hughes*, 225 N.Y. 305, 310.) But this rule (as the *Doctor* and *Whittemore* cases show) is with us no more than a *prima facie* precept of construction which may serve to point the intents of the author, when the interpretation of a writing like this trust agreement is not otherwise plain. Inasmuch as for us that rule has now no other effect, it must give place to a sufficient expression by a grantor of his purpose to make a gift of a remainder to those who will be his distributees.[65]

But this attempt at clarification was not sufficient to end the confusion or to reduce litigation. This is evident from the review of the law in 1948 in *Richardson* v. *Richardson*. The frequency of the litigation and of the finding of a remainder indicate that the foundation for the rule as one of construction — that a grantor presumptively does not intend to make a gift by stating an end limitation to his heirs — was none too substantial.

The Court of Appeals, finally finding that despite its efforts the doctrine as one of construction continued to produce unnecessary litigation and doubtfully aided in effectuating the intention of grantors, took another step to rid the state of the entire doctrine — it openly questioned the doctrine and invited legislative action. In *Matter of Burchell* the court, after noticing the ancient rule of law and its survival of the period of feudalism and the reasons for the ancient rule, stated it has lived on as one of construction in many states. It continued:

> While we have not yet adopted a rule, either by statute or judicial construction, under which language limiting an interest to

[64] Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929).
[65] Engel v. Guaranty Trust Co., 280 N.Y. 43, 47, 19 N.E.2d 673, 675 (1939).

heirs is unequivocally given its full effect, the presumption which exists from the use of the common-law doctrine as a rule of construction has lost much of its force since *Doctor* v. *Hughes* (supra). Evidence of intent need not be overwhelming in order to allow the remainder to stand. Whether the rule should be abrogated completely is a matter for the Legislature.[66]

The dissenting judge also indicated the doctrine had reached a point calling for legislation. He said:

> Reversion or remainder, however, the volume of litigation on the subject, the diversity of opinion, not to mention the difficulty, frequently, of decision, point to the advisability, if not the urgency, of clarifying legislation.[67]

At that point the New York Law Revision Commission undertook to make a study of the doctrine.[68] After a review of the cases the Commission concluded that an attempt to codify the rule would be no solution of the problem. It noted that most of the New York cases in which the doctrine was involved were cases in which the settlor attempted to revoke a trust but concluded that a solution by the adoption of a statute modeled upon California Civil Code Section 2280, which makes all trusts revocable unless the settlor otherwise expressly provides, would not be feasible because it would involve a departure from the well-settled New York legislative policy against revocation of trusts unless the settlor had reserved such power. The Commission also considered recommending legislative abrogation of the rule or legislative re-enactment of the rule as one of law but concluded that both of these courses were impolitic. A compromise was suggested which would leave the rule as developed in full effect except in trust revocation cases where the rule would be declared of no importance to a decision. In execution of this recommendation the sections relating to revocation of trusts were amended in 1951.[69] Under this legislation an exception is engrafted on the New York rule that a trust is not revocable without the consent of beneficiaries unless the settlor reserves a power of revocation.[70] The exception is that consent of a class composed of "heirs of the settlor" is not required. The effect of this legislation is that whether the end limitation is construed as a remainder or no more than the reservation of a reversion, the trust can be revoked. The statute leaves substantially in effect the doctrine of worthier title in inter vivos cases — a rule of construction of uncertain content applicable to all unrevoked trusts and to all other grants containing end limitations to the conveyor's heirs. It must still be considered in cases involving creditors' rights, taxation, subsequent conveyances of the grantor or attempted testamentary dispositions, and in cases involving disposition of trust assets. No wonder the acceptance of this legislation has not been enthusiastic.[71]

[66] Matter of Burchell, 299 N.Y. 351, 360, 87 N.E.2d 293, 297 (1949).
[67] *Id.* at 362, 87 N.E.2d at 298.
[68] *Revocation of Intervivos Trusts Which Contain Limitations to Heirs or Next of Kin of Creator*, NEW YORK LAW REVISION COMM'N REP., REC. & STUDIES 91, 111 (1951).
[69] N.Y. Laws 1951, c. 180, p. 729.
[70] In general see Note, 26 ST. JOHN'S L. REV. 201 (1951).
[71] Niles, *Trusts and Administration*, ANNUAL SURVEY OF AMERICAN LAW 570, 575 (1952); Sparks, *Future Interests*, ANNUAL SURVEY OF AMERICAN LAW 644, 648 (1951; Scott, *Revoking a Trust: Recent Legislative Simplification*, 65 HARV. L. REV. 617 (1952); Note, 26 N.Y.U. L. REV. 678 (1951); Note, 26 ST. JOHN'S L. REV. 201 (1951).

THE DOCTRINE IN OTHER STATES

The bulk of American cases on the inter vivos branch of the doctrine of worthier title have been decided in the last thirty years.[72] One reason for this increase in litigation undoubtedly has been the change of the doctrine from a rule of law into a rule of construction. Another would seem to be the great increase in the number of inter vivos trusts. A state by state review of these cases would not be profitable.[73] In most states the cases are few in number and in general merely restate the rule and follow the same general approach to the problem of construction as have the courts of New York. A few of the recent cases have continued to follow earlier precedents in holding it to be a rule of law.[74] The half dozen cases in Illinois did not make clear the character of the rule [75] and legislation [76] abolished the rule there about the time it seemed evident that it was to be considered one of construction. In two states legislation was enacted purporting to abolish the doctrine before there was any case law reported.[77]

Case and text treatments of the doctrine in American states have in general accepted the application of the doctrine as a rule of construction. In this adoption as part of the common law no new or even strongly stated old supporting reasons have been found; rather the Cardozo statement that the rule finds support in the assumed intention of the grantor is repeated without analysis or enthusiasm. There are many statements that the rule results in recognition of an assumed intention, but no statements proving that this is true or even strongly indicating that the court is thoroughly convinced of the validity of the foundation. Typical is the opinion in *McKenna* v. *Seattle-1st Nat. Bank*,[78] where the Supreme Court of Washington quoted from *Doctor* v. *Hughes* and then continued: "This assumption does not seem unwarranted." Admittedly the court adopted the rule and applied it and said the rule as one of construction had "on the whole, proved a useful device to the courts in ascertaining the probable intent of the grantor where his actual intent is not clear." Less could not be expected of the court. But in keeping with its unenthusiastic comment on the foundation of the rule its reference to *Fidelity Union Trust Co.* v. *Parfner* [79] in connection with the probable intent of settlors might be noticed. There, after quoting a comment from the Restatement, the New Jersey court said: "The present case is on the borderline and even slight indication of intention may influence the result . . . and, after some hesitation, I have come to the conclusion that she had no other beneficiaries in mind."

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[72] See note 7 *supra*.
[73] General considerations of the doctrine include: SIMES AND SMITH, *op. cit. supra* note 8, §§ 1601-13; Morris, *supra* note 60.
[74] See Wilson v. Pharris, 203 Ark. 614, 158 S.W.2d 274 (1941); Robinson v. Blankenship, 116 Tenn. 394, 92 S.W. 854 (1906).
[75] See CAREY AND SCHUYLER, *op. cit. supra* note 51, § 123; Kelly, *Real Property Developments*, 43 ILL. B.J. 59 (1954).
[76] Ill. Laws 1955, p. 498.
[77] Minnesota: Minn. Laws 1939, c. 90, p. 143; Shaw v. Arnett, 226 Minn. 425, 33 N.W.2d 609 (1948); *Report of the Committee on Real Estate Law and Practice*, 1938 Proceedings of the Minnesota State Bar Association 182; see Comment, 22 MINN. L. REV. 134 (1937). Nebraska: Neb. Laws 1941, c. 153, §§ 14, 15, p. 597; Foster, *Some Observations on the Uniform Property Act*, 20 NEB. L. REV. 333 (1941); see Ginsberg, *Uniform Property Act—What Is Nebraska To Do About It?*, 18 NEB. L. BULL. 132 (1939) (Proceedings of the State Bar Association).
[78] 35 Wash.2d 662, 214 P.2d 664 (1950).
[79] 135 N.J. Eq. 133, 37 A.2d 675 (1944).

The doctrine has been considered in many books and articles and in innumerable notes and comments. A few of these can be said to support the doctrine;[80] more to accept the doctrine as possible of support;[81] and some to challenge it.[82] There is general agreement that the doctrine is not one easy of administration, that it breeds litigation and that the decisions in many cases are open to question. This apparently was the conclusion that led the New York Court of Appeals in the *Burchell* case to invite legislation.[83]

The more the cases are analyzed, the more questionable the doctrine becomes and the more one is driven to characterize as doubtful the assumption that a conveyor, usually speaking through a competent attorney, does not mean what the words used normally mean unless, in addition to the limitation to his heirs, he says or intimates that he means what he has said. The finding of assumed intention may have been reasonable in such cases as *Doctor* v. *Hughes* and have supported the effort to rid the law of an outmoded rule of law by molding it into a rule of construction which could wither and die. Such hopes clearly have not been realized and the foundation cannot be demonstrated as reasonable in many of the modern cases.[84]

THE DOCTRINE IN CALIFORNIA[85]

In considering the operation of the doctrine in California four cases must be noticed. In the first two of the four the doctrine was not discussed; indeed it appears that it was not raised. The cases were argued on the meaning of the end limitation and whether the rule in Shelley's case and the statute abolishing that rule in California were applicable.

1. *Gray* v. *Union Trust Co.*[86] The settlor established an irrevocable trust to last for her lifetime. The trustee was to pay the net proceeds to the settlor and on termination of the trust distribute the assets as the settlor directed in her will and in default of such appointment "said property shall go to and vest in her heirs at law, according to the laws of succession of the State of California as such laws now exist." Later

[80] Morris, *supra* note 60; Reno, *The Doctrine of Worthier Title as Applied in Maryland*, 4 MD. L. REV. 50 (1939); Warren, *A Remainder to the Grantor's Heirs*, 22 TEXAS L. REV. 22 (1943).

[81] 2 SCOTT, TRUSTS § 127.1 (2d ed. 1956); SIMES AND SMITH, *op. cit. supra* note 8, §§ 1601-13; 3 RESTATEMENT, PROPERTY § 314 (1940); 1 RESTATEMENT, TRUSTS § 127 (1935); Oler, *"Remainders" to Conveyors' Heirs or Next of Kin*, 44 DICK. L. REV. 247 (1940).

[82] CAREY AND SCHUYLER, *op. cit. supra* note 51, § 123; 1 NOSSAMAN, TRUST ADMINISTRATION AND TAXATION § 21.11 (2d ed. 1956); 3 WALSH, COMMENTARIES ON REAL PROPERTY, § 289 (1947); Nossaman, *Gifts to Heirs—Remainder or Reversion*, 24 CAL. B.J. 59 (1949); Schuyler, *Future Interests in Illinois: Current Maturities and Some Futures*, 50 NW. U. L. REV. 457 (1955); Simes, *Fifty Years of Future Interests*, 50 HARV. L. REV. 749 (1937).

[83] "Whether the rule should be abrogated completely is a matter for the Legislature. . . .

"In analyzing an instrument and attempting to explore the almost ephemeral qualities which go to prove the necessary intent, many single factors may be considered. Some considered significant in one case may be deemed minimal in another, since their effect may be counteracted by the presence of other factors. It is impossible to set up absolute criteria to serve as a measuring standard for all cases." Matter of Burchell, 299 N.Y. 351, 360, 361, 87 N.E.2d 293, 297 (1949).

[84] See CAREY AND SCHUYLER, *op. cit. supra* note 51, § 124; 1 NOSSAMAN, TRUST ADMINISTRATION AND TAXATION § 21.11 (2d ed. 1956).

[85] For discussions of the California cases, see Fraser, *Future Interests*, 2 SURVEY OF CALIFORNIA LAW 211 (1949-50); Turrentine, *Future Interests*, 1 SURVEY OF CALIFORNIA LAW 196 (1948-49); Ferrier, *Gifts to 'Heirs' in California*, 26 CALIF. L. REV. 413, 430 (1938); Morris, *Bixby v. California Trust Co.—An Answer to Mr. Nossaman*, 24 CAL. B.J. 324 (1949); Nossaman, *Gifts to Heirs—Remainder or Reversion*, 24 CAL. B.J. 59, 329 (1949); Comments, 37 CALIF. L. REV. 283 (1949); 1 HASTINGS L.J. 79 (1949); 22 So. CALIF. L. REV. 497 (1949); 1 STAN. L. REV. 774 (1949).

[86] 171 Cal. 637, 154 Pac. 306 (1915).

the settlor sought to revoke on the ground that she was the sole beneficiary. In denying that settlor was the sole beneficiary the court said:

> The laws of succession as they existed at the time of the creation of the trust would fix the class entitled to take, and that class would take not as heirs of Helen Gray by virtue of her intestacy, but as a class designated in the trust instrument in the event that Helen Gray failed to exercise her power to nominate others. In other words, by a change in the laws of succession conceivably it could happen that those who would be entitled to take under the trust instrument, in the event of the death intestate of Helen Gray, would no one of them be an heir at law of Helen Gray at the time of her death. And finally upon this proposition, it should be pointed out that upon the death of Helen Gray intestate it would not be the court in probate which would determine to whom the trust property should go. The class entitled to take would be determined by a court of equity in an action brought by the trustee to determine that precise question. The trustee, therefore, owes precisely the same duty to protect the rights of this indeterminable class of beneficiaries as it does to protect the right of the named beneficiary, Helen D. Gray.[87]
>
> * * *
>
> We have so far refrained from using the word "remainder" or "remaindermen" in connection with this trust, for the creation by the trust of such remainders and remaindermen is the very heart of the controversy between these litigants. By appellant it is contended that such remainders are created and with them estates in the remaindermen, which it is beyond the just exercise of the powers of equity to destroy. Upon the other hand, it is contended that no such remainders are created; that the whole equitable estate is in the trustor, plaintiff herein, and that she is entitled to address herself to equity for the relief here obtained—the relief which will terminate a dry and naked trust, establishing the legal estate in the person who possesses the full equitable estate.[88]
>
> * * *
>
> The importance of this consideration arises from the fact that if remainders and remaindermen were created, admittedly the latter were not before the court and its decree must fall. And thus by this different method of approach we are brought to the vital consideration in the case: Were such remainders created?
>
> Our Civil Code (section 769) declares that "When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name." We have in this trust apt language to create such a future estate, dependent for its enjoyment upon the termination of a precedent life estate. We have therefore apt language to create a remainder, and it is quite permissible that it should be created to commence at a future day and be limited upon a life estate. (Civ. Code sec. 773.)[89]
>
> * * *

[87] *Id.* at 640, 154 Pac. at 308.
[88] *Id.* at 641, 154 Pac. at 308.
[89] *Ibid.*

> Respondent places reliance upon certain cases as supporting the decree of the court terminating this trust. Those cases, however, deal with a dry, naked trust or with a trust where every party in interest is before the court joining in the application, or rest expressly or by necessary implication upon the rule in Shelley's case. But this ancient rule was of feudal origin and policy, and did deliberate and designed violence to the deed of the grantor or the will of the testator, to the end that the laws of inheritance should prevail over the wish of the grantor or testator. It arbitrarily declared that apt words which indisputably created a remainder in the heirs should be held as a "limitation." In other words, as a definition of the estate which the grantee or devisee took, and that that estate was the fee simple, the remaindermen being thus cut off and taking nothing. So obnoxious was this rule to justice that it was always subjected to rigidly strict construction, till finally in many states, as in this state, it was absolutely repealed. (Civ. Code, sec. 779; *Barnett* v. *Barnett*, 104 Cal. 298, [37 Pac. 1049].) The effect of the repeal of this arbitrary rule is to restore to courts of equity their right to construe this language, in whatever instrument it may be found, in accordance with its plain import and intent.[90]

Finally noticing the application of Section 779 of the Civil Code in *Barnett* v. *Barnett*, a case involving a remainder to the heirs of a grantee life tenant, the court said:

> The conclusiveness of this determination, its immediate and direct bearing upon the language of this trust deed, are so plain as to relieve the question from the need of further discussion.[91]

2. *Bixby* v. *Hotchkis*.[92] An irrevocable trust was set up to last for twenty years. On termination the trustees were to pay the assets to the settlor if living and if not then to his heirs at law "in accordance with the laws of succession in the State of California then in effect." The court, citing a comment in the Restatement of Trusts which contained a cross-reference to the section where the doctrine of worthier title was considered, followed the *Gray* case. The matter is stated by way of conclusion:

> Moreover, contrary to the assertion by plaintiff upon which he bases his claim of right to revoke the trust, plaintiff is not the sole beneficiary, for it is provided in the instrument that in the event of plaintiff's death prior to the expiration of the twenty year period the estate at the end of the period is to pass to plaintiff's heirs at law. One who creates a voluntary trust is not the sole beneficiary if he manifests an intention to create a contingent interest in others, such as his heirs at law. (Restatement of the Law of Trusts, Comment b, p. 1039; *Gray* v. *Union Trust Co., supra.*) [93]

3. *Bixby* v. *California Trust Co.*[94] An irrevocable trust was set up for the benefit of the settlor for life and "upon the death of said trustor and beneficiary . . . all of the residue and remainder of said Trust

[90] *Id.* at 643, 154 Pac. at 309.
[91] *Id.* at 649, 154 Pac. at 311.
[92] 58 Cal. App.2d 445, 136 P.2d 597 (1943).
[93] *Id.* at 451, 136 P.2d at 600.
[94] 190 P.2d 321 (1948), rev'd., 33 Cal.2d 495, 202 P.2d 1018 (1949).

Estate shall be . . . distributed and delivered to the heirs at law [of the trustor] in accordance with the laws of succession of the State of California then in effect."[95] Appellant in his brief argued that this language called for a determination of "heirs" at the time of the settlor's death by the law at that time, thus distinguishing the *Gray* and the *Hotchkis* cases. The court's attention was directed to the doctrine of worthier title as stated in the Restatements of Trusts and Property, to the New York cases, to the New York conclusion that neither the rule in Shelley's case nor the statute abolishing such rule had any effect on this type case and to selected cases from other states. The District Court of Appeal held that a trust for the settlor for life and then to the settlor's heirs at law fell within the rule in Shelley's case and Section 779 of the Civil Code abolishing that rule and that under the *Gray* case the settlor was not the sole beneficiary. After considering the doctrine of worthier title as stated in the Restatements, the New York cases and a few others and leading texts, the District Court of Appeal said:

> It appears to be true, as appellant says, that the rule of the Restatement, and the overwhelming weight of authority, is that by the language used in the instrument here, the heirs take by descent from the trustor and not by purchase under the terms of the trust instrument; that the instrument did not create a remainder in the heirs but was a reservation of a reversion in the trustor, and that appellant is the sole beneficiary . . . .
>
> However, the Gray case definitely held that by section 779 of the Civil Code, the word "heirs" is changed from a word of limitation to one of purchase and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate, and that the heirs take the property not by descent but by reason of the remainder which was created for them by the execution of the declaration of the trust. Consequently, we are constrained to agree with Nossaman, Scott, Simes, and other authorities, that the effect of the decision in the Gray case is that the rule against "a remainder to the grantor's heirs" is not applicable in California; that Civil Code section 779 is effective to create a remainder in the grantor's heirs when it is preceded by a valid life estate. We are unable to concur in appellant's contention that this case is controlled by the authorities upon which he relies.[96]

The Supreme Court reversed, distinguishing the *Gray* and *Hotchkis* cases and stating that the inter vivos branch of the doctrine of worthier title as a rule of construction is part of California common law:

> When the trust instrument specifies that the income shall be paid to the trustor for life and provides that on his death the trust property shall be distributed to his heirs at law, it is generally held that no remainder interests are created and that the trustor is the sole beneficiary and retains a reversionary interest in the trust corpus. (*Doctor* v. *Hughes*, etc.)[97]

[95] *Id.* 33 Cal.2d at 497, 202 P.2d at 1018.
[96] *Id.* 190 P.2d at 328.
[97] *Id.* 33 Cal.2d at 497, 202 P.2d at 1019.

> The rule established by the above decisions has been justified upon the theory that such a result carries out the usual intention of the trustor, and it applies unless a contrary intent is manifested.... It is said that where a person creates a life estate in himself with a gift over to his heirs he ordinarily intends the same thing as if he had given the property to his estate; that he does not intend to make a gift to any particular person but indicates only that upon his death the residue of the trust property shall be distributed according to the general laws governing succession; and that he does not intend to create in any persons an interest which would prevent him from exercising control over the beneficial interest. (See Rest., Property, § 314, com. a; 1 Scott on Trusts [1939] p. 657.) Moreover, this rule of construction is in accord with the general policy in favor of the free alienability of property, since its operation tends to make property more readily transferable. (See Rest., Property, § 314, com. a; 1 Simes, The Law of Future Interests [1936] p. 265.) The same result was reached in the early common law as an outgrowth of the doctrine of "worthier title," which, for reasons based on feudal law and having no counterpart in the modern law of property, preferred passage of title to heirs by descent rather than by purchase. (See 125 A.L.R. 553; 1 Scott on Trusts [1939] p. 657; 1 Simes, The Law of Future Interests [1936] § 147.)
>
> In the present case there is nothing which shows an intent on the part of plaintiff to create remainder interests in his heirs at law or to justify a departure from the usual rule of construction.[98]

4. *Nelson* v. *California Trust Co.*[99] This case involved the same trust as in *Bixby* v. *California Trust Co.* The District Court of Appeal without citation of authority concluded in a creditor's suit that the settlor was the sole beneficiary. It said:

> It is evident from the foregoing that the trust in question was created for Bixby's sole benefit; the clause referring to the "residue" is merely incidental. Indeed, if such provision were eliminated, the property of the estate upon Bixby's death would be distributed "to the heirs at law" in the same manner. In other words the clause simply means that upon Bixby's death the trust property shall be distributed according to law. And until Bixby dies there are no heirs, hence, until then Bixby is the only individual who, under the terms of the trust agreement, can lawfully claim any interest in the estate. Who the heirs may be is purely problematical; until the testator dies their identity is unknown. Indeed, it is possible that upon the death of the testator there may be no "contingent remaindermen." Hence appellant, to adopt appellant's language in part, is contesting "this action only for the purpose of protecting the contingent remaindermen," to-wit, an uncertainty.[100]

[98] *Id.* 33 Cal.2d at 498, 202 P.2d at 1019.
[99] 198 P.2d 66 (1948), aff'd, 33 Cal.2d 501, 202 P.2d 1021 (1949).
[100] *Id.* 198 P.2d at 68.

The Supreme Court affirmed the opinion of *Bixby* v. *California Trust Co.*[101]

The conclusion stated in the *Gray* case that cases of income trusts for the life of the settlor with a remainder to his heirs fell within the rule in Shelley's case and the coverage of Section 779 of the Civil Code, seems no longer acceptable to the court. This was the position taken by Judge Cardozo in *Doctor* v. *Hughes,*[102] and by most writers and accepted by most courts.[103] That such trusts could be found to fall within the rule in Shelley's case where the assets were real property has respectable support.[104] But little complaint will be voiced over the change.

The *Bixby* case clearly adopts the inter vivos branch of the doctrine of worthier title as a rule of construction. What weight will be given the presumption that a reversion is reserved and what sort of evidence will be sufficient to show a contrary intention, are as yet unstated. The foundation stated is the assumed intention of a grantor or settlor not to make a gift to a class when he states an end limitation to his heirs. However, one of the judges[105] would like to see the inference held strong enough to include limitations to special classes, such as heirs determined by the law at the time of the conveyance, such as was involved in the *Gray* case, or determined by the law at the moment of distribution which was other than the moment of the settlor's death, such as was involved in the *Hotchkis* case. The thought expressed was that the general policy against "tying up" of property would justify this extension. This line of argument, if carried to a logical conclusion, would support the adoption of the doctrine as a rule of law and an extension of it to new cases. Really there is no policy against the creation of class gifts to unascertained persons provided, of course, that the gifts do not violate the rules against the suspension of the absolute power of alienation, the rule against perpetuities or other crystallized rules. Looking at the *Gray* and the *Hotchkis* cases from the point of view of presumed intention rather than from that of policy against "tying up" of property, the conclusion that the three cases cannot be "realistically distinguished" may be supported. It is debatable that a settlor has a different intention when he says "to my heirs under the laws now in force" than when he says "to my heirs under the laws then in force."

The opinion of the Supreme Court in the *Bixby* case is open to criticism. It is doubtful that the doctrine of worthier title as a rule of construction is part of the "common law of England" adopted as the law of this State by the Statutes of 1850.[106] If reliance is to be placed on English precedents it would be more logical to hold it a rule of law absolutely prohibiting a settlor from creating a remainder in his heirs. Yet, it is probable that it will be continued in California as a rule of construction unless legislation intervenes. The course of the doctrine in American states supports this conclusion. This is true even though the alternative of the overruling of the *Bixby* case and the

[101] 33 Cal.2d 495, 202 P.2d 1018 (1949).
[102] 225 N.Y. 305, 122 N.E. 221 (1919).
[103] See SIMES AND SMITH, *op. cit. supra* note 8, § 1607; Morris, *supra* note 60, at 167.
[104] See 3 RESTATEMENT, PROPERTY § 314, comment *g* (1940).
[105] See concurring opinion of Judge Carter, Bixby v. California Trust Co., 33 Cal.2d 495, 499, 202 P.2d 1018, 1020 (1949).
[106] Cal. Stat. 1850, c. 95, p. 219, now CAL. CIV. CODE § 22.2.

holding that there are no special rules of construction in the type case involved has much to support it. This would be consistent with Civil Code sections that provide that grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided;[107] that a grant is to be interpreted in favor of the grantee;[108] that the language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity;[109] that the whole of a contract is to be taken together so as to give effect to every part;[110] that words are to be understood in their ordinary sense unless used as technical words when they are to be given a technical meaning;[111] and that uncertainties are to be resolved against the promisor or grantor.[112]

LEGISLATION IN OTHER JURISDICTIONS

The program of the American Law Institute in the Restatement of the Law of Property brought into sharp relief some of the old rules of law which no longer were supportable. One such rule was the doctrine of worthier title in both wills and deed cases. The Institute in cooperation with the Commissioners on Uniform State Laws then undertook to draft a Uniform Property Act eliminating among others this antiquated rule, publishing the first tentative draft in 1937 and the Proposed Final Draft in 1938.[113] It was about this time and probably as a result of these programs that legislation dealing with the doctrine of worthier title started to appear in American states. That legislation is noticed in chronological order below.

Minnesota

In 1937 a bill prepared by Professors Fraser and Read of the University of Minnesota was introduced in the State of Minnesota. It was referred to the State Bar for consideration, again introduced in 1939 and passed by the legislature.[114] The bill enacted the following statute:

> When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs or heirs of the body of such tenant for life shall be entitled to take as purchasers, by virtue of the remainder so limited to them. No conveyance, transfer, devise, or bequest of an interest, legal or equitable, in real or personal property, shall fail to take effect by purchase because limited to a person or persons, howsoever described, who would take the same interest by descent or distribution.[115]

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[107] CAL. CIV. CODE § 1066.
[108] *Id.* § 1069.
[109] *Id.* § 1638.
[110] *Id.* § 1641.
[111] *Id.* §§ 1644, 1645.
[112] *Id.* §§ 1069, 1654.
[113] See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 195, 258-68 (1938); UNIFORM PROPERTY ACT, 9B Unif. Laws Ann. §§ 14, 15, at 408 (1957).
[114] *Report of the Committee on Real Estate Law and Practice,* 1938 Proceedings of Minnesota State Bar Association 182.
[115] Minn. Laws 1939, c. 90, p. 143. The statute quoted was introduced by a paragraph which read as follows: "Section 1. Worthier title rule abolished.—That Section 8058 Mason's Minnesota Statutes of 1927 be and the same is hereby amended so as to read as follows:" The statute is now MINN. STAT. § 500.14(4) (1957).

Nebraska

In 1939 the Uniform Property Act was brought before the State Bar Association.[116] The Committee report on the doctrine of worthier title was:

> Section 14 abolishes the doctrine of worthier title and provides that when any property is limited to the heirs or next of kin of the conveyer such conveyees acquire the property by purchase and not by descent. Section 15 makes the same provision as to inter vivos conveyances. We have no statute or court decisions on this in Nebraska and it suffices to say that the old doctrine of worthier title has no place in the present day and age; and the enactment of these sections merely carries out the intent of the parties and does away with useless technicalities and hindrances upon marketability of titles.[117]

The Act as adopted by the legislature in 1941 contained the following provisions:

> Sec. 14. When any property is limited, mediately or immediately, in an otherwise effective testamentary conveyance, in form or in effect, to the heirs or next of kin of the conveyor, or to a person or persons who on the death of the conveyor are some or all of his heirs or next of kin, such conveyees acquire the property by purchase and not by descent.
>
> Sec. 15. When any property is limited, in an otherwise effective conveyance *inter vivos,* in form or in effect, to the heirs or next of kin of the conveyor, which conveyance creates one or more prior interests in favor of a person or persons in existence, such conveyance operates in favor of such heirs or next of kin by purchase and not by descent.[118]

New York

In response to the suggestions of the Court of Appeals that legislation might be desirable, the Law Revision Commission of the State of New York recommended legislation permitting revocation of trusts even though the settlor did not reserve a power of revocation, whether the end limitation created a remainder in the settlor's heirs or merely reserved a reversion to the settlor.[119] The legislature enacted the recommended legislation as follows:

> § 23. Revocation of trusts upon consent of all persons interested. Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.
>
> For the purpose of this section, a gift or limitation, contained in a trust created on or after September first, nineteen hundred fifty-one, in favor of a class of persons described only as heirs or next

[116] Ginsburg, *supra* note 77; Foster, *supra* note 77.
[117] Ginsburg, *supra* note 77, at 143.
[118] Neb. Laws 1941, c. 153, §§ 14, 15, p. 597; NEB. REV. STAT. §§ 76-114, 76-115 (1943).
[119] See p. D-23 *supra.*

of kin or distributees of the creator of the trust, or by other words of like import, does not create a beneficial interest in such persons.

§ 118. Revocation of trusts upon consent of all persons interested. Upon the written consent acknowledged or proved in the manner required to entitle conveyances of real property to be recorded of all the persons beneficially interested in a trust in real property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the whole or such part thereof by an instrument in writing acknowledged or proved in like manner and thereupon the estate of the trustee shall cease in the whole or such part thereof. If the conveyance or other instruments creating a trust in real property shall have been recorded in the office of the clerk (or register) of any county of this state, the instrument or instruments revoking such trust with the consents thereto as above provided shall be recorded in the same office of every county in which the conveyance or other instrument creating such trust shall have been recorded.

For the purposes of this section, a gift or limitation, contained in a trust created on or after September first, nineteen hundred fifty-one, in favor of a class of persons described only as heirs or next of kin or distributees of the creator of the trust, or by other words of like import, does not create a beneficial interest in such persons.[120]

Illinois

In Illinois where the doctrine of worthier title in inter vivos cases had been considered in perhaps ten cases over the first half of this century, doubt still existed as to whether it was a rule of law or a rule of construction.[121] Leading practitioners found nothing to support it in either case.[122] After consideration by the Committee on Real Property Law of the Chicago Bar Association, the Committee on Trust Law of the Chicago Bar Association and the Executive Committee of the Section on Real Estate Law of the Illinois State Bar Association,[123] the following legislation abolishing the doctrine was enacted:

> Where a deed, will or other instrument purports to create any present or future interest in real or personal property in the heirs of the maker of the instrument, the heirs shall take, by purchase and not by descent, the interest that the instrument purports to create. The doctrine of worthier title and the rule of the common law that a grantor cannot create a limitation in favor of his own heirs are abolished.[124]

England

In noticing legislation mention should be made of the English legislation. The doctrine as applied in both wills and deed cases was branded as no longer supportable with a recommendation of a statute abolishing it in the Fourth Report made to His Majesty by the Commissioners

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[120] N. Y. Laws 1951, c. 180, p. 729; N. Y. Pers. Prop. Law § 23 and N.Y. Real Prop. Law § 118.
[121] See note 75 *supra*.
[122] *Ibid.*
[123] See Schuyler, *supra* note 82.
[124] Ill. Laws 1955, p. 498; Ill. Stat. Ann. c. 30, §§ 188-89 (1957).

Appointed to Inquire Into the Law of England Respecting Real Property in 1833. Parliament thereupon acted to abolish the doctrine by enacting the following statute:

> [W]hen any land shall have been devised, by any Testator who shall die after the Thirty-first Day of *December* One thousand eight hundred and thirty-three, to the Heir or to the Person who shall be the Heir of such Testator, such Heir shall be considered to have acquired the Land as a Devisee, and not by Descent; and when any Land shall have been limited, by any Assurance executed after the said Thirty-first Day of *December* One thousand eight hundred and thirty-three, to the Person or to the Heirs of the Person who shall thereby have conveyed the same Land, such Person shall be considered to have acquired the same as a Purchaser by virtue of such Assurance, and shall not be considered to be entitled thereto as his former Estate or Part thereof.[125]

Kansas

In 1939 Kansas abolished the doctrine of worthier title in wills cases. That doctrine had been before the courts [126] but apparently the doctrine as applied in inter vivos conveyances had never been raised in the state. This may account for the limited legislation. The provision enacted was the following:

> In the case of a will to heirs, or to next of kin of the testator, or to a person an heir or next of kin, the common-law doctrine of worthier title is abolished and the devisees or devisee shall take under the will and not by descent.[127]

COURSES AVAILABLE TO THE LEGISLATURE

First the Legislature might leave the matter to the courts. The improbable might happen and the Supreme Court overrule the *Bixby* case and declare the rule no part of the law of the State. At the other extreme, the court might declare the rule part of the common law of England adopted as the law of California by the Statutes of 1850, thus prohibiting the creation of a remainder in the conveyor's heirs and practically forcing legislative action. The probable course, however, if no legislative action is taken will be a continuation of the rule as one of construction with the courts attempting to so state the rule as to avoid the confusion and unhappy character of the New York experience. In thirty years the New York Court of Appeals was unable to maintain such a course. Of course the rule could be stated as one just short of a rule of law—a presumption to yield only to an expressed intention to the contrary.[128] This, however, has not found much support.

Second, the Legislature might undertake to define the rule as one of construction and to determine its force. A note written in the *California Law Review* has suggested this course.[129] The writer would make the rule just one step short of a rule of law, a rule which would yield only to an express statement by a grantor or a settlor that he means to

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[125] Stat. 1833, 3 & 4 Wm. IV, c. 106, § 3, p. 1002.
[126] See Bunting v. Speek, 41 Kan. 424, 21 Pac. 288 (1889), and question concerning opinion voiced in Kirkpatrick v. Kirkpatrick, 112 Kan. 314, 211 Pac. 146 (1922).
[127] Kan. Laws 1939, c. 181, § 6, p. 359; KAN. GEN. STAT. ANN. § 58-506 (1949).
[128] See Comment, 37 CALIF. L. REV. 283 (1949).
[129] *Ibid.*

create a remainder or to make a class gift to beneficiaries under his trust. This is placing far more weight on the assumption supporting the rule as one of construction, namely that the conveyor does not mean what the words of his grant normally mean, than the courts have been willing to accept. Indeed, the courts have continued to voice without enthusiasm the original guarded statement of Judge Cardozo, the assumption that the rule has some support in the intention of the settlor. Their holdings in favor of remainders show how weak the assumption is held to be. An attempt to define the rule legislatively as one of construction which would yield to evidence of a contrary intention short of an expressed intention, seems doubtful. The conclusion of the New York Law Revision Commission on this point was: "In the light of past difficulties and the earnest and scholarly efforts of the Court of Appeals to solve this problem by developing rules of construction, it would appear that any effort to codify a rule of construction must necessarily fail." [130]

Third, the Legislature might make the rule again one of law prohibiting the creation of a remainder in the conveyor's heirs. This would be an arbitrary rule defeating intention in many cases and justified only in that it would produce predictability of meaning of end limitations to a grantor's heirs and in that way guard against frequent need for litigation. This course does not have any real merit.

Fourth, the Legislature might abolish the doctrine of worthier title, both as a rule of law and as a rule of construction. This could be done by enacting substantially the following statute:

> The rules of worthier title, both as rules of law and as rules of construction as applied to limitations to heirs or next of kin of conveyors or testators or to limitations having such meaning though not employing such terms, are abolished and the meaning of such limitations shall be determined by the general rules controlling the construction of conveyances or wills.

The enactment of such a statute would be no more than a legislative declaration that there is no reason why the normal principles of construction of conveyances should not apply to a limitation to the heirs of a grantor or settlor; that the assumption underlying the rule as one of construction—that a grantor or settlor does not mean what his words normally mean—is of insufficient weight to justify a continuation of the rule. This course would not be in conflict with the legislative policy concerning the revocation of trusts as voiced in Section 2280 of the Civil Code (that a trust is revocable unless otherwise specified), with the general rules of construction of deeds and contracts, or with the legislation controlling the creation of contingent interests. This course has been taken in three American states. In almost twenty years of experience in two of these states and in two years of experience in the third state, there has been no indication that this type of legislation has resulted in defeating intention. When the Uniform Property Act was first published one writer thought it would be applied in a way to defeat intention in many cases.[131] A contrary conclusion was voiced

[130] See Report of the New York Law Revision Comm'n, note 68 *supra*.
[131] Reno, *supra* note 80.

by an attorney considering the over-all effect of the Act on Maryland law were it to be adopted in that state.[132] Apparently experience has not supported the fear.

Fear has been expressed that the enactment of a statute such as the Uniform Property Act might have the effect of precluding the courts from giving effect to a conveyor's expressed intention to retain a reversion.[133] It is doubtful that any court would find in such a case that property was "limited" within the meaning of the legislation. A similar type of fear was voiced in connection with the Illinois legislation;[134] namely, that it might be construed as permitting the creation of a future interest theretofore held impolitic and impossible of creation. The answer was the same.

If legislation abolishing the doctrine is enacted, it should include the wills branch of the doctrine as well as the inter vivos branch. Admittedly it is current understanding that the wills branch of the doctrine is no part of California law[135] but the matter should be made certain, as it is in the statute proposed above.

NOTE ON ESTATE TAXATION

If the doctrine of worthier title is not abolished there are bound to arise cases in which a settlor thinks he has disposed of all of his interest in trust property and dies confident that by way of that trust and his will he has made a wise settlement of his estate, only to have his intended scheme frustrated and his estate unnecessarily depleted by tax assessments. To illustrate: *A* conveys 75 percent of his estate in trust for his wife for life remainder to his heirs and *A* declares the trust irrevocable. He dies survived by five brothers and ten nephews and many other relatives. By his will he disposes of the property he has on death among third persons. Under the doctrine of worthier title the heirs of the settlor would not take as remaindermen. Rather the settlor would die possessed of the reversionary property in the trust assets.[136] These, after being depleted by the payment of estate taxes, would pass by the will to the legatees named to the exclusion of the blood relatives. If the doctrine of worthier title were abolished not only would this frustration of the settlor's scheme be avoided but the chances of depletion of the estate by reason of the inclusion of the trust property in the decedent's gross estate would be reduced.[137] If the doctrine of worthier title were abolished the remainder would still be contingent until the settlor died and he would have a defeasible reversion up to the moment of his death. The value of this, of course, would be included in his estate for purposes of federal taxation[138] but this defeasible reversion normally would be of little value, far less than the five percent of the value of the trust property required by Section 2037 of the Internal

[132] Myerberg, *Maryland Examines the Proposed Uniform Property Act*, 4 MD. L. REV. 1 (1939).
[133] Oler, *supra* note 81, at 263.
[134] See Schuyler, *supra* note 82, at 470.
[135] See Turrentine, *supra* note 85, at 198.
[136] On taxation of reversions see INT. REV. CODE OF 1954, § 2033.
[137] All or part of the trust property may be included in the gross estate of the settlor by reason of common provisions of trusts, such as the retention of a life estate or the reservation of a power of appointment. See INT. REV. CODE OF 1954, §§ 2036, 2041.
[138] *Id.* §§ 2033, 2037. See Adriance v. Higgins, 113 F.2d 1013 (2d Cir. 1940).

Revenue Code of 1954 to bring the value of the trust property into the gross estate of the settlor.[139] An illustration of the value of a defeasible reversion is found in *Estate of Spiegel* v. *Commissioner*.[140] This case involved the giving of a contingent remainder to the children of the settlor or their issue on condition that they survive the settlor but did not involve the doctrine of worthier title. The defeasible reversion of the settlor was valued at $70 although the trust assets amounted to $1,140,000. The persons to take the remainder could be ascertained only by their surviving the settlor. Until that time the settlor retained a possibility of having the trust property revert to him or to his estate. These facts were held to require that the value of the trust property be included in the gross estate of the settlor. This construction of the tax laws was considered so harsh that Congress amended the code overruling the case in some situations and modifying it in others. [141] In 1954 a further modification resulted in the current provision of the Internal Revenue Code.[142]

In 1949 at the time of the *Spiegel* case it would not have been very important taxwise whether an end limitation to the heirs of the settlor was held a remainder or under the doctrine of worthier title a reversion was found in the settlor. If the interest was a remainder it was a contingent remainder and the persons to take would not be ascertainable until the death of the settlor and they would have to survive him to take. In addition the settlor during the period of contingency would have a defeasible reversion and a possibility, however remote, of having the estate revert to him or his estate. Under the rule of the *Spiegel* case this would have resulted in the inclusion of the value of the trust property in the settlor's gross estate. If the doctrine of worthier title was applied, then the settlor would have the reversion and its value would be part of his gross estate. Today, however, whether the interest is a remainder or the settlor retains a reversion is important taxwise. Abolition of the doctrine of worthier title will generally result in finding the end limitation a remainder. This means the trust property will be included in the gross estate of the settlor only if his defeasible reversion has a value in excess of five percent of the trust property. This is highly unlikely.

The effect of the end limitation to the heirs or next of kin of the settlor is to be determined by state law.[143] The few tax cases involving

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[139] On the method for determining the value of the settlor's defeasible reversion see Regulation 105, FED. TAX REG. § 81.17, p. 1269 (West 1956).

[140] 335 U.S. 701 (1949).

[141] For more than forty years the federal estate tax has been levied on the property of a decedent who in his lifetime had made "transfers intended to take effect in possession or enjoyment at or after his death." See Int. Rev. Code of 1939, § 811(c)(1) and (2). By 1949 the quoted provision was held to include transfers in which the grantor, knowingly or unknowingly, retained a reversionary interest or possibility that the property might revert to him or his estate. Estate of Spiegel v. Commissioner, 335 U.S. 701 (1949). The Technical Changes Act of 1949 overruled the *Spiegel* case as to transfers prior to October 8, 1949, and modified the ruling of that case as to later transfers. 63 STAT. 891, 26 U.S.C. § 811(c) (1949). The House Committee in its report attending the Internal Revenue Code of 1954, considered the law still unduly harsh in subjecting to estate tax assets of a trust under which the settlor substantially disposed of all his interests, merely because the ultimate takers were not to be determined until the time of the settlor's death. See House Committee Report, 1 CCH FED. EST. & GIFT TAX REP. ¶ 1470.05 (1958). Section 2037 of the Internal Revenue Code of 1954 modified the law in keeping with the House Committee Report.

[142] INT. REV. CODE OF 1954, § 2037, 4A P-H 1956 FED. TAX SERV. ¶ 120, at 370 *et seq.*

[143] For a general statement on reference to state law in federal taxation, see Gallagher v. Smith, 223 F.2d 218 (3d Cir. 1955). See also Slade's Estate v. Commissioner, 190 F.2d 689 (2d Cir. 1951).

trusts in which such limitations appear seem to establish this rule even if they do not establish a method for treatment of the tax consequences of such end limitations.[144]

[144] Notice that all these cases were decided prior to the Technical Changes Act of 1949 and the Internal Revenue Code of 1954. See Morsman v. Commissioner, 90 F.2d 18 (8th Cir. 1937); Beach v. Busey, 156 F.2d 496 (6th Cir. 1946); Commissioner v. Hall's Estate, 153 F.2d 172 (2d Cir. 1946).

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