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THE DOCTRINE OF WORTHIER TITLE IN ILLINOIS: BURYING THE DEAD

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INTRODUCTION

The doctrine of worthier title directs that a limitation in an inter vivos conveyance to the grantor's heirs creates no interest in the grantor's heirs, but rather retains an interest in the grantor. The interest retained would be a future interest, a reversion, for the limitation to the grantor's heirs would follow a particular estate limited to another.¹ The heirs of the grantor would ultimately take only if the grantor died intestate still owning the reversion.²

The doctrine has suffered a somewhat stormy history in Illinois. Recently, the Supreme Court summarized its status, after noting that because of the court's holding on another issue

the doctrine [of worthier title] is not relevant and therefore we need not reach the other issues briefed before this court: whether the doctrine is a rule of construction or rule of law and whether the doctrine is an anachronism which should be abandoned in the case of trusts established in Illinois prior to our 1955 statutory abolition of the doctrine.³

The doctrine of worthier title has been applied in Illinois both as a rule of construction, indicating the intent of the grantor, and as a positive rule of law, operating independently of the grantor's intent. The Illinois General Assembly seemingly abolished the doc-

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1. An inter vivos grantor would rarely purport to make a direct gift of a present possessory estate "to my heirs," intended in the technical sense. *Nemo est haeres viventis*. If a grantor did make such a conveyance, it would be a nullity, failing for want of a grantee, and the grantor would retain a fee simple absolute, or the same estate he had before. 1 AMERICAN LAW OF PROPERTY § 4.19 (A.J. Casner ed. 1952).

The rule might give rise to a possibility of reverter on a limitation of an executory interest to the grantor's heirs, as well as to a reversion on a limitation of a remainder to his heirs. *Id.*

2. *Id.*

3. *Harris Trust & Sav. Bank v. Beach*, 118 Ill. 2d 1, 20, 513 N.E.2d 833, 843 (1987).

trine by statute in 1955.⁴ However, the Appellate Court of Illinois has refused to apply the statute to extinguish the doctrine as a rule of construction.⁵ As a result, the status of the doctrine is uncertain despite its apparent statutory abolition. Furthermore, there no longer appears to be any reason for retaining the doctrine. To promote certainty in conveyancing and to give effect to the intention of the grantor, the doctrine of worthier title should be totally abolished.

This article will examine the Illinois cases on the doctrine of worthier title, concentrating on whether the doctrine was applied as a rule of law or construction.⁶ Next, this article will discuss the statute abolishing the doctrine in the context of the courts' treatment of the rule to determine the current status of the doctrine. Finally, the policy considerations surrounding the doctrine will be analyzed to create a foundation for abrogating the common-law rule in cases applying pre-statute law, and for extinguishing any of the vestiges of the rule in cases applying the statutory abolition.

I. THE HISTORY OF THE RULE IN ILLINOIS

A. *The Doctrine of Worthier Title at Common Law*

The feudal policy of the doctrine of the worthier title quite possibly originated with a thirteenth century statute voiding a conveyance by the tenant to his eldest son and heir apparent.⁷ The statute

4. 1955 Ill. Laws 498; ILL. REV. STAT. ch. 30, ¶¶ 188-89 (1987). The statute states: Where a deed, will or other instrument purports to create any present or future interest in real or personal property in the heirs of the maker of the instrument, the heirs shall take, by purchase and not by descent, the interest that the instrument purports to create. The doctrine of worthier title and the rule of the common law that a grantor cannot create a limitation in favor of his own heirs are abolished.

This Act shall apply only to instruments which become effective after the effective date of this Act.

Id.

5. *Stewart v. Merchants Nat'l Bank of Aurora*, 3 Ill. App. 3d 337, 340-41, 278 N.E.2d 10, 13-14 (1972). See *infra* text accompanying notes 88-90 for a discussion of this case.

6. Where the doctrine of worthier title was a *rule of law*, as it was under English law, it applied to real property interests and operated without regard to the intent of the transferor. Indeed, the common law assumed that the transferor intended the heirs to take under the transfer (to avoid feudal "inheritance taxes"), but said that he could not do so. A. GULLIVER, *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS* 94-95 (1959).

Where the doctrine is a *rule of construction*, it applies to real or personal property interests and supposedly operates to ascertain and effectuate the intention of the transferor. *Id.* at 97. Indeed, all rules of construction are subservient to that purpose. R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 41 (3d ed. 1981).

When the doctrine of worthier title is used as a rule of construction, it creates a rebuttable presumption that a provision for the heirs of the transferor does not show an intent to give them any interest. A. GULLIVER, *supra*, at 97.

7. C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 151-52 (1962)

was passed to preserve for the feudal overlord the lucrative feudal incidents including relief, wardship, and marriage associated with the descent of real property.⁸ Remainders developed in the next century. It is assumed that the doctrine of worthier title arose at that time to protect those very same interests.⁹

In its most basic form, the rule as applied to inter vivos transfers came to mean that a grantor cannot create a remainder or an executory interest in his own heirs.¹⁰ If a grantor attempted to convey a future interest to his heirs, the common law treated that attempt as merely confirming a reversion in the grantor.¹¹ The rule was applied as a positive law of property and operated regardless of the grantor's intent so that the heirs took nothing by virtue of the conveyance.¹² Thus, if A conveys a life estate to B, with a remainder to A's heirs, the true status of title is a life estate in B and a reversion in A.¹³ The doctrine of worthier title operates on the "remainder" to A's heirs at law and holds it void.

At common law the doctrine of worthier title comprised not only an inter vivos branch but also a testamentary branch.¹⁴ The testamentary branch of the doctrine of worthier title directed that a devise to a person was a nullity if that person was in fact the heir of the testator. Since title acquired by inheritance was "worthier" than title acquired by devise, the heir took by descent. The testamentary branch applied whether the purported limitation was either a present or future interest. However, it applied only if the heir took an estate of the same quantity and quality as that which would descend absent the purported limitation.¹⁵ In such a case it should make no difference in modern law, to the heirs or anyone else, whether heirs take by devise or by inheritance. Hence, the testamentary branch of the doctrine is obsolete,¹⁶ and will be referred to in this study only

(citing in support, the Statute of Fraudulent Feoffments, 1267, 52 Hen. 3, ch. 6).

8. *Id.* at 152 n.1. At one time in English history feudal tenure existed between an heir who took by descent and his ancestor's lord. L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 1601 (2d ed. 1956 & Supp. 1987). Feudal tenure did not exist if the heir took by purchase as an inter vivos transferee. *Id.*

9. C. MOYNIHAN, *supra* note 7, at 152; L. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* § 26 (2d ed. 1966) ("That is to say, if the heir could take by purchase, then such valuable incidents of feudal tenure as wardship and primer seisen would not accrue to the lord when the tenant's estate passed to his heir.").

10. C. MOYNIHAN, *supra* note 7, at 150; S. KURTZ & H. HOVENKAMP, *CASES AND MATERIALS ON AMERICAN PROPERTY LAW* 316 (1987).

11. Comment, *Limitation to the Heirs of a Settlor*, 34 U. ILL. L. REV. 835 (1940) [hereinafter Comment *Heirs of a Settlor*].

12. See H. CAREY & D. SCHUYLER, *ILLINOIS LAW OF FUTURE INTERESTS* § 124 (1941).

13. This example is taken from C. MOYNIHAN, *supra* note 7, at 149-50.

14. *Id.* at 153-55.

15. *McNeilly v. Wylie*, 389 Ill. 391, 59 N.E.2d 811 (1945); S. KURTZ & H. HOVENKAMP, *supra* note 10, at 317.

16. 1 *AMERICAN LAW OF PROPERTY* § 4.19 (A.J. Casner ed. 1952).

incidentally.

Whether the doctrine of worthier title applies to inter vivos conveyances, however, can make a tremendous difference in determining who takes, not just how they take. The inter vivos branch has enjoyed considerable attention in the United States as a result of Judge Cardozo's opinion in *Doctor v. Hughes*.¹⁷ In *Hughes*, a settlor conveyed real property to a trustee to hold in trust for the settlor, and upon the latter's death to convey (if not sold) the trust property to his heirs at law. The settlor's apparent heirs at the time of the action were his two daughters. One of these daughters had conveyed her interest in the trust to her husband, and creditors of the couple sought to reach that remainder.

The Appellate Division found a reversion in the settlor by reading the trust instrument as merely unnecessarily directing the trustee to convey to those who would inherit in the absence of such a conveyance, and not disposing of the entire fee.¹⁸ The Court of Appeals affirmed, reasoning that the doctrine of worthier title still existed and was to be applied absent a clear expression to the contrary. These opinions appear consistent, and when read together were interpreted as initiating the concept of the doctrine as a rule of construction.¹⁹ Thus, the New York rule became that where the grantor uses language purporting to create a remainder in his own heirs, there is a rebuttable presumption that the grantor intended to keep a reversion.²⁰

B. *Treatment of the Doctrine of Worthier Title in Illinois Prior to the Statutory Abolition*

There were only nine Illinois decisions before the 1955 statutory

The last Illinois cases dealing with the testamentary branch of the doctrine of worthier title were *McNeilly v. Wylie* and *Boldenweck v. City Nat'l Bank & Trust Co.*, discussed *infra* at note 81. Decided in 1945 and 1951, these were pre-statutory abolition cases. The statute specifically applies to wills. It should bury the testamentary branch of the doctrine of worthier title, ending any doubt about its continued viability.

17. 225 N.Y. 305, 122 N.E. 221 (1919).

18. *Doctor v. Hughes*, 174 A.D. 767, 161 N.Y.S. 634 (1916), *aff'd*, 225 N.Y. 305, 122 N.E. 221 (1919).

19. A. GULLIVER, *supra* note 6, at 108.

20. C. MOYNIHAN, *supra* note 7, at 156. Professor Gulliver states:

Under this theory, there is a rebuttable presumption that language purporting to transfer the property to the heirs of the transferor shows no intent to give them an interest; the result depends on assumed intent, and not, as at common law, on "an absolute prohibition limiting the power of a grantor."

A. GULLIVER, *supra* note 6, at 108.

The New York rule of *Doctor v. Hughes* has been abolished by statute. Now a conveyance to one's own heirs creates a remainder interest. However, the statutory scheme does allow a settlor to revoke a trust in which there is an end limitation to his or her own heirs without the consent of the apparent heirs. RESTATEMENT (SECOND) OF PROPERTY § 30.2, at 469 (1988).

abolition discussing the effect of a limitation by a grantor (as opposed to a testator) to his heirs after an intermediate estate was involved.²¹ In none of the opinions was there reference to the phrase "doctrine of worthier title" as such.²² An examination of these decisions is in order to determine whether the doctrine, albeit without the label, was applied by Illinois courts as a rule of law or a rule of construction before the statute was passed. That determination will then aid in understanding exactly what the Illinois General Assembly intended to abolish in 1955.²³

The first such case was *Hobbie v. Ogden*,²⁴ decided by the Supreme Court of Illinois in 1899. In that case, the grantor (settlor) A, as ordered in a divorce decree, placed certain real property in trust for the support of his divorced wife B and two children for the life of B. The corpus was to be sold and the trustee was to pay support biannually out of the proceeds. Upon B's death, the trustee was directed to "convey, pay over and deliver to [A], or his heirs, the said trust fund."²⁵ A predeceased B, but his executor sought to include the property in A's estate at B's death. The court determined that the trustee had legal title and that full equitable title to the reversion remained in the grantor A, subject only to B's equitable life estate.²⁶ Assuming that *Hobbie v. Ogden* was applying the doctrine of worthier title without so labeling it, then the case is significant for two reasons. First, the court expanded the common-law doctrine of worthier title to include personal property.²⁷ This application to personal property of itself shows that the doctrine was being utilized as a rule of construction.²⁸ Second, the rule was applied to equitable interests.²⁹ And finally, the court's emphasis on the grantor's pur-

21. The number of cases involving a worthier title question appears to be few. See H. CAREY & D. SCHUYLER, *supra* note 12, at § 123 (noting only seven decisions up to 1941).

22. However, one of the cases to be examined did use the phrase "worthier or better title" in reference to the testamentary branch of the doctrine. *Akers v. Clark*, 184 Ill. 136, 137, 56 N.E. 296, 297 (1900). The first Illinois case found to use the phrase "worthier and better title" was *Kellett v. Shepard*, 139 Ill. 433, 447, 28 N.E. 751, 755 (1891), in which the court referred to the testamentary branch. The court viewed it as a rule of construction and found its application unnecessary.

23. See *infra* text accompanying notes 107-13 for a discussion of what the legislature intended to abolish.

24. 178 Ill. 357, 53 N.E. 104 (1899).

25. *Id.* at 362, 53 N.E. at 105.

26. *Id.* at 368, 53 N.E. at 107 ("The equitable title remaining in the grantor would descend by law to his heirs, and the conveyance provided for would only be necessary to make that a legal estate in him or them which was already vested in them as an equitable one.")

27. *Id.* at 365, 53 N.E. at 106 ("The real estate conveyed by the trust deed was to be converted into personal property . . ."). See also H. CAREY & D. SCHUYLER, *supra* note 12, at § 123; Comment, *Heirs of a Settlor*, *supra* note 11, at 847.

28. See *supra* note 6. See also C. MOYNIHAN, *supra* note 7, at 155.

29. *Hobbie v. Ogden*, 178 Ill. at 367-68, 53 N.E. at 106. See also H. CAREY & D. SCHUYLER, *supra* note 12, at § 123; Comment, *supra* note 11, at 847.

pose or intent is further reason for concluding that the court was utilizing a rule of construction. It emphasized that A was required by court decree to carve out an estate for the life of his divorced wife and that A's purpose was to do just that. The divorce court had no jurisdiction to provide for the distribution of his property for other purposes or to compel him to provide for his heirs, and the purpose of the trust was not to dispose of the fee.

The second Illinois decision, *Lawrence v. Lawrence*,³⁰ is somewhat curious in that the only holding was that the supreme court could not decide the case. Husband and wife, A and B, conveyed property in trust to T to pay the income to B for life and then to A for life, if he should survive B, but if he should not survive B, then T was directed "to re-convey said premises . . . to the legal heirs" of A.³¹ Many years later, A and B sued to have the trust terminated and the corpus returned to the settlors. The circuit court held that the trust deed had not been delivered and entered a decree that the property be returned to A and B. The Supreme Court of Illinois reversed and remanded the case on the grounds that the circuit court's proceedings had not been properly preserved for appeal,³² and therefore an appellate decision could not properly be made.³³

The supreme court did comment on the property interests that were created. "The trust was a voluntary settlement for the benefit of the settlors during their natural lives, with *remainder* in fee to and for the benefit of their *heirs*. It was perfectly created . . ." ³⁴ Indeed, if a reversion were retained, then A and B were the only persons beneficially interested in the property and the court need not have remanded the case regardless of the improper record. Later cases have given *Lawrence* meaning by adopting this reasoning.³⁵ If this analysis is accepted, then the doctrine of worthier title, if con-

30. 181 Ill. 248, 54 N.E. 918 (1899).

31. *Id.* at 250, 54 N.E. at 919.

32. *Id.* at 253-54, 54 N.E. at 919-20. See also H. CAREY & D. SCHUYLER, *supra* note 12, at § 123; Comment *supra* note 11, at 847 (summarizing the opinion): The complaint did not allege nondelivery; no certificate of evidence was preserved for appeal; and the circuit court made no specific findings of fact on the issue of nondelivery.

33. The court stated in this regard: "When a decree in chancery granting affirmative relief is brought into review on error or appeal, the rule is [that] the decree must be supported by testimony preserved in the record, or by facts appearing from specific findings of fact recited in the decree." 181 Ill. at 253, 54 N.E. at 920.

34. *Id.* at 252, 54 N.E. at 919 (emphasis added).

35. See H. CAREY & D. SCHUYLER, *supra* note 12, at § 123; Comment, *supra* note 11, at 848 (*Heirs of a Settlor*, citing, *Hubbard v. Buddemeier*, 328 Ill. 76, 159 N.E. 229 (1927); *Burton v. Boren*, 308 Ill. 440, 139 N.E. 868 (1923); *May v. Marx*, 300 Ill. App. 144, 20 N.E.2d 821 (1939)).

The argument has also been advanced that A, by specifically reserving a life estate after the death of B, negated any intent to retain a reversion. Comment, *supra* note 11, at 848.

sidered at all, was deemed not to apply at all to the case, and certainly not as a rule of law.³⁶

In the next case relevant to our consideration, *Akers v. Clark*,³⁷ the doctrine was applied. One could argue either way on the question of whether it was applied as a rule of law or of construction. In *Akers*, A made the following conveyance by deed: "[A] conveys and warrants to [B] during her natural life and at her death to revert back to my heirs."³⁸ Later, A devised the fee in the same premises to his daughter subject to B's life estate. Upon A's death, some of A's other heirs brought suit against the daughter to partition the property. The theory for recovery was that the deed created remainder interests in the heirs of A that could not be defeated later by devise. The Illinois Supreme Court held that A retained a reversion and his devise was therefore valid. The authority relied upon, in addition to *Hobbie v. Ogden*, was Washburn's work on *Real Property*. The sections quoted set forth the rule in Shelley's case, the testamentary branch of the doctrine of worthier title, and the following, which amounts to the inter vivos branch of the doctrine of worthier title:

At common law, if a man seized of an estate limited it to one for life, remainder to his own right heirs, they would take not as remaindermen but as reversioners; and it would be, moreover, competent for him, as being himself the reversioner, after making such a limitation, to grant away the reversion.³⁹

Whether the *Akers* court was applying the doctrine as a rule of construction or of law is debatable. On behalf of the former, one could say that the grantor probably did not intend by the conveyance to give a remainder to his heirs. Even the language, "to revert back to my heirs"⁴⁰ establishes such a contrary intent. Certainly, to the extent that his later specific devise of the fee in the same land, subject to B's life estate, is relevant to indicate his intent at the time of the inter vivos conveyance, the intent to retain a reversion is shown. On the other hand, the strongest support for an argument that the doctrine was being applied as a rule of law was the court's

36. Caveat: there is no indication that the doctrine of worthier title was briefed or argued by counsel, and it has been urged that the opinion should not be considered persuasive on that point. Carey and Schuyler caution that the decision in *Lawrence* should not be accorded the weight of an express ruling since the opinion "is absolutely silent upon the point of property interests created by the deed of trust." H. CAREY & D. SCHUYLER, *supra* note 12, at § 123. However, as established by the quote in the text, the court did comment that a remainder was created in the grantors' heirs.

37. 184 Ill. 136, 56 N.E. 296 (1900).

38. *Id.* at 136, 56 N.E. at 296.

39. *Id.* at 138, 56 N.E. at 297 (quoting 2 E. WASHBURN, A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY ¶ 395 (2d ed. 1864)).

40. *Id.* at 136, 56 N.E. at 296 (emphasis added).

comment that "under the law as well as under the deed[,]"⁴¹ the interest after B's life estate reverted to the grantor or his heirs. The court also said that the result, a reversion in the grantor, was the same as if the words "and at her death to revert back to my heirs" had been omitted from the deed.⁴² Perhaps the court was saying that it would reach the same conclusion whether the doctrine were a rule of law or of construction.

Twenty years after *Akers*, the court relied upon the doctrine in a totally inapplicable situation. In *Biwer v. Martin*,⁴³ A, after reserving a life estate for himself, created two successive life estates, a contingent remainder in fee, and a special power of appointment. A then specified that if the contingent remainder failed, and if the power of appointment were not exercised, then the remainder after the life estates "shall vest in all the lineal descendants of grantor, per stirpes, in fee."⁴⁴ The court held that A had a reversion in fee simple, which was of course true, because A had created a life estates with contingent remainders in fee. The court's reasons for its conclusion, however, are "plainly incorrect."⁴⁵ The court stated that the grantor's reversion resulted from the limitation to his lineal descendants. The intermingling of elements of the Rule in Shelley's Case and the doctrine of worthier title is shown by the following quote:

Under the rule at common law, where a grantor in a deed conveys a life estate with remainder over, either mediately or immediately [Shelley], to his heirs [worthier title] or the heirs of his body [heirs of the body of the first grantee — Shelley], the heirs do not take a remainder at all but the word "heirs" is regarded as defining or limiting the estate which the first taker has [!]. In such case the lineal heirs or heirs of the body of the grantor take not a remainder but a reversion,

41. *Id.* at 139, 56 N.E. at 297.

42. *Id.* at 138, 56 N.E. at 297.

43. 294 Ill. 488, 128 N.E. 518 (1920). It should be noted that the limitation was not to the grantor's heirs, and therefore the doctrine of worthier title should not have been applied. The supreme court did apply the rule, however, and for that reason it is included in our survey. For a further explanation, see *supra* text accompanying note 21.

44. 294 Ill. at 490, 128 N.E. at 520 (emphasis omitted).

45. H. CAREY & D. SCHUYLER, *supra* note 12, at § 123. In taking issue with the court's analysis the authors state: "It is true that A had a reversion in fee because he had created life estates with contingent remainders over. The limitation to his 'lineal descendants' created a contingent remainder and the quoted words designated purchasers and did not confirm a reversion in A." *Id.* We agree with this analysis, because by limiting the alternate contingent remainder to A's "lineal descendants," A excludes some who might be his heirs at law. In that case, the doctrine of worthier title does not apply. L. SIMES & A. SMITH, *supra* note 8, at § 1606 ("Unless the limitation is construed to designate those persons who would take on intestacy of the grantor, then the limitation is entirely outside the scope of the rule here considered."). The court in *Akers v. Clark* appeared to accept the doctrine as it existed under the common law and thus this rule would seem to be included. For a discussion of *Akers v. Clark*, see *supra* text accompanying notes 37-42.

and such reversion by descent from the grantor and not by the deed [worthier title].⁴⁶

The Illinois Supreme Court applied the doctrine as a rule of law in *Burton v. Boren*,⁴⁷ although once again the phrase "doctrine of worthier title" is not used. In that case, A conveyed his interest in a parcel of land to be held in trust by T for the benefit of A for life. At A's death, the fee or the proceeds from its sale were to "immediately vest in and become the property of the heirs-at-law of the said [A] . . . and said heirs-at-law shall be entitled to said property under the laws of descent of the State of Illinois then in force."⁴⁸ T acted as trustee for nine years and upon her request to be removed and have a successor appointed, A cross-claimed for a termination of the trust. A's theory was that the reversion was in him, and that no person other than himself and the trustee had any interest in the trust property. A argued that as settlor he was therefore entitled to terminate the trust. The supreme court agreed that the trust deed did not create remainders in the heirs,⁴⁹ and affirmed the termination.

Four years later the supreme court refused to allow termination of a trust because the trust deed did create remainders. In *Hubbard v. Buddemeier*,⁵⁰ the settlor conveyed the fee to a trustee upon certain trusts at the termination of which the trustee was directed to convey to the grantor's surviving issue, or if none to her "legal heirs." The court held that the trust deed "conveyed all existing legal or equitable rights of the grantor in the premises,"⁵¹ and conferred "rights upon beneficiaries who might, in the contingencies contemplated, succeed to [the settlor's] rights."⁵² In short, the supreme court in this instance, as in the *Lawrence* case that it cited,⁵³ in no way implied that the doctrine of worthier title applied at all, much less as a rule of law.

The Illinois Appellate Court, by contrast, applied the doctrine as a rule of construction in *May v. Marx*.⁵⁴ The conveyance in *May* was from A, who had just reached her majority, to her brothers in

46. *Biwer v. Martin*, 294 Ill. 488, 493, 128 N.E. 518, 521 (1920). As authority for this passage the court cited sections of 2 WASHBURN ON REAL PROPERTY (2d ed. 1864) dealing with the Rule in Shelley's Case (§ 242), and the doctrine of worthier title (§ 395), as well as *Akers v. Clark*, 184 Ill. 136, 56 N.E. 296 (1900).

47. 308 Ill. 440, 139 N.E. 868 (1923).

48. *Id.* at 441, 139 N.E. at 868.

49. A's children and heirs apparent, disclaimed any interest in the property. The court, however, said that the heirs had no interest to disclaim and never would have except as reversioners by descent from A. *Id.* at 443, 139 N.E. at 869.

50. 328 Ill. 76, 159 N.E. 229 (1927).

51. *Id.* at 80-81, 159 N.E. at 232.

52. *Id.* at 84, 159 N.E. at 233.

53. *Id.* at 82, 159 N.E. at 233 (citing *Lawrence v. Lawrence*, 181 Ill. 248, 54 N.E. 918 (1899)).

54. 300 Ill. App. 144, 20 N.E.2d 821 (1939).

trust for her benefit for twenty-five years. The trustees were to pay A \$3,000 quarterly from income. If A did not live for twenty-five years, then “[u]pon my death the trust shall be dissolved and the property shall descend to my heirs, as the law provides.”⁵⁵ A few days later A purported to modify the trust to provide that all the income could be paid to her, in the discretion of the trustee. Years later the trustees brought suit against A and her presumptive heirs for a construction of the trust instrument. A contended that the purpose of the trust was to relieve herself of the management of the property and not to give anyone other than herself any interest. The court agreed, and held that she had a reversion in the twenty-five year term and thus the right to modify the trust.

The court spent considerable effort reviewing whether the trustees had a fee simple estate in the trust property under Illinois law,⁵⁶ but then made the significant conclusion that: “The determination in each case depends on the intent of the settlor as disclosed in the language used in the instrument.”⁵⁷ The opinion does not advance any other evidence to support its conclusion beyond the words of the conveyance itself. The effect of the court’s holding is that where there is no contradictory evidence on the issue of intent then the grantor is assumed to have retained a reversion. Thus, the *May* court had adopted the New York view stated in *Doctor v. Hughes*⁵⁸ apparently without realizing what it had done.⁵⁹ The Illinois Su-

55. *Id.* at 146, 20 N.E.2d at 822.

56. Whether it matters for doctrine of worthier title purposes that the trustee has a fee in the corpus has generated much confusion in the Illinois decisions. One author commented:

It is interesting to note that the court [in *May v. Marx*] held that, although the trustee had the power of sale, he did not have the legal fee. The law to the contrary is well settled in Illinois. Apparently the court feared that so to [sic] hold would result in a remainder rather than a reversion because *Burton v. Boren* had been the last case decided and that case apparently felt [sic] that the legal fee in the trustee was sufficient to make the words ones of purchase. Perhaps that too was why the court attempted to distinguish *Lawrence v. Lawrence*. But, as has been seen, the court in the *Burton* case was apparently wrong for it would appear under the earlier Illinois cases to make no difference whether or not the legal fee was in the trustee.

Comment, *Heirs of a Settlor*, *supra* note 11, at 849-50.

57. 300 Ill. App. at 155, 20 N.E.2d at 825.

58. The court in *May* used the doctrine to presume intent where no other evidence was available. See *supra* notes 17-20 and accompanying text for a discussion of the presumption of intent. The evidence required to rebut the presumption that the grantor intended a reversion was of a “clearly expressed” contrary intent. *Doctor v. Hughes*, 225 N.Y. 305, 312, 122 N.E. 221, 222 (1919). This standard was relaxed later to require the court only to ascertain that the grantor’s intent was to give a remainder instead of retaining a reversion. *Whittemore v. Equitable Trust Co.*, 250 N.Y. 298, 301, 165 N.E. 454, 455 (1929).

59. The court did not cite to *Doctor v. Hughes*, nor did it recognize in the opinion that it was altering the law. However, the commentators and the Illinois Bar understood the impact of the *May* decision. L. SIMES & A. SMITH, *supra* note 8, at § 1609 (stating that Illinois cases go both ways on how Illinois applies the doctrine and

preme Court appeared to affirm *May* in *Sutliff v. Aydelott*,⁶⁰ decided the following year.

Sutliff was a trust termination action. Several settlors, apparently from one family, conveyed real property and capital stock in trust. The real property was conveyed to the trustees reserving to the grantors the "rents, issues and profits thereof" until a sale was effected by the trustees. At another place in the trust instrument the income from the trust was to be applied to the benefit of the grantors "and the heirs of each of them"⁶¹ while the real estate shall remain in the trust. The trustees were empowered to sell the real estate from time to time and divide the proceeds "among said beneficiaries [the grantors] . . . and their heirs."⁶² The personal property was conveyed to the trustees for the life of the grantors and after the survivor's death to be conveyed "to the heirs-at-law" of the grantors. The Illinois Supreme Court treated the two conveyances separately.

The court first analyzed the conveyance of the real estate. However, in that regard the court erroneously referred to the applicable rule as the Rule in Shelley's Case,⁶³ and stated that the word "heirs" was a word of limitation and not of purchase. The court then cited *Burton v. Boren*⁶⁴ as also setting down the rule that the word "heirs" is "a word of limitation."⁶⁵ Carey and Schuyler succinctly comment on this misconception where the doctrine of worthier title

citing the *May* decision as an application of the doctrine as a rule of construction). Kelly, *Real Property Developments*, 43 ILL. B.J. 59, 60 n.8 (1955) (citing the *May* decision as treating the doctrine as a rule of construction and not of property).

60. 373 Ill. 633, 27 N.E.2d 529 (1940).

61. *Id.* at 635, 27 N.E.2d at 531 (emphasis added).

62. *Id.* (emphasis added).

63. *Id.* at 636-37, 27 N.E.2d at 531. One commentator has succinctly illustrated the Rule in Shelley's Case as follows:

Thus, A conveys or devises land to B for life, and after B's death to the heirs of B. Apart from the Rule in Shelley's Case the state of the title would be: life estate in B, contingent remainder in fee simple in B's heirs, reversion in A in fee. But by virtue of the Rule the state of the title is: life estate in B, vested remainder in B in fee simple. The doctrine of merger will then cause B's life estate to coalesce with his remainder so that the ultimate result is that B gets a present estate in fee simple.

C. MOYNIHAN, *supra* note 7, at 139. Since the conveyance of real property in *Sutliff* referred only to the grantors and their heirs, the Rule in Shelley's Case is not applicable. For the latter rule to apply there must be a grant of a freehold followed by a remainder to the grantee's heirs. Also notice that the Rule in Shelley's Case operates as a rule of law. *Id.* at 138-39; *Sutliff*, 373 Ill. at 638, 27 N.E.2d at 532. Because the court in *Sutliff* relied upon it, however erroneously, one might argue that the court actually applied the doctrine of worthier title to the real property conveyance as a rule of law.

64. 308 Ill. 440, 139 N.E. 868 (1923). For a discussion of *Burton*, see *supra* notes 47-49 and accompanying text. The court also cited *Biwer v. Martin*, 294 Ill. 488, 128 N.E. 518 (1920), and *Akers v. Clark*, 184 Ill. 136, 56 N.E. 296 (1900). For a discussion of *Biwer* and *Akers*, see *supra* notes 37-46 and accompanying text.

65. *Sutliff*, 373 Ill. at 637, 27 N.E.2d at 532.

is involved:

This is incorrect. The question has never been whether the word "heirs", or any other, is a word of purchase or one of limitation. The question is whether such a word or words are words of purchase [granting a *remainder*] or wholly meaningless and superfluous. A grantor never acquires a reversion through the use of such words. He has it without them if he has it at all.⁶⁶

Nonetheless, under this analysis the settlors were allowed to terminate the trust and regain legal title to the real estate. The result was indeed correct. If a grantor A settles a trust for the benefit of "A and her heirs," A has the full equitable interest. The words "and her heirs" are in this situation words of limitation; no remainder in anyone was purportedly granted.

However, in the trust of the personal property a remainder following the grantors' beneficial life estates *was* limited to their heirs. The court gave effect to the limitation as a remainder. The court first reasoned that the Rule in Shelley's Case was not applicable to personal property and therefore the court need not mechanically apply a rule of law. The court then found that the grantors had conveyed all of their interest to the trustees⁶⁷ and that they had reserved only the income and dividends from the trust. And by directing a conveyance of the corpus to the heirs of the grantors upon the death of the survivor of the grantors, the grantors had not intended to retain a reversion.

The two portions of the opinion were then tied together by the statement: "[t]he intention being clear, and there being no rule of construction to apply as in the case of real estate, there was no power in the court to terminate the trust with respect to the per-

66. H. CAREY & D. SCHUYLER, *supra* note 12, at § 123.

67. 373 Ill. at 638, 27 N.E.2d at 532: "The language of the trust indenture with respect to personal property . . . provides that the stock shall be held until after the death of all the grantors, and after the death of the survivor the trustees shall convey to the heirs-at-law the several undivided interests in the stock." This reference to the trustees having the entire legal fee demonstrated the confusion discussed previously. See *supra* note 56 and accompanying text for a discussion of this confusion. Where the trust is executory in character the doctrine of worthier title was said not to apply. *Sutliff*, 373 Ill. at 637-38, 27 N.E.2d at 532. The court recites:

The test as to whether a trust is executory is to determine whether the testator or settlor has acted as his own conveyancer and defines precisely the settlement to be made. If he has, the word "heirs" is one of limitation. If he has not, the trust is executory, and the word "heirs" is a word of purchase, and the persons coming within such definition have an interest in the property. One of the tests to determine whether the settlor has acted as his own conveyancer is to ascertain whether the trust instrument purports to pass title directly to the beneficiaries or whether the instrument requires a trustee to make the conveyance. If the trust instrument requires the trustee to convey, it is presumed the trust is executory

Id. (citations omitted).

sonal property.”⁶⁸ Thus, the supreme court seems to have held that a remainder was created in the grantors’ heirs where the court had no evidence of contrary intent.⁶⁹ If this was the court’s new interpretation of the doctrine, then it appeared to reverse itself again in *Corwin v. Rheims*.⁷⁰

In *Corwin*, under the court’s construction of a prior conveyance and a trust,⁷¹ three siblings owned a reversion in land in Chicago, subject to a ninety-nine year lease. The siblings conveyed their interests to a trustee, reserving beneficial life estates in themselves, insofar as relevant. The instrument provided: “[I]n the event of the death of all of said beneficiaries the trust hereby created shall cease and terminate, and said property shall be and become the property of the legal heirs of the [settlers] in equal shares per stirpes and not per capita.”⁷² The last surviving settlor, Maude, was the heir of the other two settlors. Maude died, leaving A as her sole heir. Maude died testate, however, devising one-fourth of the corpus to A and the other three-fourths to four others. A argued that she took the entire interest as a remainderman, since she was the settlors’ heir. The four other devisees argued that the doctrine of worthier title applied, so that Maude died owning a reversion, which she properly devised.

The court held that the doctrine applied and, therefore, the property passed by the devise. The court did not consider whether the intent of the settlors of the trust was to create a remainder or merely to confirm a reversion. Instead, the *Corwin* court applied the doctrine as a positive rule of law. It said: “This case . . . involves the rule of the common law that one who owns real estate cannot, either by conveyance or by limitation of uses, make his heirs purchasers.”⁷³ Moreover, the court’s response to A’s argument that “heirs” of the settlors should be fixed upon the death of the survivor and meant

68. *Id.* at 638-39, 27 N.E.2d at 532.

We have no explanation of what the court meant by a “rule of construction . . . as in the case of real estate” (emphasis added), when it had just applied a rule of law to the real estate. *Id.* One might argue that the court was rejecting the doctrine of worthier title as a rule of construction in personal property conveyances.

69. Carey and Schuyler argue that the intention of the grantors was clear in *Sutliff*, and that the heirs should have received the real property as well. This construction of the real property trust would require that “and their heirs” be read as “or their heirs.” H. CAREY & D. SCHUYLER, *supra* note 12, at § 123.

70. 390 Ill. 205, 61 N.E.2d 40 (1945).

71. We discuss the court’s construction of the prior conveyance and trust rather than our own construction of the instruments, because in our opinion the court arrived at its construction by an erroneous application of the rule against perpetuities. That topic is outside the scope of this discussion, and the error to which we refer is adequately considered by the dissent in *Corwin*, 390 Ill. at 229, 61 N.E.2d at 51 (Gunn, J., dissenting).

72. *Id.* at 210-11, 61 N.E.2d at 43-44 (emphasis omitted).

73. *Id.* at 224, 61 N.E.2d at 49.

the common heirs of all three settlors on that date was as follows:

Under the views expressed, this [argument] is immaterial, for the persons who could qualify as legal heirs, determined either at the death of each settlor or at the death of the survivor, are the heirs of the ones who conveyed the property *and the principle that a grantor cannot make his heir a purchaser applies in either case.*⁷⁴

It is well established that if the grantor uses the designation "heirs" to mean a class other than those who would take on intestacy according to the statutes of descent and distribution, the doctrine of worthier title does not apply, certainly not as a rule of construction.⁷⁵ For example, if the "heirs" are to be determined as of a time other than the grantor's death, the rule does not apply.⁷⁶ So if *heirs* were interpreted to mean the common heirs determined at the death of the surviving grantor, as they were pretty clearly intended to be in *Corwin*, it would indicate an intention to designate a class of persons as purchasers and not merely those who should take under intestate succession at the death of each settlor.⁷⁷ The holding of the court, in ignoring such considerations, strongly supports the conclusion that the rule was applied as a positive rule of law.⁷⁸ Interestingly enough, the court for the first time cites *Doctor v. Hughes*, the leading rule of construction case.⁷⁹

Thus, the status of the inter vivos branch of the doctrine of worthier title in Illinois was uncertain when the Illinois General Assembly passed the statute abolishing the doctrine in 1955.⁸⁰ The feudal doctrine began as a positive rule of property law, but by 1955 it was also regularly being applied as a rule of construction, or just ignored.⁸¹ Of the nine cases examined, the doctrine was applied as a

74. *Id.* at 225, 61 N.E.2d at 49-50 (emphasis added).

75. L. SIMES & A. SMITH, *supra* note 8, at §§ 1606, 1609-10.

76. *Id.* at § 1610 n.93.

77. *Id.* at § 1609. For example, a spouse of one of the settlors could have been an heir of that settlor at the time of her death, but if the spouse died before the surviving settlor, the spouse would not have been her heir as determined at the death of the surviving settlor.

78. Kelly, *supra* note 59, at 60 n.8; L. SIMES & A. SMITH, *supra* note 8, at § 1609.

79. *Corwin*, 390 Ill. at 224, 61 N.E.2d at 49. See *supra* text accompanying notes 17-20 for a discussion of *Doctor v. Hughes*. In addition, the *Corwin* court cited to *Burton v. Boren*, 308 Ill. 440, 139 N.E. 868 (1923); *Biwier v. Martin*, 294 Ill. 488, 128 N.E. 518 (1920); and *Akers v. Clark*, 184 Ill. 136, 56 N.E. 296 (1900). See *Corwin*, 390 Ill. at 224, 61 N.E.2d at 49.

80. 1955 Ill. Laws 498.

81. Uncertainty is no doubt fueled when the dicta in *McNeilly v. Wylie*, 389 Ill. 391, 59 N.E.2d 811 (1945), and *Boldenweck v. City Nat'l Bank & Trust Co.*, 343 Ill. App. 569, 99 N.E.2d 692 (1951) are considered. The Illinois Supreme Court in both cases held that the testamentary branch of the doctrine of worthier title was not applicable to the facts.

The same justice wrote the *McNeilly* opinion and the *Corwin* opinion a short time later. He quoted the common-law rule in reference to the inter vivos branch, noted its abolition by statute in England in 1833, and then stated that it was applied

rule of construction in three,⁸² as a rule of law in two,⁸³ arguably as either in one,⁸⁴ not at all in two,⁸⁵ and impossibly intertwined with the Rule in Shelley's Case and misapplied to "lineal descendants" in one.⁸⁶

C. *Treatment of the Doctrine of Worthier Title in Illinois
After Its Abolition by Statute*

It was with this background that the Illinois General Assembly abolished the doctrine of worthier title by statute in 1955. Sections 188 and 189 provide:

Where a deed, will or other instrument purports to create any present or future interest in real or personal property in the heirs of the maker of the instrument, the heirs shall take, by purchase and not by descent, the interest that the instrument purports to create. The doctrine of worthier title and the rule of the common law that a grantor cannot create a limitation in favor of his own heirs are abolished. This Act shall apply only to instruments which become effective after the effective date of this Act.⁸⁷

The only opinion construing this act was rendered by the Appellate Court of Illinois in *Stewart v. Merchants National Bank*.⁸⁸ In that case Stewart, after receiving a personal injury settlement in 1967, created a trust with himself as beneficiary. The instrument recited that the trust was irrevocable, to last for ten years, and that if the settlor/beneficiary should die within the ten years, then in default of a will the property should pass to his heirs-at-law in equal shares. Three years later Stewart petitioned to revoke the trust. No consent was possible from the settlor's heirs, which might include unborn or minor heirs, so the issue was whether the settlor was the

in the United States "more as a rule of construction." *McNeilly*, 389 Ill. at 393, 59 N.E.2d at 812. He stated the testamentary branch of the doctrine and said it is "[t]he rule in this State." *Id.* The court held, however, that the testamentary branch did not apply to the facts in *McNeilly*. *Id.*

In *Boldenweck*, the Illinois Appellate Court said that "[t]here is no positive rule of law or rule of property in this State that a person cannot by his will limit his remainder to his own heirs." *Boldenweck*, 343 Ill. App. at 590, 99 N.E.2d at 701.

82. *Hobbie v. Ogden*, 178 Ill. 357, 53 N.E. 104 (1897); *May v. Marx*, 300 Ill. App. 144, 20 N.E.2d 821 (1939); *Sutliff v. Aydelott*, 373 Ill. 633, 27 N.E.2d 529 (1940).

83. *Burton v. Boren*, 308 Ill. 440, 139 N.E. 868 (1923); *Corwin v. Rheims*, 390 Ill. 205, 61 N.E.2d 40 (1945).

84. *Akers v. Clark*, 184 Ill. 136, 56 N.E. 296 (1900).

85. *Lawrence v. Lawrence*, 181 Ill. 248, 54 N.E. 918 (1899); *Hubbard v. Budemeier*, 328 Ill. 76, 159 N.E. 229 (1927).

86. *Biber v. Martin*, 294 Ill. 488, 128 N.E. 518 (1920). The intertwining with the Rule in Shelley's Case also occurred in *Sutliff v. Aydelott*, 373 Ill. 633, 27 N.E.2d 529 (1940).

87. ILL. REV. STAT. ch. 30, ¶¶ 188-189 (1987).

88. 3 Ill. App. 3d 337, 278 N.E.2d 10 (1972). For a discussion of *Stewart*, see Note, *The Doctrine of Worthier Title as a Rule of Construction in Illinois*, 67 Nw. U.L. REV. 773 (1972) (analyzing the case and concluding that it is poor precedent).

sole beneficiary. The trial court held that contingent interests were created in Stewart's heirs and denied revocation. The appellate court held that the heirs did not have a remainder interest and allowed revocation.

The court referred to the statute abolishing the doctrine of worthier title, but found that *May v. Marx*⁸⁹ was still good law. The court reasoned that since the General Assembly would not change the rule that the intent of the settlor should govern, and since under *May* the doctrine of worthier title only presumes intent, then the doctrine is still valid as a rule of construction in spite of the statute. The court therefore read the statute as only abrogating the doctrine where applied as a rule of law.

In referring to the statute, the appellate court quoted only the first sentence. It then said: "Imperative as that language may seem, we refuse to believe that it would require a trust to be construed in such a way as to override the expressed intent of the maker of such instrument."⁹⁰ Over and above the disregard for the plain, "imperative" language of the statute, the statement is subject to criticism in referring to the settlor's "expressed" intent *not* to make his heirs beneficiaries, when he had expressly provided for just that.⁹¹ The only intent expressed in the trust was threefold: First, that if Stewart died within the ten years, the remainder was to go to Stewart's "heirs-at-law in equal shares if beneficiary [Stewart] leaves no valid will." Second, that the trust be spendthrift in nature.⁹² And third, that the trust be irrevocable within the ten-year term. To glean from these expressions of intent that Stewart "expressly" intended to retain a reversion in the term strains credulity.

The reliance on case law by the *Stewart* court was misplaced, even if the doctrine of worthier title did survive as a rule of construction. The end limitation in *May v. Marx* was that upon settlor's death, the property "descent [sic] to my heirs, as the law pro-

89. *May v. Marx*, 300 Ill. App. 144, 20 N.E.2d 831 (1939).

90. *Stewart*, 3 Ill. App. 3d at 340, 278 N.E.2d at 13.

91. The Reporter's Notes to RESTATEMENT (SECOND) OF PROPERTY § 30.2, at 466-67 (1988), points out the *Stewart* court's failure to indicate clearly which words showed the "expressed intent" on the part of the settlor to create a reversion. The Reporter says that it is clear from the opinion that the provisions quoted in the text were ignored.

92. Because Stewart was in fact the settlor (although the instrument purported to make his attorney the settlor), the spendthrift clause would have been unenforceable. A property owner may not create a spendthrift trust in his own favor. G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 110 (4th ed. 1963). That point was not relevant in the case. The spendthrift clause, as well as the provision for irrevocability, does demonstrate Stewart's lack of confidence in his own prudence. The court noted that the primary purposes of the trust were to provide for Stewart's rehabilitation from personal injuries and to pay a mortgage debt on his home.

vides."⁹³ The end limitation in *Stewart* was to Stewart's "heirs-at-law in equal shares."⁹⁴ Stewart's heirs under the statute of descent and distribution might not have taken in equal shares, but per stirpes.⁹⁵ Perhaps a more important difference between *May* and *Stewart* is that in the former there was no reservation of a testamentary power of appointment in the settlor whereas in the *Stewart* trust there was. In the New York case of *Richardson v. Richardson*,⁹⁶ cited with approval by the *Stewart* court, the court held that a remainder was created by a limitation to intestate successors in default of appointment by will. The *Richardson* court therefore denied termination. Moreover, New York had by statute abolished its worthier title doctrine after the *Richardson* case, but six years before the *Stewart* case, a factor the court did not consider.⁹⁷

The ultimate fate of *Stewart* as precedent, and indeed the fate of the statute abolishing the doctrine of worthier title, is quite uncertain. Twice since its statutory abolition the supreme court has spoken obliquely about the doctrine, but in neither case did the court construe Section 188. In addition, both cases involved instruments which had become effective before the effective date of the statute.

The dispute in *Harris Trust & Savings Bank v. Beach*⁹⁸ required the court to interpret two instruments creating inter vivos trusts in the 1920's. In each, A settled the trust for the benefit of his wife B for life. In the 1921 trust he provided that if B survived A, then upon B's death the corpus be divided among the heirs of A, share and share alike. The 1926 trust provided that upon B's death the trust would terminate and the corpus be distributed equally among A's heirs. At the death of B the trustees sought instructions regarding the distribution of the estate. The trial court held that the doctrine of worthier title applied to these instruments only as a rule of construction. Taking A at his word, the trial court held that A intended to make a gift to his heirs, and not to retain a reversion for himself, upon the stated conditions. Finally, the trial court held that the identity of the remaindermen, A's heirs, was determined at the time of A's death. The appellate court reversed, holding that the

93. *Stewart*, 3 Ill. App. 3d at 340, 278 N.E.2d at 13 (quoting *May v. Marx*, 300 Ill. app. 144, 20 N.E.2d 831 (1939)).

94. *Id.* at 339, 278 N.E.2d at 12.

95. The doctrine applies only where there is a limitation to the grantor's heirs in the technical sense. Because persons who take by intestacy do not necessarily take equal shares, it is probable that *Stewart* did not use the word heirs in the technical sense. Note, *supra* note 88, at 783-84.

96. 298 N.Y. 35, 81 N.E.2d 54 (1948).

97. N.Y. EST. POWERS & TRUST LAW § 6-5.9 (McKinney 1967) (enacted 1966). The Revisers' Notes to this section state that § 6-5.9 abolishes the doctrine of worthier title and changes the case law of *Doctor v. Hughes* and its progeny.

98. 118 Ill. 2d 1, 513 N.E.2d 833 (1987).

doctrine of worthier title in Illinois in the 1920's applied as a rule of law.⁹⁹

The supreme court reversed, disagreeing with both courts below. It decided that the identity of A's heirs should be determined at the time of B's death. That decision, of course, rendered the doctrine of worthier title inapplicable, for the doctrine is in issue only when there is a purported gift to legal heirs, determined at the time of A's death.¹⁰⁰ In the court's words:

As a result, the doctrine [of worthier title] is not relevant and therefore we need not reach the other issues briefed before this court: whether the doctrine is a rule of construction or rule of law and whether the doctrine is an anachronism which should be abandoned in the case of trusts established in Illinois prior to our 1955 statutory abolition of the doctrine.¹⁰¹

In *Warren Boynton State Bank v. Wallbaum*,¹⁰² the deed in controversy was executed in 1903. The grantor, after reserving a life estate in himself, conveyed a tract to his then five-year old daughter for life, and upon her death "leaving no . . . children her surviving the [real estate] shall descend to the heirs of [the grantor] share and share alike. The children of any deceased child taking only the share which their parent would inherit if living."¹⁰³ The interpretation depended on what was meant by the phrase *heirs of the grantor*. The trial court decided that all the grantor's heirs (including the life tenant daughter), determined upon the death of the grantor, took from the deed. The appellate court decided that heirs was used in its non-technical sense to mean the grantor's children.¹⁰⁴ Accordingly, it said that the doctrine of worthier title did not apply:

It is not a positive rule of law but only a rule of construction and

99. *Harris Trust & Sav. Bank v. Beach*, 145 Ill. App. 3d 673, 495 N.E.2d 1170 (1986). In support of its decision the appellate court cited *Corwin v. Rheims*, 390 Ill. 205, 61 N.E.2d 40 (1945); *Biwer v. Martin*, 294 Ill. 488, 128 N.E. 518 (1920); and *Akers v. Clark*, 184 Ill. 136, 56 N.E. 296 (1900). *Beach*, 145 Ill. App. 3d at 676, 495 N.E.2d at 1173. The appellate court's citation of *McNeilly v. Wylie* as reciting that the Illinois rule is a rule of law and not of construction shows confusion between the testamentary and inter vivos branches of the doctrine. *Id.* at 676, 495 N.E.2d at 1173. See *supra* note 81 for a discussion of *McNeilly v. Wylie*.

100. *Beach*, 118 Ill. 2d at 20, 513 N.E.2d at 842. See *supra* text accompanying notes 75-76 for a discussion of the effect on the doctrine's applicability depending on when a decedent's "heirs" are determined.

101. *Id.* at 20, 513 N.E.2d at 843. The discussion in *Beach* of *McNeilly* and other testamentary cases revealed some confusion. The testamentary branch requires that a devise to heirs be of the same kind and quality that would pass by descent were the gift to heirs omitted from the will. The inter vivos branch requires that the purported gift to heirs be intended to indicate those who would take by inheritance.

102. 123 Ill. 2d 429, 528 N.E.2d 640 (1988).

103. *Id.* at 433, 528 N.E.2d at 642.

104. 143 Ill. App. 3d 628, 493 N.E.2d 21 (1986), *rev'd*, 123 Ill. 2d 429, 528 N.E.2d 640 (1988). For a good discussion of this case at the appellate court level, see Whitfield, *Property*, 11 S. ILL. U.L.J. 915, 920-28 (1987).

when it is clear from the language employed that the grantor intended to use the term "heirs" in other than its strict, technical sense, the Doctrine will not be allowed to defeat the intent of the drafter.¹⁰⁵

The supreme court reversed, disagreeing with both courts below. It decided that *heirs* of the grantor meant "heirs" as determined as if the grantor had died at the death of the life tenant daughter. It commented that, accordingly, the doctrine of worthier title is not applicable, stating that: "Our court fully addressed that issue in *Harris Trust & Savings Bank v. Beach*."¹⁰⁶

III. THE STATUS OF THE RULE IN ILLINOIS: BURYING THE DEAD

A. *Analysis of the Statute—What Did It Abolish?*

The most important question facing any court confronted with a worthier title issue arising after 1955 is what precisely did the statute abolish. Did it abolish the doctrine as a rule of law or of construction? The authors maintain that the General Assembly intended Section 188 to abolish the doctrine of worthier title completely from Illinois law.

The General Assembly worded the statute as inclusively as possible to incorporate the doctrine as applied in Illinois. This thesis derives from a comparison of Section 188 to the Illinois decisions and the common law before the statute was passed. Furthermore, the fact of enactment of legislation and the language mandate that courts apply different law after the statute.

A close analysis of the statute demonstrates its inclusiveness. For example, Section 188 begins by including all modern means of conveyancing within its scope. Its applicability to deeds, wills, and other instruments encompasses every decision on point in Illinois.¹⁰⁷ In fact, the term "other instruments" appears particularly directed at trust instruments because of their frequent treatment in the Illinois decisions.¹⁰⁸

105. 143 Ill. App. 3d at 632, 493 N.E.2d at 24-25.

106. 123 Ill. 2d at 442, 528 N.E.2d at 646.

107. The applicable conveyances of two decisions were by deed, of legal interests: *Akers v. Clark*, 184 Ill. 136, 56 N.E. 296 (1900); *Biwer v. Martin*, 294 Ill. 488, 128 N.E. 518 (1920). The applicable conveyances in the remaining seven cases were by trust instruments: *Corwin v. Rheims*, 390 Ill. 205, 61 N.E.2d 40 (1945); *Sutliff v. Aydelott*, 373 Ill. 633, 27 N.E.2d 529 (1940); *May v. Marx*, 300 Ill. App. 144, 20 N.E.2d 821 (1939); *Hubbard v. Buddemeier*, 328 Ill. 76, 159 N.E. 229 (1927); *Burton v. Boren*, 308 Ill. 440, 139 N.E. 868 (1923); *Lawrence v. Lawrence*, 181 Ill. 248, 54 N.E. 918 (1899); *Hobbie v. Ogden*, 178 Ill. 357, 53 N.E. 104 (1899). The two other decisions most recently prior to the statute involved wills. See *supra* note 81 for a discussion of these two will decisions.

108. Of the nine cases decided before Section 188 was enacted, the instrument of conveyance in seven of them was the trust deed. See *supra* note 107 for citation to these seven cases.

The statute also includes all types of property to which the doctrine has been applied. The words "real or personal property" surely include land, personalty, and the equitable interests that were at issue in decisions such as *Hobbie v. Ogden*.¹⁰⁹ Additionally, the statute specifies "any" present or future interests in property. This also indicates expansive coverage of the statutory requirement of abolition.

The General Assembly's use of the word *purports* also gives Section 188 a broad application. The usual meaning attributed to the word is "[t]o convey, imply, or profess outwardly, as one's (esp. a thing's) meaning, intention, or true character; to have the appearance, often the specious appearance, of being, intending, claiming, etc. (that which is implied or inferred)."¹¹⁰ Thus, Section 188 mandates that when any instrument reveals the appearance of creating an interest in the heirs of the maker then the statutory terms must be applied, that is, that the heirs shall take.

This language, in essence, appears to be directed at bringing within the statute the doctrine as a rule of construction as well as of law. Any other interpretation would rob the word *purport* of its rational meaning. The word if properly interpreted includes the doctrine when used as a rule of construction; because in that case the limitation to the grantor's heirs is said to presume intent, and the word *purport* means "to . . . imply . . . as one's . . . intention, or true character."

The word includes the doctrine as a rule of law, because the words used in the instrument "have the appearance . . . of intending" that the heirs take a remainder. This is because the words *to my heirs* give at least the appearance of an intent that the heirs are to take. Thoughtful authorities have pointed out in this regard that the word *heirs* is totally meaningless unless it is held to be a word of purchase.¹¹¹ Thus, the statute should be read to include both rules.¹¹²

The General Assembly then supplied its own meaning to the conveyance if it met the above, expansive criteria. The statute pro-

109. 178 Ill. 357, 53 N.E. 104 (1899). See *supra* text accompanying notes 24-29 for a discussion of *Hobbie*.

110. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2017 (2d ed. unabridged, 1941).

111. H. CAREY & D. SCHUYLER, *supra* note 12, at § 123. See also *infra* notes 123, 124, and 131.

112. In fact, the draftsman of Section 188 has stated that the statute was intended to abolish the doctrine as a rule of law and of construction. Note, *supra* note 88, at 778-79 n.26 (letter from Daniel M. Schuyler, Chairman of the Executive Committee, Section on Real Estate Law, Illinois State Bar Association, to Amos M. Pinkerton, Executive Secretary, Illinois State Bar Association, July 16, 1954, on file at the Northwestern University Law Review Offices, 357 East Chicago Ave., Chicago, IL 60611).

vides that in limitations to the grantor's heirs the heirs "shall" take by purchase and not descent. This, in effect, means that the Illinois courts should disregard the doctrine of worthier title and give effect to a remainder to the heirs of the grantor.

Furthermore, although the doctrine was being applied in Illinois in 1955 both as a rule of law and of construction, the General Assembly did not discriminate between the two in Section 188. That section merely states: "The doctrine of worthier title and the rule of the common law that a grantor cannot create a limitation in favor of his own heirs are abolished."¹¹³ The drafter says the same thing twice, really three times, once in the first sentence and twice in the second sentence. Why else but for emphasis?¹¹⁴ This broad, inclusive, emphatic language where the legislature appeared well informed on the subject matter manifests that the General Assembly intended to abolish the doctrine as a rule of law and of construction.

Thus, the answer to the question "what did Section 188 abolish" appears to be easily answerable—the entire doctrine of worthier title as it was known in 1955. Any other conclusion is hard to justify in light of the history of the doctrine in Illinois and the specific statutory language used by the legislature.

This interpretation of Section 188 is reinforced by noting the language used in the statute abolishing the Rule in Shelley's case in 1953.¹¹⁵ The Rule in Shelley's Case is similar to the doctrine of worthier title in some respects but has always been applied as a positive rule of law.¹¹⁶ The former rule was abolished by the single sentence: "The rule of property known as the rule in Shelley's Case is abolished."¹¹⁷ The similarity of history and application of the two rules would seem to dictate similar treatment by the General Assembly, and the differences between the length of the two statutes is explained by the dual and inconsistent application of the doctrine of worthier title in the Illinois cases.

For these reasons, the doctrine of worthier title should be considered totally abolished as to instruments effective after 1955. The most compelling reason for so holding is the doctrine of separation

113. ILL. REV. STAT. ch. 30, ¶ 188 (1987).

114. Cf. N.Y. EST. POWERS & TRUSTS LAW § 6-5.9 (McKinney 1967): "Where a remainder is limited to the heirs or distributees of the creator of an estate in property, such heirs or distributees take as purchasers."

Interestingly enough, no litigation has been required to "construe" this statute. At least there are no annotations under it in N.Y. EST. POWERS & TRUSTS LAW § 6-5.9 (McKinney 1967 & Supp. 1989). Apparently, the one sentence was plain enough.

115. 1953 Ill. Laws 1479; ILL. REV. STAT. ch. 30, ¶ 186 (1987).

116. See *supra* note 63 for the text of the Rule in Shelley's Case. In fact, the Rule in Shelley's Case arose from the same common law concerns and about the same time as the doctrine of worthier title. C. MOYNIHAN, *supra* note 7, at 151.

117. ILL. REV. STAT. ch. 30, ¶ 186 (1987).

of powers. Courts ought to apply statutes ingenuously, whether or not they agree with the legislature as to the wisdom of those statutes.

B. Benefits from Abolition

There are reasons in addition to respect for the legislature for following the statute. The body of Illinois case law interpreting the effect of a conveyance to a grantor's heirs is confusing, inconsistent, and unnecessarily complex.¹¹⁸ And if Illinois retains the doctrine, its caselaw will even more closely begin to parallel the New York experience under *Doctor v. Hughes*. There, many cases indistinguishable on their facts were decided differently.¹¹⁹ The question most troublesome was what constituted an expression of "contrary intent" sufficient to overcome the presumption that a grantor intended to retain a reversion. Professor Leach lamented:

Inevitably each case is a toss-up, and most go right up to the Court of Appeals. One of my colleagues made a study of the New York cases to see if he could find some thread of rationality running through them. His conclusion was that if the case came before the Court in even-numbered years there was a four-to-one chance that a contrary intent would be found, but vice versa in odd-numbered years. There's jurisprudence for you with a vengeance.¹²⁰

Uncertainty and unpredictability in the law breed economic waste. In the context of donative transactions it tears families apart. Consider, for example the *Harris Bank* and *Warren Boynton* cases: In both cases, the courts at each of the three levels reached different conclusions as to the intent of the grantor in limiting interests to his heirs.¹²¹

118. The doctrine of worthier title has been fraught with confusion almost from the beginning. The problems associated with executory trusts are vivid examples, for a discussion of which see *supra* note 67 and accompanying text. In other opinions, the courts have confused the doctrine of worthier title with the rule in Shelley's Case. Throughout the doctrine's history in Illinois it has been applied inconsistently as both a rule of construction and of law.

119. Comment, *supra* note 11 at 841 ("[I]t is impossible to reconcile all of the cases or to set out a formula which will definitely point to a reversion or a remainder.").

120. B. LEACH, PROPERTY LAW INDICTED 56 (1967).

121. Of course, abolishing the doctrine of worthier title as a rule of construction will not obviate all problems of interpreting gifts to heirs. Problems of implied conditions of survivorship will remain. Comment, *Future Interests—Remainders—Status of Implied Conditions of Survivorship in Illinois*, 13 S. ILL. U.L.J. 131 (1988).

Incidentally, a return to the law of *Evans v. Giles*, discussed in Casenote, *Future Interests—Contingent Remainders—Unstated Conditions of Survivorship*, S. ILL. U.L.J. 313 (1982), would greatly ameliorate those problems. In refusing to imply conditions of survivorship and in dropping the doctrine of worthier title courts would be taking grantors at their word, rather than engaging in second guessing the likely intent of a grantor, often long dead, about contingencies he probably never thought about. Cf. *In re Estate of Breckenridge*, 56 Ill. App. 3d 128, 130, 371 N.E.2d 1286,

The Illinois situation does not have to become as untenable as was the law in New York before its abolition statute. Certainty and predictability can be enhanced if Illinois courts will replace the doctrine of worthier title with the cardinal rule of interpretation of instruments that the writer's intent should govern the meaning attributed to it, and that "[n]o technical rule of construction should be permitted to interfere."¹²² This means simply treating the doctrine as if it never existed. Courts will then look for the grantor's intent and decide accordingly—without reference to the artificial presumption created by the doctrine of worthier title as a rule of construction.

In many cases there is no evidence of the grantor's intent other than the words of a short conveyance which include a remainder or executory interest to the grantor's heirs. The grantor's limitation of a future interest to his heirs, without more, is sufficient evidence of the intent that they take as purchasers.¹²³ Presuming the contrary, that a grantor meant to keep a reversion for himself from his words granting an interest to others, flies in the face of common sense.¹²⁴

The policy reason that has been advanced for retaining the doctrine of worthier title as a rule of construction is that it gives the courts flexibility in responding to efforts to revoke trusts.¹²⁵ It has been called "a useful weapon in the armory of the judicial legislator."¹²⁶ Professor Gulliver cogently criticizes that kind of "flexibility":

There are some who consider this sort of adroit and esoteric intellectual exercise an admirable example of the legal mind at work. On the other hand, it may be suggested that courts should meet the issues presented squarely, and overrule precedent if it is no longer satisfac-

1287 (1978) ("Rules of construction are simply artificial devices by which courts find an intent when very probably none existed at the time the instrument became operative.").

122. *Boldenweck v. City Nat'l Bank & Trust Co.*, 343 Ill. App. 569, 579, 99 N.E.2d 692, 696 (1951).

123. See H. CAREY & D. SCHUYLER, *supra* note 12 at § 123; C. MOYNIHAN, *supra* note 7, at 161 ("As a rule of construction the inter vivos aspect of the doctrine has been productive of litigation and confusion; and it has been questioned whether the . . . rule does in fact express the intention of the normal settlor of a trust."). Comment, *supra* note 11, at 851 ("[A]ny rule of construction which passes over and ignores the [word] heirs, . . . limiting what plainly purports to be a remainder, is not in harmony with the interpretative process.").

124. The doctrine "gave language an effect contrary to its usual meaning (as the [1833 Report of the English Commission] put it with British restraint, 'We also think, that where the Testator expressly devises an estate, his intention may be inferred to be that the devise should take effect.')" A. GULLIVER, *supra* note 6, at 95.

125. See *id.*, referring to worthier title as a "popular, though not necessarily desirable, device for getting results, particularly in the face of embarrassing precedent."

126. Note, *The Rule Favoring Title by Descent Over Title by Devise*, 46 HARV. L. REV. 993, 1000 (1933).

tory. In any event, the ad hoc use of worthier title has led to confusion and therefore to litigation; the real issues and motivations may be entirely obscured in an opinion by technical discussion of worthier title or evanescent speculation about "intent"; and one judge, wishing to reach result X, may hold that worthier title applies to certain language, whereas another judge, wishing to reach result Y, may hold that it does not. One cannot expect consistent and predictable law to emerge from decisions framed largely or entirely in terms of an escape device that has nothing to do with the real issue before the court.¹²⁷

In short, retaining the doctrine in order to increase flexibility is an improper method to protect a settlor's interest in revoking a trust. To allow the doctrine to be used in this way confuses both the law of revocability of trusts and the law of remainders. If a settlor wishes to retain the flexibility to revoke, he should reserve the right to do so directly in the trust instrument.¹²⁸ The benefits of abolishing the doctrine of worthier title should not be sacrificed on the altar of allowing improvident settlors to revoke trusts. The Appellate Court of Illinois "paid a high price" to do so in Stewart's trust.¹²⁹

C. Instruments Effective before the Statute

For a time, cases will continue to arise requiring the interpretation of limitations to a grantor's heirs in instruments effective before July 1, 1955, the effective date of the statute.¹³⁰ There is no reason to continue to apply the doctrine of worthier title as to these cases because no draftsman ever relied on the doctrine of worthier title to change a remainder to his heirs into a reversion in himself.¹³¹ Furthermore, a lawyer interpreting an Illinois instrument effective before 1955 would not reasonable rely upon the doctrine of worthier

127. A. GULLIVER, *supra* note 6, at 109. See also Comment, *The Illinois Doctrine of Worthier Title Revisited*, 4 Nw. U.L. REV. 507, 517-18 (1953), arguing that flexibility generally is offset by its effect on the settlor wishing to create a remainder in his heirs.

128. Comment, *supra* note 127, at 517. In addition, the use of the doctrine may be said to decrease the flexibility of the settlor since under the doctrine as applied in *Stewart* the settlor will have to convince the court that he meant what he said. See *supra* notes 88-97 and accompanying text for a discussion of *Stewart*.

129. Note, *supra* note 88, at 778.

130. This has happened twice to date: Warren Boynton State Bank v. Wallbaum, 123 Ill. 2d 429, 528 N.E.2d 640 (1988); Harris Trust & Sav. Bank v. Beach, 118 Ill. 2d 1, 513 N.E.2d 833 (1987).

131. Professor Gulliver states:

It is difficult to believe that worthier title may "reasonably be supposed to have determined the conduct" of the settlor or his attorney. In certain areas of the law of future interests, such as the rule against perpetuities, there is a special justification for *stare decisis* But it seems very doubtful that a lawyer would rely on worthier title and insert what purported to be a gift to the settlor's heirs for the express purpose of reserving a reversion; the latter is easily and traditionally accomplished by either making no disposition at the end of the trust or by providing for return to the settlor personally.

A. GULLIVER, *supra* note 6, at 109-10.

title.

As already discussed, there was no predictability of result where some Illinois courts applied the doctrine as a rule of law, others as a rule of construction, and still others did not apply it at all. Thus, in the short run, while litigating pre-abolition cases, Illinois jurisprudence should follow the cases that ignored the doctrine and left the remainder in the grantor's heirs where he put it.¹³² Likewise, in the long run, Illinois jurisprudence should apply the abolition statute to totally abolish the doctrine of worthier title.

CONCLUSION

The feudal reasons for creating the doctrine have not existed for centuries. The doctrine of worthier title and the Rule in Shelley's case developed around the law of remainders only because of the existence of feudal incidents. We no longer need to keep the fence up around these interests after the reasons for doing so have long since vanished. Remainders and executory interests were important advancements in the common law. Now they should be allowed to operate as their grantors intend that they should, and without the "assistance" of the outmoded doctrine of worthier title.

The status of the doctrine of worthier title in Illinois is uncertain, although it need not be. The language of the statutory abolition read in light of the history of the doctrine compels the conclusion that the Illinois General Assembly intended that the doctrine be completely abrogated. Further, there is little in the way of benefit to justify the continued existence of such a confusing rule. It is time to bury the dead.

132. *Hubbard v. Buddemeier*, 328 Ill. 76, 159 N.E. 229 (1927); *Lawrence v. Lawrence*, 181 Ill. 248, 54 N.E. 918 (1899).

