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I. INTRODUCTION

A "page of history is worth a volume of logic"[1] when it comes to understanding real property concepts.[2] This is especially true when dealing with the wills branch of the worthier title doctrine.[3] For the wills branch, like the inter vivos branch of the doctrine,[4] had its origin in the English feudal society. Indeed, at its inception it seems to have been inseparably bound to that society. It was, therefore, a rule which eventually became no longer

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1 Holmes, J., in New York Trust Co. v. Eisner, 256 U.S. 345 at 349, 41 S.Ct. 506 (1921).

2 Justice Cardozo went even further. He said: "Let me speak first of those fields where there can be no progress without history. I think the law of real property supplies the readiest example." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 54 (1921). It is also interesting to note that Justice Cardozo wrote the opinion in the leading case in the United States involving the inter vivos branch of the worthier title doctrine. See Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919).

3 For brevity and convenience the wills branch of the worthier title doctrine will hereinafter be referred to as the "wills branch," the "rule" or the "doctrine." In general, on the wills branch see 1 AMERICAN LAW OF PROPERTY §4.19 (1952); 3 POWELL, REAL PROPERTY §381 (1952); Harper and Heckel, "The Doctrine of Worthier Title," 24 ILL. L. REV. 627 (1930); comments, 47 N.W. UNIV. L. REV. 507 (1952); 1952 WASH. UNIV. L. REV. 117; notes, 39 IOWA L. REV. 199 (1953); 49 MICH. L. REV. 1066 (1951); 46 HARV. L. REV. 993 (1933); 14 N.C.L. REV. 90 (1935); 16 TENN. L. REV. 358 (1940). For an amusing account involving the wills branch as it relates to title problems see Crocker, "The History of a Title, A Conveyancer's Romance," AM. L. REV., Oct. 1875, reprinted in PATTON, TITLES §34, n. 85 (1938).

4 Professor Warren thought it improper to link together the inter vivos and the wills branch of the worthier title doctrine. He observed: "The heir-devisee rule is dead or dying. It has outlived whatever usefulness it ever had. It is in a state of nocuous desuetude. The restaters have recognized this. They have themselves recommended its legislative repeal. But the ruling against a remainder to a grantor's heirs is a living, growing rule,—very sensible and very serviceable. A similar rule has been evolved applicable to personal property. A liaison between the quick and the dead is not fitting. Why tie a bull-pup to the tail of a dead cat?" Warren, "A Remainder to the Grantor's Heirs," 22 TEX. L. REV. 22 at 27-28 (1943).

useful and was accordingly abolished in England by statute.[5] Strange though it may seem to the layman and even to the lawyer, it is nevertheless a fact that many a rule long since abolished in England still exists in the United States. It is the writer's view that we are here concerned with just such a rule. Indeed, it might well be said that there would be little if any justification for this paper if it were settled law that this rule was nonexistent in the United States.[6] However, before we can understand its modern consequences, a knowledge of its historical setting and application are essential. It is, therefore, the purpose of this article to examine the history and origin of the wills branch of the worthier title doctrine, to ascertain the extent of its application and the manner of its application, to determine the legal consequences flowing therefrom, and to consider the desirability of its continued existence. No treatment will be given here to the inter vivos branch of the worthier title doctrine, since it has been the subject of a previous paper.[7]

A definitive statement of a legal proposition is frequently too inclusive or too exclusive, yet it seems that if such a statement can be made with accuracy it is eminently desirable. It gives the reader, especially if he is not familiar with the subject matter, a starting point. It affords to all of us a common place to begin our thinking. Subject to the qualifications hereafter discussed, the rule of the English common law, forming the basis of this paper, may be stated as follows:

A devise of a present or future interest in land to the heir of the testator, either by name or in form, is void if the heir takes by virtue of the devise precisely the same interest he would have taken if the devise had been stricken out of the will.

II. HISTORY AND ORIGIN OF THE RULE

It was about the middle of the sixteenth century when the wills branch of the worthier title doctrine made its appearance.[8] Thereafter it grew and expanded steadily; in fact its formulation and development cover a span of almost three centuries. Unlike the rule in Shelley's Case or the rule in Wild's Case, this rule is not

5 3 & 4 Wm. 4, c. 106, §3 (1833).

6 For a discussion of the rule in the United States, see Part VIII infra.

7 See Morris, "Inter Vivos Branch of Worthier Title Doctrine," 2 OKLA. L. REV. 133 (1949).

8 Hinde v. Lyon, 2 Dyer 124a, 73 Eng. Rep. 271 (1555).

identified with any particular decision.[9] Rather, it seems to have developed step by step and case by case not unlike the development of the rule against perpetuities.[10] Generally speaking, the rule was applied in two classes of cases: (1) those in which the devise was to an individual who was in fact the testator's heir, and (2) those in which the devise was in form to the testator's "heirs at law."

A. *A Devise to an Individual Who Was in Fact the Heir of the Testator*

It became thoroughly engrained as a part of the English common law that an heir of the testator could not take by purchase under a will an interest in land which was precisely the same as that which he would have taken if no devise to him had been made.[11] For example, if *T* devised land to *A*, his only son and heir, the devise to *A* was void, and he took by descent instead of under the will. In Hargrave's note to *Coke on Littleton,* it is said: "One leading principle, which this and the other authorities seem clearly to establish, is, that whenever a *devise* gives to the heir the same estate in *quality* as he would have by *descent,* he shall take by the *latter,* which is the title most favoured by the law. . . ."[12]

It is interesting at this point to compare this rule with the inter vivos branch of the doctrine. The inter vivos branch applied *only* if the limitation was in form to the grantor's "heirs." It can thus be seen that this rule was very different. Its application was much broader; that is to say, if the devise were to an individual by name, and if at the time of the testator's death that individual

[9] It has been stated that the inter vivos branch of the doctrine is known as the "Rule in Bingham's Case." PATTON, TITLES §133 (1938). This is the only statement with which the writer is familiar wherein either branch of the doctrine has been linked to any single case.

[10] For a case by case development of the rule, see Harper and Heckel, "Doctrine of Worthier Title," 24 ILL. L. REV. 627 (1930).

[11] Hinde v. Lyon, 2 Dyer 124a, 73 Eng. Rep. 271 (1555); Bashpool's Case, 2 Leo. 101, 74 Eng. Rep. 392 (1585); Hainsworth v. Pretty, Cro. Eliz. 919, 78 Eng. Rep. 1140 (1602); Preston v. Holmes, Sty. 148, 82 Eng. Rep. 601 (1648); Hedger v. Rowe, 3 Lev. 127, 83 Eng. Rep. 612 (1682); Clerk v. Smith, 1 Salk. 242, 91 Eng. Rep. 214 (1698); Emerson v. Inchbird, 1 Ld. Raym. 728, 91 Eng. Rep. 1386 (1702); Smith v. Triggs, 1 Strange 487, 93 Eng. Rep. 651 (1721); Allam v. Heber, 2 Strange 1270, 93 Eng. Rep. 1174 (1748); Hurst v. Earl of Winchelsea, 2 Burr. 879, 97 Eng. Rep. 611 (1759); Chaplin v. Leroux, 5 M. & S. 14, 105 Eng. Rep. 957 (1816); Doe v. Timins, 1 B. & Ald. 530, 106 Eng. Rep. 195 (1818); Manbridge v. Plummer, 2 My. & K. 93, 39 Eng. Rep. 879 (1833); Strickland v. Strickland, 10 Sim. 374, 59 Eng. Rep. 659 (1839); Biederman v. Seymour, 3 Beav. 368, 49 Eng. Rep. 144 (1840); Rolle's Abr. 626 (1668); 2 BLACKST. COMM. 241-242; POWELL, DEVISES 420 (1788).

[12] 1 Co. LITT. 12b, note (1832).

happened to be the testator's heir at law, the rule applied and the individual took by descent instead of under the will. So the rule applied if the devise was to the testator's daughter,[13] his granddaughter,[14] or his grandson.[15] Of course, by far the greatest number of cases arose when the devise was to the testator's eldest son.[16] This was brought about by the doctrine of primogeniture. Since the eldest son was the heir at law, the land descended to him unless by custom a different mode of descent had been established.[17] It was natural, therefore, that many of these cases arose because frequently a testator would devise land to his eldest son.

Perhaps it should also be pointed out that this rule applied to both present interests (possessory estates) and to future interests,[18] whereas the inter vivos branch of the doctrine applied to future interests only. Thus, if *T*, by his will, devised land in fee simple to *A*, his eldest son, the rule was applied and *A* took by descent.[19] Likewise, if *T* attempted to create a future interest in *A*, his son and heir, by devising land to *W* for life, remainder to *A* in fee, the rule was applied and *A* took a reversion by descent instead of a remainder by purchase.[20]

B. *A Devise in Form to "Heirs" or "Right Heirs" of the Testator*

As heretofore indicated, the doctrine likewise applied if the devise was in form to the testator's "heirs at law." Here, if a testator devised land in form to "my heirs" or my "right heirs," the devise was void and the heir took by descent.[21] Seemingly, however, there was less insistence by the English courts in these cases that the quantity and quality of the estate devised be the same.[22]

13 Smith v. Triggs, 1 Strange 487, 93 Eng. Rep. 651 (1721).

14 Manbridge v. Plummer, 2 My. & K. 93, 39 Eng. Rep. 879 (1833).

15 Clerk v. Smith, 1 Salk. 241, 91 Eng. Rep. 214 (1698); Doe v. Timins, 1 B. & Ald. 531, 106 Eng. Rep. 195 (1818).

16 Hinde v. Lyon, 2 Dyer 124a, 73 Eng. Rep. 271 (1555); Preston v. Holmes, Sty. 148, 82 Eng. Rep. 601 (1648); Hainsworth v. Pretty, Cro. Eliz. 919, 78 Eng. Rep. 1140 (1602); Emerson v. Inchbird, 1 Ld. Raym. 728, 91 Eng. Rep. 1386 (1702); Hurst v. Earl of Winchelsea, 2 Burr. 879, 97 Eng. Rep. 611 (1759). Dictum in Paramour v. Yardly, 2 Plow. 539, 75 Eng. Rep. 794 at 803 (1579).

17 Bear's Case, 1 Leo. 112, 74 Eng. Rep. 105 (1589). See Neilson, "Custom and the Common Law in Kent," 38 HARV. L. REV. 482 (1925).

18 See Part V-B-4 infra.

19 Hainsworth v. Pretty, Cro. Eliz. 919, 78 Eng. Rep. 1140 (1602).

20 Preston v. Holmes, Sty. 148, 82 Eng. Rep. 601 (1648).

21 Counden v. Clerk, Hob. 29, 80 Eng. Rep. 180 (1868); Nottingham v. Jennings, 1 Comyns 81, 92 Eng. Rep. 970 (1700); Godolphin v. Abingdon, 2 Atk. 57, 26 Eng. Rep. 432 (1740); Doe v. Maxey, 12 East 589, 104 Eng. Rep. 230 (1810); dictum, Pibus v. Mitford, 1 Vent. 372, 86 Eng. Rep. 239 (1674); 1 HARGRAVE, LAW TRACTS 571 (1787).

22 For a discussion concerning the quantity and quality of the estate devised see Parts V-A and B.

At least this conclusion appears warranted by the language used in the cases. For example, in *Counden v. Clerk*[23] a testator devised land to his son John, but if John should die without lawful issue, then unto the "right heirs" male of the testator. The court held that the devise to the heirs of the testator was void "for this is a positive rule, that a man cannot raise a fee-simple to his own right heirs *by the name of heirs,* as a purchase, neither by conveyance of land, nor by use, *nor by devise.*"[24] This case was approved in *Godolphin v. Abingdon.*[25]

Likewise in *Doe v. Maxey*[26] the court again failed to stress that the estate devised had to be of the same quantity and quality before the rule applied. There, certain estates tail had been devised, with "an ultimate remainder to the testator's own right heirs forever." In commenting on this end limitation, the court observed that "it was unnecessary for him to devise, for it remained notwithstanding in him as an undisposed reversion, and descended to his own right heirs. . . . And the only operation of such a devise in terms is to exclude a conclusion that any other person was intended to take it; for certainly his heirs would take by descent and not by the will."

It can thus be seen that this type of a limitation in a will and the rule applied thereto bore close resemblance to the inter vivos branch of the doctrine. Indeed, counsel pointed this out in *Doe v. Maxey* by saying, "A limitation to the heirs of a third person may operate as a contingent remainder; but a limitation by *deed* or *will* to the right heirs of the grantor or devisor. . . is only the old reversion."[27] Hence, it would seem that here, as in the rule in Shelley's Case and as in the inter vivos branch of the worthier title doctrine, if the language was in the form to the "heirs" of the testator the English courts in effect construed the word "heirs" as a word of limitation. Nor is it surprising to find the rule being applied in this fashion, for there is fully as much justification here to treat the word "heirs" as a word of limitation as there is in the rule in Shelley's Case or in the inter vivos branch of the doctrine. Indeed, a contrary treatment would hardly have been understandable, since the real reason for treating the word "heirs" as a word of limitation was the same in all three cases.[28]

23 Hob. 29, 80 Eng. Rep. 180 (1868).
24 80 Eng. Rep. 180 at 181. Italics added.
25 2 Atk. 57, 26 Eng. Rep. 432 (1740).
26 12 East 589, 104 Eng. Rep. 230 at 235 (1810).
27 104 Eng. Rep. 230. Italics added.
28 See Part III infra.

C. *A Rule of Law*

This rule was a rule of law dictated by the policy of the age, not merely a rule of construction.[29] In the early case of *Preston v. Holmes,*[30] this was made unequivocally clear. In that case the testator devised land to his wife for life with a remainder in fee to his eldest son John. The question was whether John took by purchase under the will or by descent. It was argued that John could elect either to take under the will or by descent, whichever he chose. In denying this contention, Chief Justice Roll held "that the devise is void, and that it is not in the power of John the son, to make the election to take by descent or by purchase at his pleasure, but he must of necessity take the land as the law directs, which is by descent . . . ."[31] Justice Bacon was of the same view and held "that the heir doth here take by descent, and not by purchase, for this the law says, and he cannot alter it. . . ."[32] The rule being one of law and being tightly bound to feudal concepts, it was applicable only to real property.[33] At least the writer has found no English decisions wherein it was applied to personal property.

III. REASONS FOR THE RULE IN ENGLAND

It seems obvious that this rule could not become so thoroughly recognized as a part of the English common law unless some policy dictated that it should be so. Many and varied reasons for the rule have been given and no doubt different reasons existed at different times. In *Biederman v. Seymour,*[34] one of the last English cases on the point, the Master of the Rolls, Lord Langdale, in looking back over the three centuries during which the doctrine had flour-

29 Counden v. Clerk, Hob. 29, 80 Eng. Rep. 180 (1868); Preston v. Holmes, Sty. 148, 82 Eng. Rep. 601 (1648).

30 Sty. 148, 82 Eng. Rep. 601 (1648).

31 82 Eng. Rep. 601

32 Ibid.

33 The cases do not discuss this point directly, but all of the English cases found, except one, do involve real property. In Swaine v. Burton, 15 Ves. Jr. 365, 33 Eng. Rep. 792 at 794 (1808), there was a devise of certain real property and a bequest of a leasehold estate to trustees to convey to the heir of the testator. In that case Lord Eldon held that the rule did not apply to either the real property or the personal property, but in so doing made the following observation: "This is, not merely a devise of a freehold estate, but a disposition of leasehold, freehold, and copyhold lands. There is no doubt, that the leasehold estate in equity would be taken by them [the heirs], as purchasers."

34 3 Beav. 368, 49 Eng. Rep. 144 (1840).

ished, rather well summarized most of the reasons which had been advanced when he said:

> "By whatever may be the origin of the rule, which gives to the heir by descent, that which the testator has intended to devise; whether the rule be derived from the supposed application of a principle that a man shall not have by gift that which is his own without gift, as some have supposed; or whether the rule be adopted for the benefit of third persons, as of the lord for the preservation of tenure, or of creditors for the payment of their debts; or simply as Mr. Justice Bayley said in Chaplin v. Leroux, because it is convenient that the property should be assets in the hands of the heir; there seems to be no reason, why, as against the heir, the rule should be extended further than the principle requires."[35]

The first reason advanced by Lord Langdale that "a man shall not have by gift that which is his own without a gift" is intriguing and, to the writer at least, is a rather legalistic argument. Yet, strange as it may seem, we find, in essence, this same reason advanced in support of the position of the *Restatement of Property* relating to the exercise of a power of appointment in favor of a taker in default,[36] which is a problem bearing a close similarity to the one being discussed.

In view of the position of the *Restatement* that the wills branch of the worthier title doctrine is dead,[37] and what appears by analogy to be a contrary position on the exercise of a power of appointment in favor of a taker in default, a brief comparison of the two problems seems worthwhile.

The analogous problem on powers is this: if a donee of a power of appointment exercises his power in favor of the person named by the donor as a taker in default, does the appointee take by appointment, or does he take in default of appointment? Subject to certain qualifications, the *Restatement* view is that he takes in default of appointment.[38] Or, to put it another way, he takes as if no appointment had been made. In support of this position Professor Casner has argued, "it seems curious to say that words of appointment can give to the taker in default that which he

[35] 49 Eng. Rep. 144 at 145.

[36] Amendments to Restatement, Proposed Final Draft No. 3—Property, p. 89 [Proposed Amendments submitted by the Reporters and Advisers to the Council Meeting and to the Annual Meeting, June 1947].

[37] PROPERTY RESTATEMENT §314, comment on subsection (2) (1940).

[38] Id., §369.

already has, subject only to defeasance by appointment to another, which never occurs."[39] To the writer, it would seem that this argument is in essence the identical argument advanced by Lord Langdale in support of the rule under discussion.

Professors Powell and Simes, on the other hand, have countered, saying that the "taker in default who takes because a power is found not to have been exercised takes by choice of the donee just as truly as does an appointee selected by the donee."[40] Their argument seems sound. Furthermore, its reasoning is equally appropriate to rebut the legalistic argument set forth by Lord Langdale in support of the worthier title doctrine.

The two other reasons advanced by Lord Langdale for the rule are on a much sounder footing. Indeed, it seems that the real reason for the origin of the doctrine lies in the tenurial relationship.[41] When the feudal society flourished, the feudal incidents in favor of the lord were of considerable importance. These were due the lord only if the tenant were in by descent and not by purchase. That this was perhaps the chief reason for the rule is recognized by the commissioners who were appointed to inquire into the real property law of England. In their report they said, "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. . . ."[42]

IV. How the Rule Was Applied

It was not difficult for the English common law judges to state the rule under discussion, for it was an established principle of the common law. Furthermore, no apparent difficulty was experienced in applying the rule where the limitation was in form to the "heirs" of the testator. But the courts were troubled and

[39] Amendments to Restatement, Proposed Final Draft No. 3—Property, p. 89 [Proposed Amendments submitted by the Reporters and Advisers to the Council Meeting and to the Annual Meeting, June 1947].

[40] Ibid.

[41] "This rule, that the devisee shall be in of the elder title, viz. by descent, has been said by some to have been adopted in favour of the heir, that he might be in of his better title, and, thereby, toll an entry, or have a warranty. But if that were the case, he would be intitled to an election to take either under the will or under the devise, as might be most for his advantage; but that he cannot do. The rule seems rather to have been adopted in favour of third persons, viz. of the lord, for the preservation of the tenure, (which was a valuable thing before the statute of *Malbridge*,) and of creditors for the preservation of their debts." POWELL, DEVISES 430 (1806). See also Morris, "Inter Vivos Branch of Worthier Title Doctrine," 2 OKLA. L. REV. 131 at 138-139 (1949).

[42] FOURTH REPORT MADE TO HIS MAJESTY BY THE COMMISSIONERS, APPOINTED TO ENQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY 74 (1833).

encountered grave difficulty in determining when the rule applied where the devise was not in form to the testator's heirs, but instead was to a named person or persons.

A. *A Devise to a Single Individual*

A devise to an individual by name who was the heir at law of the testator was the typical situation in which we find the rule applied. For example, here there was no question under the rule of primogeniture but that a devise to the eldest son constituted a devise to the heir. The devise was, therefore, void if all the other requirements of the rule were satisfied.[43] Likewise, if the testator's sole heir were his daughter,[44] or granddaughter,[45] or grandson,[46] or any other single individual, a devise to such an individual was void. The rule was, therefore, sometimes oversimplified and it was stated that "a devise to the heir is void."[47]

B. *A Devise to Several Persons Who Are the Heir*

Sometimes a situation arose in which it was said that several persons inherited land as coparceners from the ancestor if he died intestate. This was true if he left only daughters, or by particular custom all males sometimes inherited in equal degree.[48] The question, therefore, naturally arose as to whether the rule applied to a devise to *several* individuals who constituted the heir. For example, suppose *T* died leaving only three daughters, *A, B,* and *C,* as his only descendants. He devised to them, by name, all his land. There was no question but that *A, B,* and *C* "put together make but one heir, and have but one estate among them."[49] Hence, this was a devise to the heir. However, since under the will they took as joint tenants and not as coparceners, it was said the

[43] Note 16 supra.
[44] Note 13 supra.
[45] Note 14 supra.
[46] Note 15 supra.
[47] Rolle's Abr. 626 (1668).
[48] "An estate held in coparcenary is where lands of inheritance descend from the ancestor to two or more persons. It arises by common law or particular custom. By common law: as where a person seised in fee-simple or in fee tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, as will be more fully shown when we treat of descents hereafter; and those co-heirs are then called *coparceners*; or, for brevity, *parceners* only. (q) Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. (r) And in either of these cases, all the parceners put together make but one heir, and have but one estate among them. (s)" 2 BLACKST. COMM. 187.
[49] Ibid.

quality of the estate under the devise was different from the *quality* of the estate by descent, and the rule was held not to apply.[50] This was also true if the devise were to *A, B,* and *C* as tenants in common, since by descent they would have taken as coparceners.[51] These decisions, of course, had the effect of decidedly limiting the application of the doctrine, for here, even though the devise was to the heir, the quality of the estate was not the same and hence the devise was not void. Yet, admittedly, if the heir had been but one person, the devise would have been void. The only difference in the two situations was that in one instance the heir was one person; in the second situation, the heir was several persons.

This problem apparently distressed Coke, then attorney general, who put the problem to the court of the King's Bench,[52] for it is said that "Coke, the Queen's attorney, demanded of the court their opinion in this case. A man having two daughters, being his heirs, deviseth his land to them and their heirs, and dies; whether they shall take as jointenants by the devise, or as coparceners by consent?—and all the Justices held clearly, that they shall have it as jointenants, for the devise giveth it them in another degree than the common law would have given it them, and for the benefit of the survivorship between them."[53]

C. *A Devise to One of Several Who Together Constitute the Heir*

Suppose a man dies leaving as his sole and only heirs at law two daughters. He devises all his land to one. Is such a devise within the rule? This question was decided in *Reading v. Rawsterne.*[54] In that case, the testator had two daughters, *B* and *C*. *B* predeceased the testator, leaving a son, *D,* to whom the testator devised his land. The question to be decided was whether *D* took one half by descent and one half by purchase, or all land by purchase. The court held "that D took the whole by purchase. For though where the same estate is devised to the heir in quantity and quality, as he would have taken by descent if there had been

50 Anonymous, Owen 65, 74 Eng. Rep. 903 (1594). See also Anonymous, Cro. Eliz. 431, 78 Eng. Rep. 671 (1595); Anonymous, Gouldsborough 141, 75 Eng. Rep. 1051 (1601). See also Part V-B.

51 Bear's Case, 1 Leo. 112, 74 Eng. Rep. 105 (1558).

52 6 CRUISE, REAL PROPERTY 153 (1850).

53 Anonymous, Cro. Eliz. 431, 78 Eng. Rep. 671 at 671 (1595).

54 2 Ld. Raym. 829, 92 Eng. Rep. 54 (1703). See also 91 Eng. Rep. 214 and 92 Eng. Rep. 994 for other reports of the same case.

no devise; the devise would be void, and such heir will take by descent, . . . yet in this case the devise *was not to the heir,* for one of the daughters, and consequently her representative, *is not heir alone,* but D. and C. were heir to the devisor, Co. Lit. 163 b. If a man plead a descent uni filiae et cohaeredi, it will be ill. Besides, if the Court hold that D. took a moiety by descent, they ought to hold consequently, that the devise as to the moiety was void, and then the said moiety ought to descend to D. and B. as heirs to A. [testator] and consequently D. had but three fourths of the lands, where they were entirely devised to him. And therefore this case is not within the reason of the cases cited; but of necessity it must be adjudged, that D. took the whole by purchase."[55]

This decision emphasizes the strict limits within which the wills branch applied. It was not applied for the simple reason that the devise "was not to the heir," since one of two coparceners "is not heir alone." In other words, this will did not come within the scope of the doctrine.

This case, however, immediately suggests another question. Suppose *A* dies leaving as his sole heir his son. He devises to his son an undivided one-half interest in a tract of land. In a subsequent paragraph of his will he devises an undivided one-half interest in the same tract to a stranger. Does the rule apply, or does the son take by purchase? The writer has found no English decision on the point; however, Mr. Fearne has expressed the view that the rule would apply.[56]

[55] 92 Eng. Rep. 54.

[56] "In an opinion of Mr. Fearne, which has been printed, he says, that a devise to the heir and another, as tenants in common, will not prevent the heir's taking his moiety by descent. For suppose a testator devises a moiety, or any other undivided share of his real estate, to a stranger, making no disposition of all the remaining undivided share, such remaining share would of course descend to his heir at law, and he must hold it in common with the devisee of the undivided share devised. It was clear, therefore that an heir might take by descent, as tenant in common with a devisee, an undivided part of the estate of which his ancestor was solely seised: and it appeared to be immaterial whether the share he so takes is expressly devised to him, or left unnoticed by the will: for if expressly devised, he takes it in common; and if not noticed, he takes in the same manner; and a devise to two or more as tenants in common is in effect a devise of one undivided part to one, and of another undivided part to the other. So that under such a devise to an heir and a stranger as tenants in common, the heir takes as if one undivided moiety were devised to the stranger, and the residue to himself, that is in the same manner as if no disposition at all of such residue had been expressed in the will, in which case he would have taken by descent; and therefore the same estate being devised to him in such residue, as he would have taken by descent; the general rule respecting devises to an heir extends to it." 6 CRUISE, REAL PROPERTY 154, citing Fearne's Opin. 128.

V. WHAT IS THE SAME ESTATE OR INTEREST

It has been said that "where the heir takes the same estate in the nature and quality which the law would give him, he takes by descent,"[57] but if "the estate given is different in its quality from the estate which would have descended, there the heir shall take by devise. . . ."[58] And in *Doe v. Timins,*[59] the court observed, "In *Chaplin* v. *Leroux* this Court thought the heir took by descent; the *quantity* and *quality* of estate being the same, whether he took by descent or devise; the *quantity* because in both cases the heir took a fee, and the *quality* because he took in severalty."

The statement of the court in *Doe v. Timins* lays down a double standard; both quantity and quality of estate must be the same. Therefore, we should give some consideration to these two concepts.

A. *The English Concept of Quantity*

The quantity aspect of the rule has been the source of much litigation in the United States. In fact, the concept of "quantity" by some American courts is entirely different from the English concept and therein lies the reason why the rule has been found not to apply in many cases in the United States. "Quantity" to many American courts has meant the amount or proportion or value of the estate devised. Suppose a testator devises an undivided one-half interest in land in fee to one of his sons. Suppose further that if the testator had died intestate, his son, as one of his heirs, would have taken but an undivided one-fourth interest in fee. On the facts, some American courts have been quick to say that the "quantity" of the estate devised is not the same; hence, the son takes by devise.[60]

The English concept of quantity did not pertain to amount, value, or proportion. Rather, "quantity" was a term defining the nature of the estate devised; that is, quantity to the English judge had reference to whether the heir took a fee simple, a fee tail, or a life estate. This was pointed out in *Chaplin v. Leroux*[61] and in *Doe v. Timins,*[62] where the court observed that the quantity of the estate was the same "because in both cases the heir took a fee."

57 Chaplin v. Leroux, 5 M. & S. 14, 105 Eng. Rep. 957 at 959 (1816).
58 Scott v. Scott, 1 Eden 458, 28 Eng. Rep. 762 (1759).
59 1 B. & Ald. 531, 106 Eng. Rep. 195 at 201 (1818). Emphasis added.
60 For a discussion of the cases in the United States on this point, see Part XI-A infra.
61 5 M. & S. 14, 105 Eng. Rep. 957 (1816).
62 1 B. & Ald. 531, 106 Eng. Rep. 195 (1818).

It should be said, however, that, except in cases involving a charge or a condition,[63] there was seldom any occasion in English law for the courts to consider whether a difference in amount, proportion, or value would so change the estate devised as to prevent the application of the rule. Since the rule applied only where one heir at law was involved, no question concerning amount, proportion, or value could ever arise except in the type of situation pointed out by Mr. Fearne.[64] We cannot say, therefore, that the English decisions are definitive on this precise problem.[65]

B. *The English Concept of Quality*

Since the rule did not apply unless the quality of the estate or the interest devised was precisely the same as that which the heir would have taken by descent, the question frequently arose: what kind of a limitation in a will so changes the quality as to prevent the application of the rule?

1. *The Effect of a Charge.* Suppose land is devised to the testator's heir at law subject to a payment of a thousand dollars by the heir to his younger brother. Does such a charge impressed upon the land change the quality so as to take such a devise out from under the rule? The English courts had said no,[66] although there is one early case to the contrary.[67] In other words, the English view was that a charge did not prevent the heir from taking by descent "for the tenure is not altered."[68]

2. *The Effect of an Executory Interest.* Suppose land is devised to *A*, the testator's sole heir at law in fee, but if he die under the age of twenty-one without living issue to *B* in fee. Does the executory interest over in favor of *B* change the quality of the fee simple estate devised to *A* so as to prevent the application of the rule? Or suppose land were devised to the testator's wife until

63 For a discussion of cases involving charges and conditions, see Part V-B-1 and 2 infra.

64 See Part IV-C supra.

65 The writer is not alone in the view that this rule applied only in the case where one person was the heir. For example, see 2 MINOR, INSTITUTES, 4th ed., 1045 (1892). For a contrary view, however, see Harper and Heckel, "Doctrine of Worthier Title," 24 ILL. L. REV. 627 at 648 (1930).

66 Clerk v. Smith, 1 Salk. 242, 91 Eng. Rep. 214 (1698); Emerson v. Inchbird, 1 Ld. Raym. 728, 91 Eng. Rep. 1386 (1702); Allam v. Heber, 2 Strange 1270, 93 Eng. Rep. 1174 (1748); Hurst v. Earl of Winchelsea, 2 Burr. 879, 97 Eng. Rep. 611 (1759); Biederman v. Seymour, 3 Beav. 368, 49 Eng. Rep. 144 (1840). Also see dictum in Scott v. Scott, 1 Eden 458, 28 Eng. Rep. 762 (1759) and Manbridge v. Plummer, 2 My. & K. 93, 39 Eng. Rep. 879 (1833).

67 Brittam v. Charnock, 2 Mod. 286, 86 Eng. Rep. 1076 (1677).

68 Allam v. Heber, 2 Strange 1270, 93 Eng. Rep. 1174 (1748).

the son and heir attains twenty-four years of age and then to him in fee. Was the quality of the estate devised to the heir the same as he would have taken if there had been no devise to him?

These were troublesome problems and the early decisions were in conflict.[69] *Scott v. Scott*[70] was the case chiefly relied on as holding that a gift over so changed the nature of the estate devised to the heir as to make the rule inapplicable. In that case, the testator devised certain land to his eldest son, Henry, in fee, but should he die without issue under twenty-one, then over. A question arose with respect to the marshaling of assets, and it was urged that the devise to Henry was void, and that the land should be treated as intestate property. The court, however, refused to apply the rule and held that the heir "took a different estate from what he would have had by descent."[71]

This case was nevertheless overruled in *Doe v. Timins*,[72] and the weight of authority is clearly contrary to *Scott v. Scott*.[73] The latest English judicial utterances on the subject came in *Manbridge v. Plummer*,[74] where it was said, "it has always been the established doctrine, that a charge upon an estate devised to the heir does not break the descent; how then will a condition operate? The charge partially affects the devise, the condition wholly affects it; and it being determined that a charge, which carries off a part, does not break the descent, neither does a condition, which in a particular event would carry off the whole, break the descent."[75]

3. *The Effect of a Trust.* It seems to have been held in at least two English cases that a devise of land to trustees, with directions to convey to a person who is heir at law of the testator, breaks the descent and prevents the application of the rule.[76] In *Swaine*

[69] See Hinde v. Lyon, 2 Dyer 124a, 73 Eng. Rep. 271 (1555), and Hainsworth v. Pretty, Cro. Eliz. 919, 78 Eng. Rep. 1140 (1602), which hold an executory interest does not prevent the application of the rule. *Contra*, Gilpins Case, Cro. Car. 161, 79 Eng. Rep. 740 (1629).

[70] 1 Eden 458, 28 Eng. Rep. 762 (1759).

[71] 28 Eng. Rep. 762 at 764.

[72] 1 B. & Ald. 530, 10 Eng. Rep. 195 (1818). In 6 CRUISE, REAL PROPERTY 153 (1850) it is said that Scott v. Scott, 1 Eden 458, 28 Eng. Rep. 762 (1759), was "materially shaken, if not overruled."

[73] Hainsworth v. Pretty, Cro. Eliz. 919, 78 Eng. Rep. 1140 (1602); Chaplin v. Leroux, 5 M. & S. 14, 105 Eng. Rep. 957 (1816). See also Hedger v. Rowe, 3 Lev. 127, 83 Eng. Rep. 612 (1682).

[74] 2 My. & K. 93, 39 Eng. Rep. 879 (1833).

[75] 39 Eng. Rep. 879 at 881.

[76] Swaine v. Burton, 15 Ves. Jr. 365, 33 Eng. Rep. 792 (1808); Davis v. Kirk, 2 K. & J. 391, 69 Eng. Rep. 834 (1856). In Davis v. Kirk, a testator devised land to trustees to pay the income therefrom to *W* for life and at her death to convey "unto such person as should answer the description of his heir at law." The court held the heir at law took by purchase and said: "The expression 'heir at law' is somewhat strong; but, independently

v. Burton,[77] the testatrix devised real and personal property in trust to pay the income to Joseph Welch for life, and after his death the trustees were to convey all of such property which had not been sold for the payment of debts to "the heir or heirs at law of her (testatrix') cousin William Cockell." William Cockell left five women as his heirs at law. By unusual circumstances these same five women were also the heirs at law of the testatrix. Thus, in effect, upon the death of Joseph Welch, the life tenant, the trustees were to convey to the testatrix' heirs at law. By the common law these women, if they took under the will, took as joint tenants with the right of survivorship, whereas, if they took by descent they took as coparceners. This became important, for one of the five died and her eldest son claimed a one-fifth part of the land. The other four women claimed that the land had been acquired by the five as joint tenants and that they as the survivors were entitled to it all. So the question was squarely raised as to whether they acquired the land as joint tenants by purchase or as coparceners by descent. In holding that they acquired the land by purchase, Lord Chancellor Eldon said, "the effect of this devise is to break the descent; vesting the estates in the trustees; and directing them to convey to the persons described as purchasers. . . . The devise also is, not to these heirs, but to trustees; and by that devise the descent is broken."[78]

It should be noted, however, that in *Doe v. Timins*[79] there was a devise of land in trust for the testator's grandson and heir at law until he attained twenty-one, and if he does not attain twenty-one then over in trust to three nieces. The trust aspect of this case was not discussed and the court held the grandson took by descent. Perhaps the court was so intent on distinguishing and overruling *Scott v. Scott* that no consideration was given to this point.

of that, the fact of the testator having divested the inheritable quality of the estate by breaking the descent entirely, and giving the estate to trustees, and leaving them to find out the heir, has put them under an obligation to look upon the heir as a *persona designata*, and they cannot regard the inheritable quality of the estate, but they must find out the person who answers the description of heir at law of the testator." 69 Eng. Rep. 834 at 835. This case is difficult to explain since it came down after the wills branch of the doctrine had been abolished by statute in England. That fact was never mentioned though it would appear to have been a complete answer, unless it was felt that the statute was incomplete and did not cover this type of a devise.

[77] 15 Ves. Jr. 365, 33 Eng. Rep. 792 (1808).

[78] 33 Eng. Rep. 792 at 794. See comment on this case in note to Scott v. Scott, 28 Eng. Rep. 762 at 764.

[79] 1 B. & Ald. 530, 106 Eng. Rep. 195 (1818).

4. *The Effect of a Future Interest; the Effect of a Power of Sale.* In the early case of *Preston v. Holmes*[80] a curious argument was made. The testator devised land to his wife for life and, at her death, to his eldest son in fee. It was argued "that the son takes by purchase, and not by descent: for the devise is not to the son in present, but after the death of the testator's wife, and if he had the lands by descent, he should have them presently." In other words, counsel argued that the remainder to the heir was a future interest, and that if there had been no will he would have taken a possessory estate. The court, of course, overruled this contention. Indeed, many of the cases already discussed involved future interests, and the English courts, so far as the writer has been able to determine, have never refused to apply the rule because a future interest rather than a possessory estate was involved. However, this point should be kept in mind, for it arises again in connection with the American decisions.[81]

Turning now to the question of a power of sale, we find this matter decided in *Doe v. Timins.*[82] Here the testator devised land in trust for his grandson, who was his heir at law, until he should attain twenty-one, and if he should not attain twenty-one, then over. The trustee also had a power of sale. The question there presented was "does this power of distress and sale, and the executory devise over, break the descent?"[83] The court concluded that it did not; the grandson took by descent. With the divestiture character of a power and the divestiture character of an executory interest being as similar and analogous as they are, it is difficult to see how the court could have reached any other conclusion.

VI. THE LEGAL CONSEQUENCES OF THE RULE

The legal consequences of the rule were of considerable magnitude while it obtained in England. At the English common law the course of descent of land was traced to the last purchaser; it, therefore, made a difference in many cases whether a devise to an heir gave him an interest by purchase or whether it was void and he took by descent.[84] Creditors of decedents were likewise vitally affected, for if the decedent validly disposed of his land by will

80 Sty. 149, 82 Eng. Rep. 601 (1648).

81 See Part XI-D infra.

82 1 B. & Ald. 530, 106 Eng. Rep. 195 (1818).

83 106 Eng. Rep. 195 at 201.

84 Clerk v. Smith, 1 Salk. 242, 91 Eng. Rep. 214 (1698); Smith v. Triggs, 1 Strange 487, 93 Eng. Rep. 651 (1721); Hurst v. Earl of Winchelsea, 2 Burr. 879, 97 Eng. Rep. 611 (1759); Manbridge v. Plummer, 2 My. & K. 93, 39 Eng. Rep. 879 (1833).

to his heir, such land could not be reached by the decedent's creditors, whereas if the devise were void, it could be so reached.[85] Furthermore, the existence of the rule sometimes affected the rights of parties when marshaling of assets was involved.[86]

VII. STATUTORY ABOLITION OF THE RULE

In 1833 both the inter vivos and wills branches of the worthier title doctrine were abolished in England by statute.[87] As a doctrine forming an integral part of the English common law and applied as a rule of policy, it had become purposeless. The reasons giving rise to its judicial birth were no more.[88] Its existence caused much litigation and defeated otherwise legitimate intention. Hence the recommendation that it be abolished was well received, and the statute abrogating the entire doctrine resulted.[89]

It is interesting to note, however, that nearly seventy years later a case arose in which an interpretation of the abrogating statute was drawn into question and a most curious problem presented itself for decision. It will be remembered that a devise

[85] Hinde v. Lyon, 2 Dyer 124a, 73 Eng. Rep. 271 (1555); Bashpool's Case, 2 Leo. 101, 74 Eng. Rep. 392 (1585); Bear's Case, 1 Leo. 112, 74 Eng. Rep. 105 (1589); Gilpin's Case, Cro. Eliz. 161, 79 Eng. Rep. 740 (1629); Brittam v. Charnock, 2 Mod. 286, 86 Eng. Rep. 1076 (1677); Emerson v. Inchbird, 1 Ld. Raym. 728, 91 Eng. Rep. 1386 (1702); Allam v. Heber, 2 Strange 1270, 93 Eng. Rep. 1174 (1748).

[86] Scott v. Scott, 1 Eden 458, 28 Eng. Rep. 762 (1759); Strickland v. Strickland, 10 Sim. 374, 59 Eng. Rep. 659 (1839); Biederman v. Seymour, 3 Beav. 368, 49 Eng. Rep. 144 (1840). In Manbridge v. Plummer, 2 My. & K. 93, 39 Eng. Rep. 879 (1833), the court distinguishes Scott v. Scott, supra, because it principally involved a marshaling of assets.

[87] Stat. 3 and 4 Wm. 4, c. 106, §3 (1833). That portion of the statute abolishing the wills branch of the doctrine provides as follows: "When any land shall have been devised, by any Testator who shall die after the Thirty-first day of December One thousand and 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. . . ."

[88] For the historical reason for the rule see Part III supra.

[89] "The Rule appears to us to be objectionable, because it creates several intricate distinctions, and has occasioned litigation among different classes of representatives. Where there is any difference between the estate which would pass by the devise, and the estate which the Heir would take by descent, he takes by force of the devise, and in some cases, where the devise is contingent or executory, it is not settled in which of the two characters the Heir will be entitled. In all cases the estate is considered to pass by the Will, for the purpose of exonerating the Heir from the liability he would otherwise be subject to, of being primarily liable for the whole of the specialty debts of the Testator, although it would not be held to pass by the Will, for the purpose of exonerating the Heir from such debts as before the passing of the late Statute could not be recovered from the Devisee. We also think, that where the Testator expressly devises an estate, his intention may be inferred to be that the devise should take effect.

"We consider, therefore, that the Rule which makes the devise void in such cases, should be abolished, and that the Heir should take by virtue of the devise." 4 FOURTH REPORT MADE TO HIS MAJESTY BY THE COMMISSIONERS, APPOINTED TO ENQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY 74 (1833).

in form to "my heirs" or "my right heirs" was accorded slightly different treatment by the English courts than was a devise to *A*, who turned out to be the testator's heir at law.[90] That is to say, when the testator employed the words "heirs" or "right heirs" they were treated as words of limitation just as they were when the rule in Shelley's Case was involved or when the inter vivos branch of the worthier title doctrine was involved. This being true, the language of the statute abrogating the worthier title doctrine became most important, for the statute purported to abolish the rule only when there was a devise "To the Heir or to the Person who shall be the Heir of such Testator. . . ."[91] Nothing was said about a devise to the "heirs" or "right heirs" of the testator. It was, therefore, the considered judgment of Mr. Hayes that "the legal import of a limitation by will to the heirs or right heirs generally, (as distinguished from a devise to the individual heir) of the testator, which does not appear to be altered by the act is equivalent to a declaration of intestacy as regards the estate to which it applies."[92]

Mr. Hayes' argument was urged upon the court in *Owen v. Gibbons*.[93] The court, as a matter of construction, held that the statute applied even though the form of the limitation was to the testator's "own right heirs." Though this construction was at variance with Mr. Hayes' view, his construction would have resulted in only a partial abrogation of the doctrine, and it would seem that since the parliament in the same statute had expressly abrogated the rule as to inter vivos gifts which were in form to the "heirs" of a grantor, it surely intended a like result when the gift by way of a devise was to the "heirs" or "right heirs" of the testator. It is not difficult, therefore, to see how the court, as a matter of construction, arrived at its decision.

VIII. THE DOCTRINE IN THE UNITED STATES

In 1813, while speaking for the United States Supreme Court, Justice Story said: "It is true that the general rule is, that an heir shall not take by devise, when he may take the same estate in the land by descent."[94] A few years later, when writing his *Commentaries,* Chancellor Kent stated: "A devise to the heir at law

90 See Part II-B supra.
91 See note 87 for the terms of the statute.
92 1 HAYES, INTRODUCTION TO CONVEYANCING, 5th ed., 318 (1840).
93 [1902] 1 Ch. 636.
94 Barnitz's Lessee v. Robert Casey, 7 Cranch (11 U.S.) 456 (1813).

is void, if it gives precisely the same estate that the heir would take by descent if the particular devise to him was omitted out of the will. The title by descent has, in that case, precedence to the title by devise."[95]

Does the rule of law stated by these distinguished jurists exist in the United States today? Dean Pound has observed that "fifty years is a long life for a rule, that is a legal precept that attaches a definite detailed legal consequence to a definite detailed state of facts."[96] Holmes made a similar observation.[97] Since the wills branch of the worthier title doctrine is precisely that kind of rule, one might expect to find it extinct after nearly 150 years of operation. Some authorities, notably the *Restatement,* have asserted that the rule alluded to by Justice Story and Chancellor Kent is no longer the law in the United States.[98]

On the other hand, equally eminent authorities have been less dogmatic. Professor Simes is one who had adopted a more cautious and, it is submitted, a more realistic approach. He states: "At one time it was important to know whether land passed by devise or descent. But today it is impossible to see why it should make any difference whether a person takes the land of a decedent by devise or descent. Hence, although there is some authority to the contrary, the better view is that in so far as the worthier [title] doctrine is applicable to wills, it is obsolete."[99]

Professor Powell has likewise declined to go along completely with the categoric position of the *Restatement.* He has stated, "Modern American Law has progressively eliminated these significances of the wills branch of this rule. Consequently, the Restatement of the Law of Property took the position that this branch of the rule is no longer a part of American law. An occasional decision nevertheless bears the imprint of the obsolete rule."[100]

Professor Casner has expressed the view that there is a "lack of significance in modern times of the doctrine of worthier title as applied to a devise to the testator's heirs."[101] Writing at a later date, however, he fully recognizes that the rule may still

95 4 KENT'S COMMENTARIES 506.

96 Pound, "Survey of Conference Problems," 14 UNIV. OF CIN. L. REV. 324 at 329 (1940).

97 See HOLMES, "The Path of the Law," COLLECTED LEGAL PAPERS 167 at 169 (1920).

98 PROPERTY RESTATEMENT §314(2) (1940).

99 1 AMERICAN LAW OF PROPERTY §4.19, p. 440 (1952).

100 3 POWELL, REAL PROPERTY §381, p. 262 (1952).

101 5 AMERICAN LAW OF PROPERTY §22.56, p. 414 (1952).

exist and he inferentially admonishes estate planners to beware of its disruptive character.[102]

It goes without saying that there is virtual unanimity of opinion among the recognized authorities that the wills branch *should not be the law.* But to say that the wills branch *is not the law* goes a step further. It is the writer's view that the position of the *Restatement* is absolutely sound and correct, unless there is considerable authority holding that different legal consequences do in fact result by applying the wills branch. It would therefore seem proper at the very outset to direct our attention to that question. For unless different legal consequences do result, questions as to how the rule is applied, how many jurisdictions have recognized it, and the like, are largely academic.

IX. Do Different Legal Consequences Result From Applying the Wills Branch?

A. *The Course of Descent*

There was a time when it was vitally important in tracing the course of descent of land to ascertain whether it was acquired by descent or purchase.[103] Current legal thinking, however, is very generally premised on the theory that the mode of acquisition of land is wholly unimportant with respect to its future devolution. One writer has said that the "problem has ceased to exist, since even in the few states which retain the doctrine of ancestral estates, statutes uniformly include realty coming to the intestate by devise or gift as well as by descent."[104] While this statement is no doubt accurate in a general sense, it is inaccurate in one important detail. This detail relates to the descent of property owned by a minor who dies unmarried, under age, and without issue. As to such a minor, statutes in several states provide that if the property came to the decedent *by inheritance,* then it descends to his surviving brothers and sisters or their issue, if any. If it did not come to him by inheritance—or to put it another way—if it came to him *by purchase,* it will devolve upon a surviving parent, if one survives.[105]

102 CASNER, ESTATE PLANNING 196-197 (1953).

103 The English cases are numerous. For United States cases see, for example, Donnelly v. Turner, 60 Md. 81 (1883); Latrobe v. Carter, 83 Md. 279, 34 A. 472 (1896); Landic v. Simms, 1 App. D.C. 507 (1893); University v. Holstead, 4 N.C. 289 (1816); Yelverton v. Yelverton, 192 N.C. 614, 135 S.E. 632 (1926).

104 Comment, 46 HARV. L. REV. 993 at 999 (1933).

105 The Michigan statute is typical of those which fall in this category. It provides as follows: ". . . and if the intestate shall leave no issue, husband or widow, his or her

Statutes of this type exist in at least fourteen jurisdictions.[106] Although limited in their scope they do determine the course of descent when the decedent dies (1) unmarried, (2) under age, and (3) when the decedent acquired his interest *by inheritance*.[107] With respect to the last requirement there is persuasive authority that the words "by inheritance" used in these descent and distribution statutes have a well accepted technical meaning. The California Supreme Court in construing its statute made this observation:

> "And this provision does not affect the question, unless 'the estate came to the deceased child . . . by *inheritance* from such deceased parent.' Did the estate *devised* by the will of James Donahue, the father of the intestate, come to the latter by 'inheritance,' within the meaning of the statute. We think not. We have no doubt that the term 'inheritance' is used in the statute in its ordinary, well known signification. An estate acquired by inheritance is one that has descended to the heir, and been cast upon him by the single operation of law. 'Descent or hereditary succession is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending to the heir is in law called the inheritance.' (. . . 2 Black. Com. 241, 294, 373, 374.)

estate shall descend to the father and mother in equal shares, and if there be but 1 of the parents living, then to the survivor alone; . . . Provided, however, That if such intestate shall die under the age of 21 years and not having been married, all the estate that came to such intestate *by inheritance* from a parent, which has not been lawfully disposed of, shall descend to the other children and the issue of deceased children of the same parent, if there be such children or issue, and if such persons are in the same degree of kindred to said intestate they shall take equally, otherwise they shall take by right of representation. . . ." Mich. Comp. Laws (1948) §702.80. Italics added.

106 Alaska Comp. Laws Ann. (1949) §60-1-3-4; Cal. Prob. Code (Deering, 1953) §§200, 225 and 227; Idaho Code (1948) §14-103; Me. Rev. Stat. (1954) c. 170, §1, subdiv. VII; Mont. Rev. Code Ann. (1947) §§67-1201, 91-401, 91-403; Nev. Comp. Laws (1949 Supp.) §9882.297; N.D. Rev. Code (1943) §§47-0121, 56-0101, 56-0104; Okla. Stat. (1951) §§60-331, 84-213; Ore. Rev. Stat. (1953) §111.020; S.D. Code (1939) §§56.0101, 56.0104; Utah Code Ann. (1953) §74-4-5; Wash. Rev. Code, §11.04.020; Wis. Stat. (1953) §237.01 (6).

In Wisconsin the statute herein cited applies only if the child dies unmarried, under age and without surviving brothers or sisters, but with surviving issue of deceased brothers or sisters. In such a case the "estate" which came to the child *"by inheritance"* from his parent goes to the issue of deceased children of the same parent. But if the child dies unmarried, under age and leaves surviving brothers or sisters of the same parent, then the "estate" acquired by such child from his parent *"by inheritance or by testamentary gift"* goes to his surviving brothers and sisters. See note 110 infra.

107 The California statute now uses the word "succession" instead of "inheritance." The Oregon statute uses the word "descent" in lieu of "inheritance."

> "The estate, in this instance, was not cast upon the deceased by operation of law, as the representative and heir of his father, but was conferred upon him by devise. The estate was acquired by *purchase,* in the technical sense of the term, and not by *descent.* It did not come to him by inheritance, and should not, therefore, have been distributed under the *seventh* subdivision of section one, but under the third, which gives the mother an equal share with the brothers and sisters."[108]

The Michigan Supreme Court has taken the same view.[109] Furthermore, based upon the Wisconsin and Minnesota statutes, a strong argument can be made that the words "by inheritance" do not include property acquired *by devise.* That is to say, the statutes in these states demonstrate the type of language the legislature employs when it *intends* to include property which the decedent may have acquired *by will.* These statutes are unequivocal in their language. The Minnesota statute provides as follows: "If a minor die leaving no spouse nor issue surviving, all of his estate that came to him by inheritance *or will* from his parent shall descend and be distributed to the other children of the same parent, if any. . . ."[110]

In view of the statutes in these fourteen jurisdictions, it becomes apparent that the course of descent may well depend upon whether property is acquired by descent or purchase. Such being the case, the wills branch takes on obvious significance. This fact was pointed out in *Cordon v. Gregg.*[111] There the Supreme Court of Oregon was faced with these facts: the testator had devised certain real and personal property in trust to be paid over to his son when he arrived at age twenty-one. His son was the testator's sole heir at law. Two months after the testator's death, his son died, being seventeen years old, unmarried, and without issue.

108 Estate of Donahue, 36 Cal. 329 at 332 (1868). See also Larrabee v. Tracy, 39 Cal. App. (2d) 593, 104 P. (2d) 61 (1940).

109 The words "by inheritance" were of particular significance in Jenks v. Trowbridge Estate, 48 Mich. 94 (1882). In commenting on the technical meaning of these words, the Supreme Court later, in referring to the opinion in the Jenks case, said: "It gave to the words 'by inheritance' used in the statute their technical legal meaning, as having reference only to the descent of real estate." In re Dodge's Estate, 242 Mich. 156 at 159, 218 N.W. 798 (1928).

110 Minn. Stat. (1953) §525.16 (5). The Wisconsin statute speaks of "all the estate that came to the deceased child by inheritance *or by testamentary gift.* . . ." Wis. Stat. (1953) §237.01 (5). Italics added.

111 164 Ore. 306, 97 P. (2d) 732, rehearing granted, 101 P. (2d) 414 (1940), noted in 20 ORE. L. REV. 164 (1941).

The son's heir at law was his mother, who was the divorced wife of the testator. The Oregon descent and distribution statute provided as follows:

> "3. If the intestate shall leave no lineal descendants, neither husband, nor wife, nor father, such property shall descend to his or her mother; . . .
>
> "5. When any child shall die under the age of 21 years and leave no husband nor wife nor children, any real estate which *descended* to such child shall *descend* to the heirs of the ancestor from which such real property descended the same as if such child died before the death of such ancestor."

The wills branch was strongly urged to defeat the claim of the testator's divorced wife. That is to say, counsel argued that the devise by the testator to his heir at law came within the wills branch and, therefore, he took by descent and not by purchase; accordingly the land "descended to such child" as provided in subdivision 5 of the statute.

On its first hearing the court expressly declined and refused to apply the wills branch, although the precise reasons for its refusal are not entirely clear. Nevertheless, the court held that the word "descended" included real property *devised* by the will and, therefore, held against the testator's divorced wife. On rehearing, however, the court reversed its former position and held the wills branch fully applicable. In so doing the court made this pertinent observation:

> " . . . We are now convinced that the common-law rule above referred to has not been changed or abrogated by the statute and that such rule, although never heretofore announced in any decision of this court, we think is binding upon the courts of this state like any other applicable common-law rule which has not been abrogated by statute. . . . That rule is stated by Blackstone as follows: '. . . But if a man, seised in fee, devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it, he shall be adjudged to take by descent, even though it be charged with incumbrances; this being for the benefit of creditors and others, who have demands on the estate of the ancestor. 1 Chitty, Bl. Comm., *242.' "[112]

Under similar statutes the Supreme Courts of Massachusetts and New Hampshire have clearly recognized that if the wills

[112] 164 Ore. 306 at 316, 101 P. (2d) 414 (1940).

branch is found to be applicable[113] different legal consequences will result.[114] Thus the course of descent may well be affected in those jurisdictions having statutes of the type herein discussed.

B. *The Rights of Creditors*

Recent decisions unequivocally show that creditors' rights may be determined by the application of the wills branch. This is demonstrated by *Rossiter v. Soper*.[115] In that case the testatrix devised land to her sister and husband in the exact shares they would have taken as her heirs at law had she died intestate. Subsequent to the probate of her will, this land was sold through a probate proceeding to pay some of the decedent's debts. A subsequent purchaser of an undivided interest in the land sought to partition it and joined the decedent's husband as a defendant. To defeat the partition suit and the probate sale proceedings, the husband argued that the land was homestead and that he had not waived his homestead nor consented in writing to the sale of such interest.

The purchaser at the sale argued that his homestead interest was extinguished because he failed to renounce the provisions made for him in the will and that, failing to renounce, both he and decedent's sister "became the owners of the property, under the will, as tenants in common, subject to the debts of the estate."[116] Under Illinois law, if the spouse accepts the terms of a will it constitutes a waiver of the homestead.[117] In holding that the husband had not waived his homestead the court said:

> "It may be noted in this connection, that the will was void and wholly inoperative. It devised to the surviving husband and sister of the testatrix, who were her only heirs, the same interests which they would take by descent had she died intestate. . . . They, therefore took under the statute by descent, and not under the will. . . . The fact that appellant did not renounce the will can have no bearing whatever on the issues in this case. . . . He took nothing under the will.

113 For a discussion of how and when the wills branch is applied, see Part XI infra.

114 Sedgwick v. Minot, 6 Allen (88 Mass. 171) (1863); M'Afee v. Gilmore, 4 N.H. 391 (1828). See also Hoover's Lessee v. Gregory, 18 Tenn. 444 (1837), where the wills branch was applied with different legal consequences resulting as to the devolution of property under the Tennessee descent and distribution statute. It should be noted that the language of the statute in both Massachusetts and New Hampshire has been changed since these cases were decided.

115 384 Ill. 47, 50 N.E. (2d) 701 (1943).

116 Id. at 49.

117 Stubblefield v. Howard, 348 Ill. 20, 180 N.E. 410 (1932).

> He was wholly unaffected by the will. His failure to renounce the will did not affect his right of homestead. Having received nothing under the will, he received nothing in lieu of his right of homestead. . . . There was nothing on which a finding could be based that he had waived his homestead by not renouncing the will."[118]

It can thus be seen that the court was quick to use the wills branch to put to rest the argument that the decedent's husband had waived his homestead by electing to take under the will. If the will was void so far as he was concerned, it was impossible for him to waive his homestead by electing to accept its terms.[119]

Another point should not be overlooked. This case may be determinative on the question of whether dower is barred. If the dispositive provisions of a will are void because of the wills branch, then presumably the will would not have the effect of barring dower as provided by statute.[120] In fact, the court said that the "surviving husband was also entitled to dower in the one-half interest which descended to the sister of the deceased, under the Descent Act in force at the time of her death."[121]

Let us now turn to a second situation where the wills branch may be significant in determining the rights of creditors. There is a line of American cases which hold that a person may renounce a devise in his favor even though by so doing he defeats the claims of his creditors.[122] Contrariwise, there is respectable authority that an heir taking by descent is powerless to renounce and, therefore, is in no position to place his assets beyond the reach of his creditors.[123] That being the state of the law, it immediately becomes important whether an heir at law takes by descent or purchase.

[118] Rossiter v. Soper, 384 Ill. 47 at 49-50, 50 N.E. (2d) 701 (1943). Illinois has now abolished the rule. See Part XII infra.

[119] For a similar decision see Denny v. Denny, 123 Ind. 240, 23 N.E. 519 (1890).

[120] Ill. Rev. Stat. (1955) c. 3, §172, provides: "Any will, whether or not it contains any provision for the benefit of the testator's surviving spouse, bars the right of the surviving spouse to elect to take dower in all real estate of the testator, unless otherwise expressed in the will or unless the will is renounced by the surviving spouse in the manner provided in Section 17."

[121] 384 Ill. 47 at 49, 50 N.E. (2d) 701 (1943).

[122] "The largest group of cases involving the right of an heir to renounce have been decided with regard to the claims of creditors. As we have seen, it is well established that a legatee may renounce a bequest in his favor. He may take such action even though he is a bankrupt at the time and his renunciation defeats the just claims of his creditors." Lauritzen, "Only God Can Make an Heir," 48 N.W. UNIV. L. REV. 568 at 575 (1953), and the cases cited. Cf. comment in MODEL PROBATE CODE §58, which states in part: "The common law is not clear as to whether the devisee is able to defeat the rights of creditors and taxing authorities."

[123] Bostian v. Milens, 239 Mo. App. 555, 193 S.W. (2d) 797 (1946); In re Meyer's Estate, 107 Cal. App. (2d) 799, 238 P. (2d) 597 (1951); annotation in 170 A.L.R. 435

The importance of this problem was pointed out in the recent case of *McQuiddy Printing Co. v. Hirsig*.[124] In that case a widow devised land to her three sons, *A, B,* and *C,* who were her heirs at law. *A's* creditor sought to attach *A's* interest in the land. To thwart these efforts, *A* executed an instrument which he contended was a renunciation of the will. The creditor countered by urging the application of the wills branch, saying that *A* took by descent and not by purchase. The court recognized the decisive nature of this contention[125] and clearly recognized that if "he takes by descent he cannot renounce his interest so as to defeat his creditors."[126] However, after a full discussion of the wills branch, the court decided it should not be applied because the devise to *A* was not of the same quality and quantity as he would have taken by descent.[127] That is to say, since there was a legacy of $500 to a sister, who was not an heir at law of the testatrix, and because of the question concerning an advancement, *A* would not take under the will an estate of the same *value* as if the testatrix had died *intestate,* and hence the estate was of different quality and quantity.[128]

But suppose there is no difference in quality and quantity and hence no basis for finding that the doctrine cannot apply. Suppose *T* devises Blackacre to *A,* his son and only heir. The residue of his estate, real and personal, he devises to *B* Charity. At *T's* death, however, suppose Blackacre is his only asset so that by any test *A* will necessarily receive an estate of the same quantity and quality under the will as he would have received if his father had died intestate. Thus if *A* is in by descent because of the wills branch he cannot renounce and his creditors can reach Blackacre. On the other hand, if *A* takes as a devisee under the will and renounces, Blackacre would go to *B* Charity under the residuary clause and *A's* creditors could not reach it. In other words, different legal consequences may result because of the application of

(1947). See also Lauritzen, "Only God Can Make an Heir," 48 N.W. UNIV. L. REV. 568 at 575 (1953), where he says: "On the other hand, it is equally well settled that an heir can not defeat his creditors in this way, because he has no power to renounce."

124 23 Tenn. App. 434, 134 S.W. (2d) 197 (1939), noted in 16 TENN. L. REV. 358 (1940).

125 Id. at 442: "The first proposition to be considered is whether Lawrence Hirsig held his interest in the estate, if any, as devisee or *by inheritance,* as the solution of this question will greatly aid in determining whether he has any interest. If he holds the same estate by devise that the law casts on him by descent, he is in by descent and not by devise. Hoover's Lessee v. Gregory, 10 Yerg., 444." Italics added.

126 Id. at 442.

127 Id. at 443.

128 For a discussion as to the proper test in applying the doctrine, see Part XI-A and B infra.

the wills branch. Moreover, the argument in favor of applying the wills branch in this kind of fact situation is an appealing one. It operates to the benefit of a group of persons favored by the law. Indeed, the fact that the rule operated in favor of creditors at the common law is said to be one of the reasons for its early existence.[129]

A third situation of significance arises in Iowa where the wills branch flourishes with vigor.[130] The Iowa homestead statute purports to make a homestead which "descends to the issue" exempt from antecedent debts of both the parent and the issue.[131] The clear import of the Iowa decisions is that an heir[132] who takes by purchase does not take the homestead free from his own antecedent debts, although such is the case if he takes by descent.[133] In other words, if the wills branch applies, an heir gets the protection of the statute; if he takes under the will, he does not.

C. *Construction Problems*

1. *Conditions in Restraint of Marriage.* From ancient times conditions in wills in restraint of marriage have been looked upon with disfavor.[134] General conditions of this nature are said to be contrary to public policy and void. That is to say, the condition may be disregarded by the beneficiary in the will without fear of losing the property so devised to him.

On the other hand, limitations have been treated differently. For example, a devise to *W so long as* she remains unmarried has

129 See Part III supra.

130 See Part IX-D infra on the Iowa cases dealing with the lapse statute.

131 Iowa Code (1954) §561.18: *"Descent.* If there be no survivor, the homestead descends to the issue of either husband or wife according to the rules of descent, unless otherwise directed by will." §561.19: *"Exemption in hands of issue.* Where the homestead descends to the issue of either husband or wife the same shall be held by such issue exempt from any antecedent debts of their parents or their own, except those of the owner thereof contracted prior to its acquisition."

132 The "heir" must also be "issue."

133 Moninger & Ringland v. Ramsey, 48 Iowa 368 (1878); First Nat. Bank v. Willie, 115 Iowa 77, 87 N.W. 734 (1901); Rice v. Burkhart, 130 Iowa 520, 107 N.W. 308 (1906); Luglan v. Lenning, 214 Iowa 439, 239 N.W. 692 (1931). Curiously enough, notwithstanding the language of the statute, it appears that the issue take the homestead free from the ancestor's debts whether they take by descent or purchase. See In re Guthrie's Estate, 183 Iowa 851 at 858, 167 N.W. 604 (1918). "Whether such issue takes it free also from liability *for his own debts* is made, by our decisions in *Rice v. Burkhart* . . . and *Voris v. West* . . . , to depend, first, upon the fact as to whether title passes by descent or purchase; and second, whether the ancestor did or did not leave a surviving spouse. . . ." Emphasis added. See also Voris v. West, 180 Iowa 138, 162 N.W. 836 (1917).

134 Browder, "Conditions and Limitations in Restraint of Marriage," 39 MICH. L. REV. 1288 (1941).

not been viewed as a *condition* but rather as a limitation. If *W* marries there is an automatic termination of her estate.

It can thus be seen that it becomes important in some cases to determine whether the devise is on "condition" or a "limitation." But this is most difficult to do and the cases give us no answer, for words normally importing a condition have been construed as a limitation and vice versa.[135] Furthermore, as Professor Browder has said, the "nadir of chaos is reached in those cases where it has been held that the presence of a gift over turns a condition into a limitation."[136]

It is at this "nadir of chaos" that the wills branch becomes significant. That is to say, the gift over converts the condition into a limitation *only* if the gift over is *valid.* Suppose, therefore, that *T* devises land to *A* in fee on the condition that she not marry and if she marries, then "to the testator's heirs at law." Because the gift over to the testator's heirs at law is said to be void under the wills branch, it has been held that the "condition" will not be converted to a "limitation."[137]

2. *Failure of the Succeeding Interest.* Turning now to a second type of construction problem, suppose *T* devises the residue, consisting of land, to *A* in fee but if *A* die without leaving any children surviving him, then over to *B* in fee. Assume *B* is the sole and only heir at law of *T*. If the devise to *B* is void because it violates the wills branch does it leave the fee absolute in *A* even though he dies without surviving children? Or, does it leave a possibility of reverter in *B* as the testator's sole heir at law? No direct American authority has been found on this question with respect to the wills branch. There are American cases on this point with respect to the inter vivos branch. In those cases where the attempted executory interest was to the grantor's "heirs at law" it has been held that the end limitation is void in so far as it designates purchasers but there is a possibility of reverter in the grantor.[138] These cases certainly ought to be persuasive. If we assume that this same conclusion would also be reached in the wills cases, then we might properly ask: does it make any difference whether the heir takes an executory interest

135 Id. at 1315, and the cases cited.

136 Id. at 1315.

137 Stilwell v. Knapper, 69 Ind. 558 (1880); Parsons v. Winslow, 6 Mass. 169 (1810).

138 Coomes v. Frey, 141 Ky. 740, 133 S.W. 758 (1911); In re Brolasky's Estate, 302 Pa. 439, 153 A. 739 (1931). See also SIMES, FUTURE INTERESTS §27 (1951).

under the will or a possibility of reverter by descent? The answer, of course, is yes in those jurisdictions which hold possibilities of reverter to be inalienable.[139]

A slight variation of the same problem arises in connection with the rule against perpetuities. For example, suppose *T* devises his residue, consisting of land, to *X* Church in fee but, if *X* Church ever ceases to teach the Apostles' Creed as a part of its doctrine, then to the testator's heirs at law. The orthodox view of this limitation, leaving aside for the moment the effect of the wills branch, would be that the executory interest to the heirs at law is void because it violates the rule against perpetuities. In such a situation it is almost universally held in the United States that the failure of the succeeding interest leaves the prior interest absolute.[140] In other words, *X* Church would have a fee simple absolute.

However, in *Sears v. Russell*[141] it was suggested that if the executory interest to the testator's heirs at law was void because of the wills branch, this would prevent the application of the rule against perpetuities. That is to say, it could be argued that the wills branch renders the end limitation void only so far as designating the heirs as purchasers, thereby giving *X* Church a fee simple *determinable* and thus leaving a possibility of reverter in the testator's heirs at law. Accordingly, it can be seen that if by applying the wills branch a court thereby precludes itself from applying the rule against perpetuities, with the corresponding result that the prior interest is rendered *determinable* instead of *absolute,* the difference in legal consequences is obvious.

3. *The Strange Case of Horton v. Cronley.* If there is doubt concerning the weird nature of some decisions involving the wills branch, we need only consider the recent case of *Horton v. Cronley.*[142] In that case the Oklahoma Supreme Court had before it these facts: *H* and *W* had executed a joint will. It purported to dispose of all property, real and personal, to the survivor "during the remainder of their life." On the death of both *H* and *W* the property was devised "one-half of estate equally to living brothers and sisters" of *H,* and "one-half of estate equally to living brothers

139 Illinois, by statute, makes a possibility of reverter inalienable by deed or by will. Ill. Rev. Stat. (1955) c. 30, §37b. See also Pure Oil Co. v. Miller-McFarland Drilling Co., 376 Ill. 486, 34 N.E. (2d) 854, 135 A.L.R. 567 (1941); North v. Graham, 235 Ill. 178, 85 N.E. 267 (1908).

140 SIMES, FUTURE INTERESTS §96 (1951), and cases cited.

141 74 Mass. 86 (1857).

142 (Okla. 1953) 270 P. (2d) 306.

and sisters" of *W*. *H* died first and the will was probated as his will by *W*. In the petition for probate *W* asserted that she was the "sole devisee and legatee, there being no children of their marriage, and that all of the property of the estate was acquired during their married life by their joint industry and, therefore, she became the sole owner thereof."[143] Pursuant to her petition the county court distributed all the property to her. Thereafter *W* died devising all her property to her brothers and sisters. *H's* brothers and sisters filed suit to establish title to one-half of the assets in her estate.

It was argued that by probating *H's* will and by her conduct with respect thereto *W* had elected to take under the will rather than as a forced heir. In rejecting this contention, the court said:

> "Under the Worthier Title Doctrine it must be presumed that Henrietta took as a forced heir, rather than under the will. However, plaintiffs contend that Henrietta took under the will and therefore asserts that she and the defendants are estopped from contending that she could revoke the conjoint will. The fallacy of this position is demonstrated by the language of the will itself, as under the will she could only receive a life estate. If she took under the will, the decree would have vested in her a life estate only, but, as we have seen, the decree vested in her a full fee simple title. If Henrietta took under the will as the sole legatee, then it follows that under subdivision 3 of the will that one-half of the estate must go to the living brothers and sisters of Ben and Henrietta, has no application. [sic] The law presumes that Henrietta took the Worthier Title which, under the law of succession, she was entitled to. She received no benefit under the conjoint will which at most could have given her a life estate. She elected to exercise her statutory right and took a fee simple title under the laws of succession."[144]

This writer does not pretend to know what the court meant. The opinion is directly contrary to the normal approach. Frequently courts go far in seeking reasons not to apply the wills branch. Here the reverse is true. It is believed, therefore, that this case cannot be squared with any orthodox concept of the wills branch.[145] It would seem that the court is holding that *W* took as a forced heir by descent against the will, "rather than under the will," and to buttress that position the court somehow

[143] Id. at 308.
[144] Id. at 313.
[145] See the dissenting opinion by Williams, J., ibid.

relies on the worthier title doctrine. This decision is especially difficult to understand in view of the court's refusal to apply the wills branch only a short time before in a case which afforded some logical basis at least for its application.[146]

D. *Lapse Statutes Affected by the Wills Branch*

Notwithstanding its severe criticism for doing so,[147] the Iowa Supreme Court has steadfastly recognized and applied the wills branch in numerous cases involving the Iowa lapse statute.[148] That statute provides in part as follows: "If a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will a contrary intent is manifest."[149]

The wills branch plays its vital part by manifesting the "contrary intent" so as to prevent the lapse statute from applying. Here is the setting frequently found: *W* dies leaving a will devising to her husband *H* "such share of my estate as he is entitled to and would receive under the laws of the State of Iowa." *H* predeceases the testatrix leaving four children by a former marriage. They claim his share under the lapse statute. The testatrix' children by a former marriage claim the whole estate. Who should prevail?

How can the wills branch possibly determine this question? The answer is to be found in a curious piece of reasoning. It runs like this: If *H* had survived *W* he would have taken nothing under the will as a purchaser, but would have taken by descent since the title by descent is more worthy than the title by purchase. If *H,* as surviving husband, would have taken nothing under the will, how can his children occupy any better position than he? They cannot, says the Iowa Supreme Court, because the wills branch, which the testator is presumed to know as part of the law, furnishes the "manifest contrary intent" to prevent the statute from applying.[150] It can thus be seen that but for the wills branch this ingenious argument could not be made and title would pass to *H's* children under the lapse statute.

146 Beamer v. Ashby, 204 Okla. 530, 231 P. (2d) 668 (1951).

147 Harper and Heckel, "Doctrine of Worthier Title," 24 ILL. L. REV. 627 at 649 et seq. (1930); notes: 39 IOWA L. REV. 199 (1953); 46 HARV. L. REV. 993 at 998 (1933); PROPERTY RESTATEMENT §312, comment *j* (1940).

148 The Iowa Supreme Court refers to this statute as the "antilapse" statute.

149 Iowa Code (1954) §633.16.

150 Tennant v. Smith, 173 Iowa 264, 155 N.W. 267 (1915); Herring v. Herring, 187 Iowa 593, 174 N.W. 364 (1919); In re Warren's Estate, 211 Iowa 940, 234 N.W. 835 (1931).

Litigation in Iowa involving this question has been considerable. Yet to apply the doctrine seems most distasteful to the supreme court. This conclusion is drawn from the fact that the court has gone to great lengths in finding the doctrine to be inapplicable.[151] In a recent case the court's displeasure with the rule was evidenced when it refused to apply it to a will which *in fact* gave the surviving spouse, had she survived the testator, exactly the same estate that she would have taken under the statute of descent and distribution. But because the will did not say "that share of my estate which my wife is entitled to receive under the laws of Iowa," the court refused to apply the wills branch, saying, we "cannot expand its purpose further. The antilapse statute was enacted to do away with the common law rule under which the heirs of a devisee could derive no benefit from the devise if the devisee predeceased the testator. We are unwilling to minimize the operation of the statute by any further extension of the 'worthier title' doctrine."[152]

Though obviously antagonistic toward the doctrine and with an ear to the ground for arguments against it, there is no doubt but that the Iowa Supreme Court recognizes it as the law. In its most recent decision on the subject the court held that "the will gives the widow the same portion of testator's estate as though he had died intestate. Consequently, the 'worthier title' rule is applicable and the estate passes to her under the statutes of descent and distribution and not under the will."[153]

E. *Miscellaneous Questions Affected by the Wills Branch*

1. *Priority of Assets.* As a general rule intestate assets will be resorted to before testate assets in satisfying the claims of creditors or in paying specific legacies. If, therefore, property passes by descent because of the wills branch rather than by purchase under the will, it will be taken first. So hold the American cases.[154] An English decision is directly to the contrary.[155]

[151] In re Watenpaugh's Will, 192 Iowa 1178, 186 N.W. 198 (1922); In re Davis' Estate, 204 Iowa 1231, 213 N.W. 395 (1927); Wehrman v. Farmers and Merchants Savings Bank, 221 Iowa 249, 259 N.W. 564 (1935); In re Schroeder's Estate, 228 Iowa 1198, 293 N.W. 492 (1940); In re Everett's Estate, 238 Iowa 564, 28 N.W. (2d) 21 (1947); Beem v. Beem, 241 Iowa 247, 41 N.W. (2d) 107 (1950), noted in 49 MICH. L. REV. 1066 (1951); In re Coleman's Estate, 242 Iowa 1096, 49 N.W. (2d) 517 (1951).

[152] Beem v. Beem, 241 Iowa 247 at 256, 41 N.W. (2d) 107 (1950).

[153] In re Miller's Estate, 243 Iowa 920 at 930, 54 N.W. (2d) 433 (1952), 36 A.L.R. (2d) 139.

[154] Ellis v. Page, 61 Mass. 161 (1851); Mitchell v. Mitchell, 21 Md. 244 (1864).

[155] Biederman v. Seymour, 3 Beav. 368, 49 Eng. Rep. 144 (1840).

The English case reasons that the rule making intestate assets first available to creditors is premised on the theory that this is in accordance with the presumed intention of the testator. If the will evinces a contrary intention, then other assets must bear their pro rata share of the debts. Therefore, if the testator devises land to his heir it clearly must "have been his intention that the devisee, who is heir, should partake of his bounty as well as other devisees." The court consequently held that the heir's land would only bear the debts ratably with assets devised to others.

The English case is obviously better reasoned, yet the Supreme Court of Maryland, while expressing "great respect for the very able judge who delivered the opinion in the case of Biederman v. Seymour" specifically rejected it.[156] It is believed that there are no American cases—at least the writer has found none—following the English view.[157]

2. *Pleadings.* Some states have statutes which permit a special demurrer for misjoinder of parties.[158] In the absence of such a statute there is some authority at least to the effect that misjoinder of parties may be raised by a general demurrer.[159] Many states also have statutes which provide that only "interested persons" may contest the probate of a will.[160] Under such circumstances the Indiana Supreme Court has held that an heir who takes by descent rather than by purchase under the will is not an "interested person" and if he joins with others to contest the will, it makes the petition subject to demurrer as to all plaintiffs.[161] Accordingly, it has been said that "a will which makes no other disposition of property than the law would make is a nullity, and not subject to contest."[162]

F. *Conclusions*

What conclusions may properly be drawn as to whether different legal consequences result because of the wills branch? To the

156 Mitchell v. Mitchell, 21 Md. 244 (1864).

157 In accord, see note, 46 HARV. L. REV. 993 at 998 (1933), where it is said: "American courts, however, have failed to perceive and accept the sound reasoning of Biederman v. Seymour."

158 CLARK, CODE PLEADING §57 (1947).

159 Railroad Co. v. Priest, 131 Ind. 413, 31 N.E. 77 (1892); Wells & Nellegar Co. v. Short, 49 Ind. App. 296, 97 N.E. 183 (1912); Cohen v. Ottenheimer, 13 Ore. 220, 10 P. 20 (1886).

160 See, for example, Okla. Stat. Ann. (1937) c. 58, §§29 and 61.

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

162 Wheeler v. Loesch, 51 Ind. App. 262, 99 N.E. 502 (1912).

writer it seems that two general conclusions may be drawn. First, there are numerous decisions in the United States where different legal consequences *did in fact result* because the rule was applied. Second, there are several distinct fact situations where different legal consequences *may result* if the rule is applied.

In drawing these conclusions it is not the intention of the writer to be critical in any way of the position taken by the *Restatement.* In support of the *Restatement's* position it must be recognized that there are numerous cases in which it makes no difference whatsoever whether the heir takes by descent or purchase.[163] The *Restatement* is certainly warranted in taking the position it has with respect to those cases.

But what about the cases where it does make a difference? The *Restatement* specifically discusses some of the problems presented by those cases. First it discusses the question of the devolution of property being determined by whether it was acquired by descent or purchase. While recognizing its importance at one time, the *Restatement* concludes that in modern law "it is no longer of any significance."[164] It is the writer's belief, however, that it may be significant and even determinative under the statutes and cases previously discussed.[165]

On the second problem which is discussed, the *Restatement* says that it "has been suggested that the rule . . . is significant today where the question involved is the order in which the assets of a decedent will be used to pay debts." But it concludes that the order in which assets are to be used to pay debts is subject "to control by the manifest intent of the deceased. The fact that the deceased has attempted to make a devise to his heirs shows an intention on his part to attach to the interest which the heirs may take the consequence of a devise. . . . Thus the rule that a testator cannot make a devise to his own heirs is of no significance in the solution of these problems."[166]

The foregoing argument is compelling, sound and reasonable. It is supported by English authority, but the writer has been unable to find any cases in the United States taking that position.[167]

163 Henry v. Griffith, 242 Ala. 598, 7 S. (2d) 560 (1942); Wiltfang v. Dirksen, 295 Ill. 362, 129 N.E. 159 (1920); In re Shumway's Estate, 194 Mich. 245, 160 N.W. 595 (1916); Brittin v. Karrenbrock, (Mo. App. 1945) 186 S.W. (2d) 35; Burton v. Kinney, 191 Tenn. 1, 231 S.W. (2d) 356 (1950).

164 PROPERTY RESTATEMENT §314, comment *j* at 1787 (1940).

165 See Part IX-A supra.

166 PROPERTY RESTATEMENT §314, comment *j* at 1787 (1940).

167 See Part IX-A-1 supra.

Finally, attention is directed in the *Restatement* to the cases involving the Iowa lapse statute. The *Restatement* position is this: to say that the wills branch could affect the construction of a lapse statute is a "fallacy . . . easily illustrated." The fallacy is that the word "devisee" or "legatee" as used in the lapse statute must mean purported devisee or legatee. Secondly, lapse statutes "are preeminently concerned with the type of case which involves a devise to the testator's heirs and to rule out such cases from the lapse statutes would frequently nullify the significance of such statutes. Thus it is clear that the application of lapse statutes in no way depends on whether the heirs, had they survived, would have taken by descent or by the devise."[168]

The writer is fully in accord with the argument of the *Restatement.* It ably points up the fallacies in letting the wills branch affect the construction of a lapse statute. No court *should* consider the wills branch in deciding how to construe a lapse statute. But one Supreme Court has done so and many people who normally would have taken under the lapse statute have been cut out.[169]

In support of its position that the wills branch is not an existing rule of law, the *Restatement* concludes: "In the absence of any discoverable circumstance in which the rule that a devise to the heirs of the testator is a nullity has significance in the solution of modern problems, the rule stated in subsection (2) is justifiable."[170] From this conclusion the writer must respectfully dissent, but in so doing he wishes to make his position unequivocally clear. He does not wish to be understood as saying, "I am right and the *Restatement* is wrong." For after all, as Professor Simes has so aptly observed, the *Restatement* is "the 'standard of perfection' in this field of law."[171] Furthermore, it has been the writer's pleasure to know and study under some of those esteemed scholars who worked on the *Restatement,* and for them he has the highest regard. Therefore, it is suggested that the difference in viewpoint is twofold: first, all of the cases discussed in this article had not been reported in 1940,[172] and second, as to those cases which were reported in 1940 there is an honest difference of opinion concerning what they held and how they should be interpreted.

168 PROPERTY RESTATEMENT §314, comment *j* at 1788 (1940).
169 See Part IX-D supra.
170 PROPERTY RESTATEMENT §314, comment *j* at 1788 (1940).
171 SIMES, FUTURE INTERESTS, Preface, v (1951).
172 The year volume 3 of the *Property Restatement* was published.

X. THE EXTENT OF RECOGNITION OF THE DOCTRINE IN THE UNITED STATES

Inasmuch as it seems reasonable to conclude that different legal consequences may result by applying the rule, the next question is: to what extent has the rule been recognized? For if the rule has been expressly recognized in a given jurisdiction, that fact alone may be vital. That is, if a case arises with the wills branch being a decisive issue, counsel urging its application will always point to such decisions, if there are any, in support of their arguments. They will have the advantage of urging a doctrine which their own courts have recognized as a common law principle. And this is so even though their own courts may not have applied the rule in a manner so as to bring about different legal consequences.

Although several cases recognized the rule at an earlier date,[173] it was perhaps largely due to the writings of Chancellor Kent and the publication of the fourth volume of his *Commentaries* in 1830 that numerous states have recognized the rule.[174] The writer has found decisions in twenty-one jurisdictions where the wills branch has been recognized. These jurisdictions include Alabama,[175] Connecticut,[176] Illinois,[177] Indiana,[178] Iowa,[179]

[173] Barnitz's Lessee v. Robert Casey, 7 Cranch (11 U.S.) 455 (1813); Parsons v. Winslow, 6 Mass. 169 (1810); Whitney v. Whitney, 14 Mass. 88 (1817); Campbell v. Herron, 1 N.C. 468 (1801); University v. Holstead, 4 N.C. 289 (1816); M'Kay v. Hendon, 7 N.C. 209 (1819); Lessee of Bond v. Swearingen, 1 Ohio 395 (1824).

[174] For example, the following cases either quote the rule from Chancellor Kent or cite him in connection therewith. Bunting v. Speek, 41 Kan. 424, 21 P. 288 (1889); Stilwell v. Knapper, 69 Ind. 558 (1880); Thompson v. Turner, 173 Ind. 593, 89 N.E. 314 (1909); In re Warren's Estate, 211 Iowa 940, 234 N.W. 835 (1931); Ellis v. Page, 51 Mass. 161 (1851); Taylor v. Johnson, 92 Okla. 145, 218 P. 1095 (1923); Beamer v. Ashby, 204 Okla. 530, 231 P. (2d) 668 (1951).

[175] Wilcoxen v. Owen, 237 Ala. 169, 185 S. 897 (1938) (dictum in a deed case).

[176] Post v. Jackson, 70 Conn. 283, 39 A. 151 (1898).

[177] Kellett v. Shepard, 139 Ill. 433, 28 N.E. 751 (1891); Akers v. Clark, 184 Ill. 136, 56 N.E. 296 (1900) (dictum in a deed case); Darst v. Swearingen, 224 Ill. 229, 79 N.E. 635 (1906); Biggerstaff v. Van Pelt, 207 Ill. 611, 69 N.E. 804 (1904); Wiltfang v. Dirksen, 295 Ill. 362, 129 N.E. 159 (1920); Cooper v. Martin, 308 Ill. 224, 139 N.E. 68 (1923); McCormick v. Sanford, 318 Ill. 544, 149 N.E. 476 (1925); Rossiter v. Soper, 384 Ill. 47, 50 N.E. (2d) 701 (1943); McNeilly v. Wylie, 389 Ill. 391, 59 N.E. (2d) 811 (1945); Boldenweck v. City Nat. Bank & Trust Co., 343 Ill. App. 569, 99 N.E. (2d) 692 (1951).

[178] Stilwell v. Knapper, 69 Ind. 558 (1880); Davidson v. Koehler, 76 Ind. 398 (1881); Robertson v. Robertson, 120 Ind. 333, 22 N.E. 310 (1889); Denny v. Denny, 123 Ind. 240, 23 N.E. 519 (1890); McClanahan v. Williams, 136 Ind. 30, 35 N.E. 897 (1893); Rawley v. Sanns, 141 Ind. 179, 40 N.E. 674 (1895); Thompson v. Turner, 173 Ind. 593, 89 N.E. 314 (1909); Wheeler v. Loesch, 51 Ind. App. 262, 99 N.E. 502 (1912); Dillman v. Fulwider, 57 Ind. App. 632, 105 N.E. 124 (1914).

[179] First Nat. Bank v. Willie, 115 Iowa 77, 87 N.W. 734 (1901); Rice v. Burkhart, 130 Iowa 520, 107 N.W. 308 (1906); Tennant v. Smith, 173 Iowa 264, 155 N.W. 267 (1915); Herring v. Herring, 187 Iowa 593, 174 N.W. 364 (1919); In re Schultz's Estate, 192 Iowa

Maine,[180] Maryland,[181] Massachusetts,[182] Mississippi,[183] New Hampshire,[184] New York,[185] North Carolina,[186] Ohio,[187] Oklahoma,[188] Oregon,[189] Pennsylvania,[190] South Carolina,[191] Tennessee,[192] Virginia,[193] Wisconsin,[194] and the District of Columbia.[195] The wills branch has been repudiated and found to be inapplicable in Kentucky[196] and Georgia.[197]

436, 185 N.W. 24 (1921); In re Watenpaugh's Will, 192 Iowa 1178, 186 N.W. 198 (1922); In re Davis' Estate, 204 Iowa 1231, 213 N.W. 395 (1927); Luglan v. Lenning, 214 Iowa 439, 239 N.W. 692 (1931); In re Warren's Estate, 211 Iowa 940, 234 N.W. 835 (1931); Wehrman v. Farmers and Merchants Savings Bank, 221 Iowa 249, 259 N.W. 564 (1935); In re Sheeler's Estate, 226 Iowa 650, 284 N.W. 799 (1939); In re Schroeder's Estate, 229 Iowa 1198, 293 N.W. 492 (1940); In re Everett's Estate, 238 Iowa 564, 28 N.W. (2d) 21 (1947); In re Finch's Estate, 239 Iowa 1069, 32 N.W. (2d) 819 (1948); Beem v. Beem, 241 Iowa 247, 41 N.W. (2d) 107 (1950), noted in 49 MICH. L. REV. 1066 (1951); In re Coleman's Estate, 242 Iowa 1096, 49 N.W. (2d) 517 (1951); In re Miller's Estate, 243 Iowa 920, 54 N.W. (2d) 433, 36 A.L.R. (2d) 139 (1952).

180 Lord v. Bourne, 63 Me. 368, 18 Am. Rep. 234 (1873).

181 Mitchell v. Mitchell, 21 Md. 244 (1864); Donnelly v. Turner, 60 Md. 81 (1883); Latrobe v. Carter, 83 Md. 279, 34 A. 472 (1896).

182 Parsons v. Winslow, 6 Mass. 169 (1810); Whitney v. Whitney, 14 Mass. 88 (1817); Ellis v. Page, 61 Mass. 161 (1851); Sears v. Russell, 74 Mass. 86 (1857); Sedgwick v. Minot, 88 Mass. 171 (1863); Thompson v. Thornton, 197 Mass. 273, 83 N.E. 880 (1908); Nat. Shawmut Bank of Boston v. Joy, 315 Mass. 457, 53 N.E. (2d) 113 (1944) (dictum in an inter vivos trust case).

183 McDaniel v. Allen, 64 Miss. 417, 1 S. 356 (1887).

184 M'Afee v. Gilmore, 4 N.H. 391 (1828).

185 In re Hawes' Estate, 162 App. Div. 173, 147 N.Y.S. 329 (1914), affd. per curiam 221 N.Y. 613, 116 N.E. 1050 (1917).

186 Campbell v. Herron, 1 N.C. 468 (1801); University v. Holstead, 4 N.C. 289 (1816); M'Kay v. Hendon, 7 N.C. 209 (1819); Wilkerson v. Bracken, 24 N.C. 315 (1842); Caldwell v. Black, 27 N.C. 463 (1845); Poisson v. Pettaway, 159 N.C. 650, 75 S.E. 930 (1912); Yelverton v. Yelverton, 192 N.C. 614, 135 S.E. 632 (1926).

187 Lessee of Bond v. Swearingen, 1 Ohio 395 (1824).

188 United States v. Fooshee, (8th Cir. 1915) 225 F. 521; Taylor v. Johnson, 92 Okla. 145, 218 P. 1095 (1923); Beamer v. Ashby, 204 Okla. 530, 231 P. (2d) 668 (1951); Horton v. Cronley, (Okla. 1953) 270 P. (2d) 306.

189 Cordon v. Gregg, 164 Ore. 306, 97 P. (2d) 414, rehearing granted 101 P. (2d) 414 (1940), noted in 20 ORE. L. REV. 164 (1941).

190 Kinney v. Glasgow, 53 Pa. St. Rep. 141 (1866); Donohue v. McNichol, 61 Pa. St. Rep. 73 (1869); Banes v. Finney, 209 Pa. 191, 58 A. 136 (1904).

191 Seabrook's Exr. v. Seabrook, McMul. Eq. (S.C.) 201 (1841).

192 Hoover's Lessee v. Gregory, 18 Tenn. 444 (1837); State v. Goldberg's Unknown Heirs, 113 Tenn. 298, 86 S.W. 717 (1904); McQuiddy Printing Co. v. Hirsig, 23 Tenn. App. 434, 134 S.W. (2d) 197 (1939), cert. den., noted in 16 TENN. L. REV. 358 (1940).

193 Biedler v. Biedler, 87 Va. 300, 12 S.E. 753 (1891); Braswell v. Braswell, 195 Va. 971, 81 S.E. (2d) 560 (1954) (dictum in a deed case).

194 In re Root's Will, 81 Wis. 263, 51 N.W. 435 (1892).

195 Landic v. Simms, 1 App. D.C. 507 (1893). See also Barnitz's Lessee v. Robert Casey, 7 Cranch (11 U.S.) 456 (1813).

196 The doctrine was recognized in the early cases. See Tyler v. Fidelity and Columbia Trust Co., 158 Ky. 280, 164 S.W. 939 (1914); McIlvaine v. Robson, 161 Ky. 616, 171 S.W. 413 (1914). It was repudiated in Mitchell v. Dauphin Trust Co., 283 Ky. 532, 142 S.W. (2d) 181 (1940). See also Copeland v. State Bank and Trust Co., 300 Ky. 432, 188 S.W. (2d) 1017 (1945).

197 Lucas v. Parsons, 24 Ga. 640 (1857).

Because it was a part of the English common law, courts in jurisdictions which have not had occasion to adopt or reject it may feel compelled to apply it as did the Oregon Supreme Court.[198] It therefore has a potential existence in all states which look to the common law except those which have repudiated it by decision or have abrogated it by statute.[199]

XI. How is the Wills Branch Applied?

Chancellor Kent has said that the wills branch applies thereby making the devise void "if it gives precisely the same estate that the heir would take by descent if the particular devise to him was omitted out of the will."[200] But when does a will give "precisely the same estate?" Or, conversely, what provisions in a will prevent the devise from being "precisely the same estate" and thereby take the case outside the wills branch? This question has been the source of much litigation in this country.

In answering the question American courts have generally followed the pattern set in some English cases[201] by saying that the devise to the heir must be of the same quantity and quality. But the meaning of "quantity" and "quality" as used in the English decisions bears little resemblance to the meaning of those words as reflected by the American decisions, as will presently be seen.

A. *The American Concept of Quantity*

It has previously been pointed out that the English concept of "quantity" had reference to tenure, or the nature of the estate created—namely, whether the heir took a fee simple, a fee tail, or a life estate.[202] Furthermore, in England the test in applying the rule, according to Mr. Crosley, "is to strike out of the will the *particular devise* to the heir, and then, if without that he would

198 Cordon v. Gregg, 164 Ore. 306, 101 P. (2d) 414 (1940), noted in 20 ORE. L. REV. 164 (1941). In Braswell v. Braswell, 195 Va. 971, 81 S.E. (2d) 560 (1954), the Supreme Court of Virginia was specifically urged to apply the inter vivos branch of the worthier title doctrine. But in its opinion it is clear that the court considered the rule applicable to either "the grantor's or testator's heirs." 195 Va. 971 at 973. In commenting on whether it was obligated to apply the rule, the court said (at 979): "The common law rule, not having been abrogated in Virginia, *is controlling.*" Italics added.

199 For a discussion of the effect of statutes on the rule, see Part XII infra.

200 4 KENT, COMMENTARIES, 14th ed., 506 (1896).

201 See Part V supra.

202 See Part V-A supra.

take by descent exactly the same estate which the devise purports to give him, he is in by descent and not by purchase."[203]

While some early American cases adhere to the English view,[204] radical departure is frequently found. Thus many decisions clearly suggest the test to be this: if the heir takes the same estate which he would have taken had the testator died *intestate,* then the rule applies.[205] This has been referred to by Professors Harper and Heckel as the so-called value, amount, or proportion test.[206] It is, of course, completely foreign to the English concept of "quantity." Seldom does the will give the heir the same amount, proportion or value of the estate that he would have taken had the testator died intestate. Thus it has been held that the wills branch does not apply if the heir gets either a lesser share[207] or a greater share[208] of the estate than he would have taken by intestacy. One case has even held that since the share of one heir could be increased if another heir contested the will, contrary to the terms of a no-contest clause, this fact alone would prevent the heir from taking the same quantity of estate as he would have taken by intestacy.[209] Likewise, a provision in a will directing the sale of land and the distribution of the proceeds to the heir has been said to prevent the operation of the rule because if the testator had died intestate the heir would have taken the land itself and not the proceeds therefrom.[210]

203 4 KENT, COMMENTARIES, 14th ed., 507 (1896), citing CROSLEY'S TREATISE ON WILLS 101 (1828). Italics added.

204 Whitney v. Whitney, 14 Mass. 88 (1817); Ellis v. Page, 61 Mass. 161 (1851). Cf. Yelverton v. Yelverton, 192 N.C. 614, 135 S.E. 632 (1926).

205 Post v. Jackson, 70 Conn. 283, 39 A. 151 (1898); Landic v. Simms, 1 App. D.C. 507 (1893); Biggerstaff v. Van Pelt, 207 Ill. 611, 69 N.E. 804 (1904); Rossiter v. Soper, 384 Ill. 47, 50 N.E. (2d) 701 (1943); First Nat. Bank v. Willie, 115 Iowa 77, 87 N.W. 734 (1901); Thompson v. Thornton, 197 Mass. 273, 83 N.E. 880 (1908); McDaniel v. Allen, 64 Miss. 417, 1 S. 356 (1887); University v. Holstead, 4 N.C. 289 (1816).

206 Harper and Heckel, "Doctrine of Worthier Title," 24 ILL. L. REV. 627 at 648 and 649 (1930).

207 In re Everett's Estate, 238 Iowa 564, 28 N.W. (2d) 21 (1947); In re Coleman's Estate, 242 Iowa 1096, 49 N.W. (2d) 517 (1951); Taylor v. Johnson, 92 Okla. 145, 218 P. 1095 (1923).

208 Rice v. Burkhart, 130 Iowa 520, 107 N.W. 308 (1906); In re Watenpaugh's Will, 192 Iowa 1178, 186 N.W. 198 (1922); In re Schroeder's Estate, 228 Iowa 1198, 293 N.W. 492 (1940); Beamer v. Ashby, 204 Okla. 530, 231 P. (2d) 668 (1951); Kenney v. Glasgow, 53 Pa. St. Rep. 141 (1866).

209 Luglan v. Lenning, 214 Iowa 439, 239 N.W. 692 (1931).

210 Darst v. Swearingen, 224 Ill. 229, 79 N.E. 635 (1906); In re Sheeler's Estate, 226 Iowa 650, 284 N.W. 799 (1939).

B. *The American Concept of Quality*

The English cases, in holding that the estate had to be of the same quality, referred to whether the heir took his interest in severalty, as a joint tenant, as a coparcenar, or as a tenant in common. In other words, if the heir would have taken as a joint tenant under the will, but as a tenant in common had the devise been stricken from the will, the quality of the estate was not the same in both cases and the rule would not apply.[211] This view has quite properly been followed in this country by some courts.[212] However, its importance in modern times has been somewhat diminished. In many states a devise of land by *T* to *A* and *B*, his heirs at law, will invest them with the title as tenants in common under the will. Had *T* died intestate they would likewise have been tenants in common. Hence, the quality is the same in either case.

The English courts were also called upon to decide whether a charge, an executory interest, a power of sale, or a devise in trust would so change the quality of the estate devised to the heir as to prevent the rule from applying. For example, suppose *T* devised land to *H*, his sole heir at law, subject to a charge of $500 which *H* was required to pay his brother. The English courts held that the existence of the charge did not prevent the application of the rule.[213] The same was true although the devise to the heir was subject to an executory interest or power of sale.[214] Some of the American cases adhere to the English view.[215] However, in other cases it has been held that a charge[216] or a power of sale[217] will prevent the rule from applying. These latter decisions again point up the fact that some courts are eager to find a reason for refusing to apply the wills branch.[218]

211 See Part IV-B supra.

212 Donnelly v. Turner, 60 Md. 81 (1883); M'Afee v. Gilmore, 4 N.H. 391 (1828); Campbell v. Herron, 1 N.C. 468 (1801).

213 See Part V-B-(1) supra.

214 See Part V-B-(2) and (4) supra.

215 Whitney v. Whitney, 14 Mass. 88 (1817); Lessee of Bond v. Swearingen, 1 Ohio 395 (1824); Kenney v. Glasgow, 53 Pa. St. Rep. 141 (1866); Banes v. Finney, 209 Pa. 191, 58 A. 136 (1904).

216 Davis' Estate, 204 Iowa 1231, 213 N.W. 395 (1927); Wehrman v. Farmers and Merchants Savings Bank, 221 Iowa 249, 259 N.W. 564 (1935).

217 Dillman v. Fulwider, 57 Ind. App. 632, 105 N.E. 124 (1914).

218 Two Oklahoma decisions clearly demonstrate how far some courts will go in attempting to find reasons not to apply the rule. In each case the court pointed to the

On the question of whether a trust will prevent the wills branch from applying, the only American cases which have really considered the question have held that a trust will not prevent the rule from applying.[219] These cases are unusual in view of the fact that some American courts, as we have seen, look for reasons to take cases outside the scope of the doctrine. They are even more unusual when it is remembered that the English courts have on occasion refused to apply the doctrine if a trust were involved.[220]

C. *Is the Devise Void?*

"The devise to the heirs is void." Statements to that effect are frequently found in decisions which recognize and announce the wills branch as part of the common law.[221] But these statements stem basically from the English cases where the statement was literally true because of the doctrine of primogeniture.[222] If, therefore, the devise to the heir at law was void he would of necessity take the land by descent, because the eldest son inherited to the exclusion of his brothers and sisters. The eldest son was the heir at law.[223]

fact that different legal consequences would result if the rule were applied and because of that fact it stated that quite obviously the "quality of the estate" was not the same. See Taylor v. Johnson, 92 Okla. 145, 218 P. 1095 (1923); Beamer v. Ashby, 204 Okla. 530, 231 P. (2d) 668 (1951).

219 Ellis v. Page, 61 Mass. 161 (1851); Cordon v. Gregg, 164 Ore. 306, 101 P. (2d) 414 (1940). In the following cases trusts were involved and while it was not discussed there is no suggestion that a trust prevents the rule from applying. Kellett v. Shepard, 139 Ill. 433, 28 N.E. 751 (1891); Boldenweck v. City Nat. Bank & Trust Co., 343 Ill. App. 569, 99 N.W. (2d) 692 (1951); Latrobe v. Carter, 83 Md. 279, 34 A. 472 (1896); Parsons v. Winslow, 6 Mass. 145 (1810).

220 See Section V-B-(3) supra.

221 Kellett v. Shepard, 139 Ill. 433, 28 N.E. 751 (1891); Darst v. Swearingen, 224 Ill. 229, 79 N.E. 635 (1906); Rossiter v. Soper, 384 Ill. 47, 50 N.E. (2d) 701 (1943); Stilwell v. Knapper, 69 Ind. 558 (1880); Denny v. Denny, 123 Ind. 240, 23 N.E. 519 (1890); Wheeler v. Loesch, 51 Ind. App. 262, 99 N.E. 502 (1912); Parsons v. Winslow, 6 Mass. 169 (1810); Whitney v. Whitney, 14 Mass. 88 (1817); M'Afee v. Gilmore, 4 N.H. 391 (1828); Campbell v. Herron, 1 N.C. 468 (1801); University v. Holstead, 4 N.C. 289 (1816); In re Root's Will, 81 Wis. 263, 51 N.W. 435 (1892). The writer of the comment in 47 N.W. UNIV. L. REV. 507 at 507 makes this statement: "Thus if a will devises various life estates with remainders over to the legal heirs of the testator and then contains a residuary gift over to others, the heirs do not take anything, but their devise or legacy goes back into the testator's estate and then to the residuary takers." No cases are cited in support of this statement.

222 See Part IV-A supra.

223 If the decedent had only daughters they all constituted the "heir" and took as coparceners. The rule did not apply to a devise to daughters because the quality of the estate was different. See Part IV-B supra.

But in the United States primogeniture does not obtain and if a man dies leaving several children, not one, but all of them are his heirs. Suppose, therefore, *T* has two sons, *A* and *B*. He wishes to disinherit *A*. He therefore devises one half of his land to *B* and one half to *X*, a stranger. Now, is the devise to *B* really void? If it is, then the land will descend to both *T's* heirs, namely *A* and *B*, thereby permitting *A* to inherit contrary to his father's wishes. The writer has found no American case which has applied the wills branch so as to bring about this legal consequence.[224] It therefore seems proper that the oft-repeated statement "the devise to the heir is void" must be tempered by the actual holdings in the cases.

D. *The Form of the Devise*

One significant point of difference exists between the inter vivos branch and the wills branch. It is with respect to the form of the limitation. The inter vivos branch applies only to those cases where an end limitation is in form to the heirs at law or next of kin of the grantor.[225] With the wills branch such is not the case. If the devise is to persons *who are in fact* heirs of the testator at the time of his death the wills branch will apply whether the testator refers to them individually,[226] mentions them as a class, such as children,[227] or refers to them as his "heirs at law."[228]

224 See, however, McIlvaine v. Robinson, 161 Ky. 616, 171 S.W. 413 (1914), and the comment thereon in Mitchell v. Dauphin Deposit Trust Co., 283 Ky. 532 at 537, 142 S.W. (2d) 181 (1940), where it is suggested that the wills branch did give an heir an interest in land which she would not have received had the wills branch not been applied. See also Rawley v. Sanns, 141 Ind. 179, 40 N.E. 674 (1895), and M'Kay v. Hendon, 7 N.C. 209 (1819).

225 See Morris, "Inter Vivos Branch of the Worthier Title Doctrine," 2 OKLA. L. REV. 133 at 149 (1949).

226 Rossiter v. Soper, 384 Ill. 47, 50 N.E. (2d) 701 (1943); Stilwell v. Knapper, 69 Ind. 558 (1880); Thompson v. Turner, 173 Ind. 593, 89 N.E. 314 (1909); Tennant v. Smith, 173 Iowa 264, 155 N.W. 267 (1915); Herring v. Herring, 187 Iowa 593, 174 N.W. 364 (1919); In re Warren's Estate, 211 Iowa 940, 234 N.W. 835 (1931); In re Miller's Estate, 243 Iowa 920, 54 N.W. (2d) 433 (1952); Hoover's Lessee v. Gregory, 18 Tenn. 444 (1837); University v. Holstead, 4 N.C. 289 (1816).

227 Robertson v. Robertson, 120 Ind. 333, 22 N.E. 310 (1889); Davidson v. Koehler, 76 Ind. 398 (1881).

228 Kellett v. Shepard, 139 Ill. 433, 28 N.E. 751 (1891); Wiltfang v. Dirksen, 295 Ill. 362, 129 N.E. 159 (1920). But in Post v. Jackson, 70 Conn. 283, 39 A. 151 (1898), it was strongly suggested that the form of the limitation had to be the "lawful heirs" of the testator before the wills branch would apply. Likewise, in the recent case of Boldenweck v. City Nat. Bank & Trust Co., 343 Ill. App. 569, 99 N.E. (2d) 692 (1951), the court

The wills branch therefore is much broader in scope because it applies to both present and future interests and likewise is not dependent upon an exact form of limitation before it comes into play.

E. *A Rule of Law*

There would appear to be no doubt that in England the wills branch was applied as a rule of law.[229] In the United States the same conclusion seems justified.[230] That is to say, the writer has found no decision which has treated the rule as one designed to aid the court in ascertaining the probable intention of the testator. It is true that in Iowa it has been inferred that the rule may be one of construction since it constitutes the springboard upon which a court can find a "manifest intent" that the testator would not want the lapse statute applied to his will.[231] Likewise, it is suggested in two early Illinois cases that the rule is one of construction.[232] However, on the whole it clearly seems to be applied as a rule of law. Indeed, it would appear that the principal reason some courts go so far to find facts making the rule inapplicable is to avoid its heavy hand.[233]

F. *Personal Property*

The wills branch having its origin in ancient feudal land law might logically be presumed to have no application to personal property. Especially would this seem to follow since even

observed (at 590): "The rule upon which plaintiffs rely applies only to limitations of remainders to right heirs. Manifestly, the rule cannot apply where from the will, as a whole, it appears that the testator used the word 'heirs' in a sense other than right heirs."

229 See Part II-C supra.

230 Rossiter v. Soper, 384 Ill. 47, 50 N.E. (2d) 701 (1943); Davidson v. Koehler, 76 Ind. 398 (1881); In re Warren's Estate, 211 Iowa 940, 234 N.W. 835 (1931); Latrobe v. Carter, 83 Md. 279, 34 A. 472 (1896); Parsons v. Winslow, 6 Mass. 169 (1810); Whitney v. Whitney, 14 Mass. 88 (1817); Ellis v. Page, 61 Mass. 161 (1851); University v. Holstead, 4 N.C. 289 (1816); Yelverton v. Yelverton, 192 N.C. 614, 135 S.E. 632 (1926); United States v. Fooshee, (8th Cir. 1915) 225 F. 521 (1915); Cordon v. Gregg, 164 Ore. 306, 97 P. (2d) 732, rehearing granted, 101 P. (2d) 414 (1940); Hoover's Lessee v. Gregory, 18 Tenn. 444 (1837). See also the cases cited in notes 175 to 195 supra.

231 Beem v. Beem, 241 Iowa 247, 41 N.W. (2d) 107 (1950), noted in 49 MICH. L. REV. 1066 (1951).

232 Kellett v. Shepard, 139 Ill. 433, 28 N.E. 751 (1891); Wiltfang v. Dirksen, 295 Ill. 362, 129 N.E. 159 (1920).

233 See Part XI-A and B supra.

in the United States it is generally regarded as a rule of law. Surprisingly, however, there are a few decisions which actually apply the doctrine to personal property.[234] Moreover, some courts while not squarely passing on the point have clearly indicated that the rule is applicable to personal property.[235]

However, in most jurisdictions when the wills branch has been urged the subject matter of the action has been land. Accordingly it seems correct to say that as a rule of property based on feudal concepts, as distinguished from a rule of construction, the doctrine should be applied only to real property.[236]

XII. STATUTORY ABOLITION

A recent decision by the Iowa Supreme Court points up the fact that the wills branch was abolished in England thirteen years before Iowa became a state.[237] As compared to its treatment in England the rule has fared much better in the hands of American legislators. In this country it has been abrogated by statute only in Kansas,[238] Nebraska,[239] and Illinois.[240] In addition, Minnesota has a statute the effect of which probably abolishes the rule.[241] Partial abolition may result in states having statutes which provide in effect that the word "heirs" is to be treated as a word of purchase.[242] And, as previously pointed out, the rule has received judicial repudiation in Georgia[243] and Kentucky.[244]

For a rule of law which has no useful purpose it is somewhat

234 In re Warren's Estate, 211 Iowa 940, 234 N.W. 835 (1931); Thompson v. Turner, 173 Ind. 593, 89 N.E. 314 (1909); Parsons v. Winslow, 6 Mass. 169 (1810).

235 Robertson v. Robertson, 120 Ind. 333, 22 N.E. 310 (1889); Denny v. Denny, 123 Ind. 240, 23 N.E. 519 (1890); In re Hawes' Estate, 162 App. Div. 173, 147 N.Y.S. 329 (1914), affd. per curiam, 221 N.Y. 613, 116 N.E. 1050 (1917).

236 Lord v. Bourne, 63 Me. 368, 18 Am. St. Rep. 234 (1873); Cordon v. Gregg, 164 Ore. 306, 97 P. (2d) 732, rehearing granted 101 P. (2d) 414 (1940).

237 Beem v. Beem, 241 Iowa 247, 41 N.W. (2d) 107 at 112 (1950).

238 Kan. Gen. Stat. (1949) §58-506.

239 Neb. Rev. Stat. (1943) §76-114.

240 Ill. Rev. Stat. (1955) §188.

241 Minn. Stat. (1953) §500.14(4).

242 Cal. Prob. Code (Deering, 1953) §108; 20 Pa. Stat. Ann. (Purdon, 1950) §180.14(4).

243 Lucas v. Parsons, 24 Ga. 640 (1857).

244 Mitchell v. Dauphin Deposit Trust Co., 283 Ky. 532, 142 S.W. (2d) 181 (1940). See also Copeland v. State Bank and Trust Co., 300 Ky. 432, 188 S.W. (2d) 1017 (1945).

surprising that it has not received the same legislative "treatment" which the rule in Shelley's case has received.[245] The reason it has not lies, perhaps, in the fact that it is not universally well known.

XIII. CONCLUSION

What meritorious arguments can be made in favor of the wills branch of the worthier title doctrine? The writer can think of none. The rule invites litigation, ensnares the unwary draftsman and frustrates the wary draftsman. As a rule of law it applies to devises made to people who are the most natural objects of the testator's bounty. To the writer's knowledge, every man who has taken up the pen to write on the policy aspects of the rule has concluded that it has no place in our law.[246] Such unanimity of opinion from all segments of our profession is seldom seen.

There is one argument to be made in favor of the rule when it is applied to prevent a renunciation by the heir to the detriment of his creditors.[247] However, the answer to that problem is to enact legislation placing the heir and devisee in exactly the same position in so far as legal consequences are concerned. In other words, renunciation should be permitted as to both or denied as to both.[248]

It is the writer's view that if the legislatures of every state, which have not already done so, would adopt the proposed stat-

245 PROPERTY RESTATEMENT §313 (1948 Supp.) shows thirty-six jurisdictions have abolished the rule in Shelley's Case by statute in whole or in part.

246 "The purpose for the application of the doctrine of worthier title at common law finds no support in our law." McNeilly v. Wylie, 389 Ill. 391 at 393, 59 N.E. (2d) 811 (1945); ". . . the doctrine of worthier title serves to hinder, rather than aid, in the ascertainment of the intention of a testator, which is the cardinal purpose in the construction of wills and that it has no place in our jurisprudence." Mitchell v. Dauphin Deposit Trust Co., 283 Ky. 532 at 538, 142 S.W. (2d) 181 (1940); "The reason for the rule in England, to that effect, does not apply in this state." Lucas v. Parsons, 24 Ga. 640 at 659 (1857); "In its original form it had no relation to the genius of our laws." Beem v. Beem, 241 Iowa 247 at 255, 41 N.W. (2d) 107 (1950), noted in 49 MICH. L. REV. 1066 (1951); "But a vestige, a survival of ancient legal theory, it serves no genuine social purpose, if accurately applied." Harper and Heckel, "Doctrine of Worthier Title," 24 ILL. L. REV. 627 at 655 (1930); "It is hoped that the Iowa court will eliminate this antiquated doctrine from the Iowa law." Note, 39 IOWA L. REV. 199 at 202 (1953).

247 See Part IX-B supra.

248 See, for example, MODEL PROBATE CODE §58 (1946).

ute of the American Law Institute and the Commissioners on Uniform State Laws abolishing the rule, the land would be rid of an outmoded doctrine.[249]

[249] "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." Uniform Property Act §14.