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Survival of Certain Feudal Law Concepts in Wyoming

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SURVIVAL OF CERTAIN FEUDAL LAW CONCEPTS IN WYOMING

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I.

EXISTENCE OF TENURE

To determine whether tenure exists in Wyoming it is first necessary to establish what we mean by "tenure". As between landlord and tenant under a lease for a term of years, it can hardly be disputed that there is tenure; and the same thing is true of a tenant for life. The lessee holds of his landlord, and the life tenant holds of his reversioner.[1] Indeed, the word "tenant" indicates the existence of this tenure. Surely, the conclusion that tenure of this type exists in Wyoming, as indeed in every other state of the United States, will not be challenged.

In determining the existence or non-existence of tenure as between the grantor and grantee of a fee simple estate, however, a more difficult problem arises. In many states—by statute, court decision, or otherwise—it has been made clear that "tenure" does not exist.[2] There is reason to believe that the tenure referred to is tenure of this type. On the other hand, in at least two states, New Jersey and Georgia, statutes have declared that tenure does exist;[3] but it is believed that the *Statute Quia Emptores*[4] is in force in those states, from which it follows that tenure between grantor and grantee of a fee simple cannot exist in either of these states. Indeed, the conclusion that there is no tenure in this situation must be reached in the vast majority of the states of the Union. In Pennsylvania and South Carolina, however, the situation is different. Both these states have this type of tenure, but both of them take the view that the *Statute Quia Emptores* is *not* in force.[5] The result in these states must be that when A grants a fee

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1. Gray, The Rule Against Perpetuities, 4th ed. (1942) sec. 22.
2. Ibid. secs. 23, 23.1, and 23.2. Included by Professor Gray in this category are: Arkansas, Connecticut, Illinois, Iowa, Kentucky, Maryland, Michigan, Minnesota, New York, Ohio, Virginia, West Virginia, and Wisconsin.
3. Ibid. secs. 23 and 23.2.
4. Stat. Westminster III (18 Edw. I. c. 1.), enacted in 1290, abolished sub-infeudation in the case of a conveyance in fee simple. After Quia Emptores such a conveyance operated by substituting the grantee for the grantor in the feudal chain. Thus, after 1290, if B, holding of A, conveyed to C in fee simple, C simply took B's place in the feudal pyramid, and B dropped out of the picture completely.
5. Gray, secs. 26 and 27.

simple to B, tenure exists between them. It would thus seem clear that in Pennsylvania and South Carolina a grantee of a fee simple holds of his grantor.

Whether tenure exists between a grantor and grantee of a fee simple today is perhaps not a matter of great practical importance,[6] but the question may nevertheless arise whether such tenure exists in Wyoming. The common law of England, so far as not inapplicable here, has been adopted in Wyoming. Statutes declare that Wyoming accepts the common law as it existed in 1607, the fourth year of the reign of James the First.[7] *As Quia Emptores* was in force in England from 1290, it is reasonable to assume that it also must have been adopted by Wyoming, for there are neither cases nor statutes indicating the contrary. Accordingly, it is believed that Wyoming courts would refuse to recognize the existence of tenure between grantor and grantee of a fee simple absolute. The Wyoming case of *Fuchs v. Goe*[8] states that "The courts will adopt principles of common law as rules of decision so far only as those principles are adapted to circumstances within the state, its state of society, and its form of government." Surely tenure between grantor and grantee of a fee simple absolute, a principle of feudal land law abolished even in England since 1290, can hardly be regarded as adapted to circumstances within Wyoming, its state of society, or its form of government. That the non-existence of tenure in this situation is also the overwhelming weight of authority in the United States would tend to give support to the view that it is also non-existent in Wyoming.

It may well be that of the various types of tenure, the one just discussed is the one most truly demanding designation as "feudal"; for it is the one that had the most widespread social and political consequences. This is the tenure that existed before 1290 whenever a tenant in fee simple purported to transfer his entire estate to another. Even though the grantor theoretically parted with his entire estate, he nevertheless retained a position in the feudal pyramid as his grantee's overlord, and he had the benefit of the right of escheat on failure of his grantor's heirs as well as other beneficial feudal incidents. If by "feudal" tenure we mean this tenure, it obviously does not exist in Wyoming. Even vestiges of such tenure could exist in America only in a state refusing to recognize *Quia Emptores;* and there is no reason to believe that Wyoming would take such a view.

Next to be considered is the relation between a grantor and grantee of a fee simple determinable. Suppose A conveys "to B and his heirs so long as the premises are used for religious purposes."

6. "Most lawyers are of opinion * * * that, except possibly in Pennsylvania, it makes precious little difference in the practical working of our law whether tenure exists or not". Vance, the Quest for Tenure, 33 Yale L. J. at page 250.
7. Wyo. Comp. Stat., 1945, Sec. 16-301.
8. (1945) 163 P. (2d) 783 at 792.

Such conveyance gives B a determinable fee simple,[9] and it leaves A with a possibility of reverter in case the lands are ever diverted to uses other than the one specified. Our present concern is whether there is tenure between A and B. Professor Gray argues that *Quia Emptores* abolished tenure as to all fees simple.[10] If this were true, a possibility of reverter—an interest admittedly based upon tenure—could not exist after 1290. Indeed, this is the view actually taken by Professor Gray. Notwithstanding Professor Gray's argument, however, many American courts have recognized such interests as valid.[11] The explanation would seem to be that *Quia Emptores* abolished subinfeudation with its tenure between grantor and grantee, only in the case of the transfer of a fee simple *absolute;* and that fees simple determinable, not being fees simple absolute, but something else, are not subject to the terms of *Quia Emptores.*[12] It is to be observed that both views as to the extent of the effect of *Quia Emptores* assume that tenure must exist if the grantor is to have a possibility of reverter; and the existence of this interest in America would thus seem to be proof that tenure exists in this situation. Unfortunately there are neither Wyoming statutes nor cases dealing with the determinable fee. Consequently it is impossible to state with certainty that as between grantor and grantee of a fee simple determinable tenure exists in Wyoming; but there is no reason to assume that Wyoming courts would not follow the view held by most American courts and textwriters and hold that tenure exists in this situation.

Finally to be considered is the existence or non-existence of tenure between the holder of the fee and the state. In the Nebraska case of *In Re O'Connor's Estate,*[13] in which the intestate died without heirs and the state took his property by escheat, the court held that escheat was not a *transfer* of property, but that the state had paramount title to the property all the while. The view that escheat takes place because of the state's paramount title would seem to be a clear recognition of tenure;[14] and it, rather than the view that escheat is a taking by the state through succession as the ultimate heir,[15] seems to have been the

9. This estate is often called a fee simple subject to a special limitation. Other examples are: "to B and his heirs until Old Main shall fall"; "to C and his heirs while they shall continue to dwell on the premises", etc.
10. Gray, sec. 31 et seq.
11. The prevailing American view recognizes the validity of the possibility of reverter. Simes, Law of Future Interests, sec. 178; Thompson on Real Property, secs. 2182-2188; Powell, Determinable Fees, 23 Col. L. Rev., 207.
12. The Statue reads: "And it is to wit that this statute extendeth but only to lands holden in fee simple". "Fee simple" is interpreted by the majority of courts and legal writers to mean fee simple absolute. See Powell, Determinable Fees; cited supra note 11. See also Vance, Rights of Reverter and the Statute Quia Emptores, 36 Yale L. J. 593.
13. (1934) 126 Neb. 182, 252 N.W. 826.
14. "Clearly the theory of the law in the United States, then, is that first and originally the state was the proprietor of all real property, and last and ultimately will be its proprietor; and what is commonly termed ownership is in fact but tenancy, whose continuance is contingent upon legally recognized rights of tenure, transfer, and of succession. When this tenancy expires or is exhausted

idea prevailing in America ever since the Revolutionary War. It was believed that the state then stepped into the place of the English Crown.[16] If so, an owner in fee simple who had hitherto held of the Crown thereafter held of the state; for, as stated by Gray, "Land was held of the Crown in the Colonial times, and it does not seem that so fundamental an alteration in the theory of property as the abolition of tenure would be worked by a change of political sovereignty. Tenure still obtains between a tenant for life or years and the reversioner; and so in like manner, it is conceived, a tenant in fee simple holds of the chief lord, that is, of the state."[17]

To determine Wyoming's view resort must be had to the statutes of Wyoming, for there are no cases in point. Section 22-202, Wyoming Compiled Statutes, 1945, reads: "The original and ultimate right of all property, real and personal, within the limits of this state, is in the people thereof." This seems to indicate that the state is the paramount owner of all property. If this be true, what we commonly think of as ownership may be nothing more than a tenancy.[18] The Wyoming escheat statute[19] states that "Whenever the title to any property fails for want of legal heirs, it reverts to the state". If propery "reverts" to the state, a persuasive argument can be made that the state has had an interest in the property all the time. It is therefore reasonable to conclude that in Wyoming tenure exists between the state and the owner in fee simple. North Dakota and Nebraska seem to have reached the same conclusion[20] in spite of the fact that the word "revert" does not appear in their escheat statutes.[21] It may thus be argued that there is even stronger reason to believe the existence of such tenure in Wyoming.

Although it may be largely an academic question whether the owner in fee simple holds of the state, there is one practical aspect of the problem. If the view be taken that escheat is a taking by the state through succession, property so escheating would be theoretic-

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by reason of the failure of the state or the law to recognize any person or persons in whom such tenancy can be continued, then the real estate reverts to and falls back upon its original and ultimate proprietor, or in other words, escheats to the State". In re O'Connor's Estate, cited supra note 13. "The state, however, does not come in by way of succession". In re Miner's Estate, 143 Cal. 194, 76 Pac. 960, 970. "An escheat is nothing more nor less than the reversion of property to the state, which takes place when the title fails." Delany v. State, 42 N.D. 630, 174 N.W. 290, 291. (If property reverts to the state, the state must have had an interest in the property all the time, such interest being based upon, and proof of, tenure.)

15. Minnesota seems to be one of the state taking the minority view. See Fraser, Future Interests in Property in Minnesota, 3 Minn. L. Rev. 324 at 327.
16. Tiffany, Law of Real Property 3rd ed. (1939) sec. 19.
17. Gray, sec. 22.
18. "What is commonly termed ownership is in fact but tenancy". In re O'Connor's Estate; cited supra notes 13 and 14.
19. Wyo. Comp. Stat. 1945, sec. 22-203.
20. Delaney v. State, cited supra note 14; In re O'connor's Estate, cited supra notes 13, 14 and 18.
21. Cal. Prob. Code, sec. 231; No. Dak. Rev. Code, 1943, sec. 56-0114; Nebr. Comp. Stat., 1929, sec. 76-501.

ally subject to inheritance taxation,[22] for inheritance taxes are taxes on the *transfer* of property.[23] On the other hand, if the view be taken that property escheats because of the state's paramount title based upon tenure, there would be no *transfer* when property escheated; and it is hard to see any theory upon which an inheritance tax could be exacted. The conclusion that there is tenure between the Wyoming holder of a fee simple and the state may therefore not be completely without practical significance.

II.

THE ESTATE IN FEE TAIL

In England ever since feudal times, the great landowners have sought methods by which they might preserve their estates intact from generation to generation. The thing most desired was a device to deprive successive owners of the power to alienate the lands. Thus, early as the beginning of the thirteenth century, conveyaynces to a donee "and the heirs of his body" began to appear.[24] The purpose of a gift in such form must surely have been to keep the property within the immediate family of the donee. The grantors of these estates obviously wished to make it impossible for the first donee to convey the estate and thus defeat the rights of his lineal heirs. But the judges apparently did not share the donors' sympathy for a device to restrain alienation in any such fashion as this; and before the first quarter of the thirteenth century had come to an end the English courts interpreted these conveyances in such a way as to defeat the grantors' intentions. The interpretation seems to many to be a strange one. Although it may be argued that there is nothing about the conveyance to justify it, the courts nevertheless held that what was created was an estate *on condition.*[25] Thus, in a gift from A "to B and the heirs of his body" (or "to B and the heirs male of his body") the courts held that it was a gift to B *if* he had heirs (or heirs male) of his body.[26]

22. People v. Richardson, 259 Ill. 275, 109 N.E. 1033; Christianson v. King County, 239 U.S. 356, 36 S.C. 114.
23. "It is argued that this state, having escheated to the county of Jefferson, there has been no transfer of the estate within the meaning of the Inheritance Tax Law. * * * The tax imposed upon transfers of property by the state applies to the transfer of the property of an intestate to a county by escheat." People v. Richardson, cited supra note 22. Escheat to a county is extremely rare in America. Such escheat is purely statutory. See Ill. R.S., 1943, Sec. 162. Obviously there is no possibility of tenure between an owner of land and the county. Thus the court's decision that the escheat in this case was a "transfer" seems unquestionably sound.
24. 2 Pollock & Maitland, History of English Law, 16. Perhaps the commonest form of such gift was a conveyance to a man and his wife and the heirs of their bodies. Ibid. p. 17.
25. Professor Plucknett suggests a possible justification for the courts' interpretation of these gifts. "The donor might likewise have imagined that his gift was in a sense conditional, for it is natural that he should intend the gift to be the foundation of a new family, and if that family did not become established, then the gift should revert to the donor". Plucknett, Concise History of the Common Law, 2 ed., 491.
26. 2 Poll. and Mait., 17.

Accordingly, in the view of the courts, the birth to B of an "heir" of the proper kind "satisfied the condition"; and B thereafter had the power to convey away a fee simple, and thus destroy the rights of his lineal heirs. Although B himself did not acquire a fee simple—unless perhaps he obtained it by a reconveyance[27]—the estate was for most purposes equivalent to a fee simple once the condition had been satisfied. The important distinction was that, in the absence of any conveyance to a stranger, the estate descended, not to heirs in general, but only to those lineal heirs specified in the limitation.[28] If there were no such heirs the estate reverted to the donor.[29]

That the early thirteenth century judges were defeating the purpose of these gifts is clear; and late in the century the Parliament sought to remedy the situation. The Statutes *De Donis Conditionalibus*,[30] enacted in 1285, demanded that effect be given to the intention of the donors of these estates.[31] After 1285, therefore, descent was limited to the heirs specified in the limitation. The effect was that no conveyance by the first donee could defeat the right of his lineal heirs to succeed to the estate. Nor could it defeat the right of the donor and his heirs to claim the property on failure of the designated issue. Thus, in consequence of *De Donis Conditionalibus*, the "fee conditional" was transformed into a new type of estate known as an "estate in fee tail".[32] The inheritance is "cut" in that it is restricted to lineal heirs. So long as primogeniture was in effect the inheritance went to the first donee's eldest son,[33] then to the eldest son of that eldest son, etc., etc. In case any of these successive tenants in tail were to die without a lineal

27. Apparently this was not an uncommon practice. "The donees of these conditional fees-simple took care to aliene as soon as they performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee-simple absolute". Blackstone's Commentaries, Bk. 2, Ch. 7, p. 111.
28. Until primogeniture was abolished, an estate "to B and the heirs of his body" theoretically descended to B's eldest son, then to the eldest son of B's eldest son, etc. The case with which the issue could be deprived of all interest by a conveyance by the donee, once the "condition had been satisfied" however, made it quite certain, as a practical matter, that these estates would soon be converted into estates in fee simple and the restricted form of descent destroyed. See Thompson, Real Property, Sec. 761.
29. 2 Poll. & Mait. 17.
30. Stat. 13 Edw.I., Ch. 1.
31. The statute provides in part: "Concerning lands that many times are given upon condition, that is, to wit, * * * where one giveth land to another and the heirs of his body issuing, it seemed very hard to the givers and their heirs that their will being expressed in the gift was not * * * observed. * * * Wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver of his heirs if issue fail."
32. "The 'conditional fee' of former times became known as a fee tail, * * * a fee that has been carved or cut down; and about the same time the term fee simple was adopted to describe the state which a man has who holds 'to him and his heirs'." 2 Poll. & Mait., 19.
33. It would of course be otherwise in the case of a fee tail femals, i.e., where the conveyance is "to B and the heirs female of his body".

heir, the estate would go to the next elder brother of the deceased tenant and resume its descent in the manner described.[34]

After *De Donis*, the donee of a conveyance by A "to B and the heirs of his body" really had but little more than a life interest in the property. His creditors could take by levy nothing more than a life estate.[35] A forfeiture by B had no effect upon the heirs.[36] This, obviously, was a good kind of estate to have. So good was it that great numbers of states became so entailed during the two centuries following 1285.[37] But the fee tail was never popular with the judges, and by the sixteenth century the English courts had devised two collusive and fictitious ways of destroying these entails. By the use of the "common recovery"[38] and the "fine"[39] fee tail estates were once more given the alienability of fees simple; and this was the situation at the time the settlement of America began. These two dissentailing devices were continued in use in England until abolished by statute in 1833.[40] By this statute a tenant in tail was given the power to convey a fee simple by the use of a deed. In 1925 "The Law of Property Act" completely abolished the fee tail as a legal estate.[41]

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34. See 2 Thompson, Real Property, Sec. 761, cited supra note 28.
35. Tiffany, sec. 47.
36. 2 Blackst. Comm. Ch. 7, p. 116.
37. See Tiffany, sec. 46.
38. "The common recovery was a very old form of action * * *. The principle had already become established that a tenant in tail could convey a fee simple and so bar his heirs, providing he left assets equal in value to the land. This was then enlarged into the proposition that he could so convey if he left for his heirs a judgment for the value of the land so conveyed. These principles were combined in the common recovery in this fashion. If B, the tenant in tail, wished to convey the land to C in fee simple, C would bring by agreement a common recovery against B. B would allege that he had derived title in the land from X and would ask that X be brought in to defend the case. X, upon being called in, would, in accordance with the agreement between himself and B, admit that he had conveyed the land to B, but that he had no defense to C's action. Judgment would thereupon be given that C should recover the land in accordance with the terms of his allegation that he was entitled to it in fee simple. B and B's heirs would be given what in legal theory was an adequate recompense in the shape of a judgment against X for other lands of equal value in respect of which A's interest as reversioner would also theoretically attach. Since, however, X was always chosen for the part that he played for the very reason that he was entirely irresponsible financially, the judgment against him, although adequate on the face of it, was, as was intended from the beginning, in fact worthless, and the net result of the transaction was that C obtained the land in fee simple and that the entailed line and the rights of the original donor of the land were barred." Bigelow, Introduction to the Law of Real Property, 3 Ed., 27. See also Tiffany, Sec. 46.
39. The "fine" was also a form of law suit. It was so called because it put an end —a "final concord"—to a suit at law. It was really a friendly compromise presumably intended as a compromise of a legal action. The suit was often fictitious, but for disentailing purposes the English courts seemed quite willing to ignore the unreality of the suit. The gist of the "concord" was simply that the tenant in tail acknowledged title in fee simple to be in his opponent in the litigation, the desired transferee. The court thereupon gave legal effect to the "final concord" by declaring it to be the court's judgment. Although De Donis had expressly prohibited the use of the fine for barring entails, an anonymous case, 1 Dyer 2b, 73 Eng. Repr. 7, recognized disentailing by fine in 1527, and the statutory prohibition was removed in 1540 by Stat. 32 Henry VIII, c. 36.
40. Stat. 3 and 4 Wm. IV, Ch. 74.
41. "The only estates in land which are capable of subsisting or of being conveyed or created at law are—

In the American states various views have been taken as to these conveyances to one and the heirs of his body. Four states have maintained that the Statute *De Donis Conditionalibus* was not taken over as part of the common law, and in these four states the result of such a conveyance would seem to be the creation of a fee simple conditional as it existed in England before 1285.[42] Most American states, however, regard *De Donis* as part of their common law. In these states the existence of the estate tail is theoretically possible; but in only four of them[43] are there decisions holding that the fee tail exists,[44] and even in these four the entail may probably be barred by the use of a deed purporting to convey a fee simple.[45]

Most of the states have taken the view that the estate tail is not suited to existing American institutions, and have enacted statutes tending to abolish it. Three or four of these states permit the fee tail to last for the lifetime of the first donee but convert the estate tail into a fee simple absolute when it reaches the next taker;[46] but statutes dealing with the estate tail usually abolish it completely. A number of them abolish it by giving a life estate to the first donee and a remainder

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(a) An estate in fee simple absolute in possession;
(b) A term of years absolute. * * *
All other estate * * * take effect as equitable interests." Law of Property Act, 1925. Stat. 15 Geo. 5, Ch. 20. Evidently, therefore, the only way a fee tail can exist today in England is as an equitable estate.

42. Iowa, Nebraska, Oregon, and South Carolina. In these four states the courts have declared that the fee conditional exists. See Simes, Sec. 37.

43. Delaware, Maine, Massachusetts, and Rhode Island (as to deeds only). See Restatement of Property, Special Note 2 to Introductory Note to Chapter 5. Until 1939 Kansas recognized the fee tail. (See Ewing v. Nesbitt, 88 Kan. 708, 129 Pac. 1131.) This estate was abolished by Kan. S.L., 1939, Ch. 181, Sec. 2, cited infra note 47. Prior to 1939 the estate in fee tail existed in Wyoming. (See Jensen v. Jensen, cited infra note 50.) The law of Wyoming as to this matter today will be discussed in this paper at the end of this section.

44. As at common law the fee tail descends only to lineal heirs, but the general rule today seems to be that the estate descends to all the children of the same generation qualifying under the terms of the conveyance. These children apparently take an undivided interest as tenants in common. (See Tiffany, Sec. 421.) It is believed, however, that the common law rule as to primogeniture has been retained for the descent of the fee tail in Massachusetts, and perhaps in Maine and Delaware, in spite of its widespread abolition in other situations. See Restatement, Sec. 85. See also Morris, Primogeniture and Entailed Estates. 27 Col. L. Rev. 24.

45. In some states special formalities may be prescribed for the disentailing conveyance. Statutes of a few states require the inclusion of a recital in the deed that the purpose is the barring of the entail. Restatement, Sec. 79. Apparently for disentailment in Wyoming recourse to court action was necessary. See note 51 infra.

46. "Each estate given in fee tail shall be an absolute estate in fee simple to the issue of the first donee in tail". Conn. Gen. Stat., 1930, Sec. 5001. "All estates given in tail, by deed or will, in lands or tenements lying within this state, shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." Throckmorton's Ohio Code, 1936, Sec. 10-512-8 cited infra note 56. "No person seized in fee-simple shall have a right to devise any estate in fee tail for a longer time than to the children of the first devisee". Rhode Island Gen. Laws, 1938, Ch. 566, Sec. 10. Rhode Island's treatment of inter vivos transfers of the estate tail is referred to in note 43, supra. Wyoming, having enacted a statute adopting substantially the words of the Ohio statute cited supra, this note, (See Wyo. S. L., 1939, Ch. 92, Sec. 1) must now be regarded as within this category of states, as will be pointed out in this paper at the conclusion of this section.

in fee simple to the next taker,[47] but most of these statutes deal with the fee tail by converting it into a fee simple. In the light of such a conversion, the question arises whether any remainder or gift-over that might have been created to take effect after the fee tail is to be destroyed by such conversion. Suppose, for example, that A has conveyed Blackacre "to B and the heirs of his body, remainder to C and his heirs". A statute which would operate to convert B's estate in fee tail into a fee simple obviously endangers the existence of C's remainder in fee. Thirteen states seem to ignore any such future interest,[48] but at least seven states attempt to save the future interest by having it vest on the first donee's death, providing he leaves no issue at that time. If, however, there is issue surviving the first donee, the remainder or gift over is denied effect.[49]

In the few remaining states where there are no statutes dealing with the estate tail, one cannot be certain what view would be taken if land were to be conveyed to one and the heirs of his body; but it is reasonable to assume that the courts would decide that such a conveyance creates a fee simple or that it gives a life estate to the first donee and a remainder in fee to his issue.

The question of the existence of the estate tail in Wyoming may now be discussed. Until 1939 Wyoming was one of those few states recognizing the fee tail in its traditional form,[50] but it should be noted that it is by no means clear that the entail could be as readily barred in Wyoming as elsewhere in America. The Wyoming Legislature seems never to have enacted any statute authorizing the use of a disentailing deed, and the fact that there is prescribed a method of disentailment by a proceeding in the district court[51] seems to indicate that

47. Restatement, Spec. Note 5 to Intro. Note to Ch. 5, lists the following states as in this category: Arkansas, Colorado, Georgia (as to estates by implication only), Illinois, Missouri, New Mexico, and Vermont. Today this category includes Kansas (S. L. 1939, Ch. 181, Sec. 2) and apparently Florida. (Laws 1941, Ch. 20854, Sec. 2.)

48. Alabama, Arizona, Georgia (except as to estates in fee tail by implication), Kentucky, Minnesota, Mississippi, New Jersey, North Carolina, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin. See statutes collected in Restatement, Spec. Note 4 to Intro. Note to Ch. 5.

49. California, Michigan, Montana, New York, North Dakota, Oklahoma, and South Dakota. See statutes cited supra note 48.

50. Jensen v. Jensen, 54 Wyo. 224, 89 P. (2d) 1085. See note 43, supra.

51. "District courts in an action by the tenant in tail * * * may authorize the sale of any state (sic), whether the same was created by will, deed, or contract, or came by descent, when satisfied that a sale thereof would be for the benefit of the person holding the first and present estate, interest, or use, and do no substantial injury to the heirs in tail, or others in expectancy, succession, reversion, or remainder". Wyo. Comp. Stat. 1945, Ch. 3, Sec. 6401. "All parties in interest may appear voluntarily and consent in writing to such sale * * *" Sec. 6404. "All money arising from sales under this subdivision shall, for purposes of descent, succession, reversion, or remainder, have the same character, and be governed by the same principles, as the estate sold, and shall pass according to the terms of the deed, will, or other instrument creating the estate." Sec. 6406. (See also Secs. 6402, 6403, 6405, 6407, and 6408.) All the statutes referred to in this note were taken over from Ohio legislation, and have been in force, without amendment, since 1886. See also note 45 supra.

there is no other means of barring an entail in this state than by court action. This appears to have been the view taken by Ohio,[52] from whose statutes the Wyoming disentailing legislation was adopted,[53] and it is believed that the power to bar an entail is similarly limited in Wyoming. *Jensen v. Jensen*[54] is the leading Wyoming case dealing with the fee tail. The trial court in that case said that only by formal court action was disentailment possible in Wyoming, and there seems to be nothing in the opinion of the state Supreme Court that would indicate disagreement with the view of the lower court on this point. It is reasonable to assume therefore that since no Wyoming statute has given the tenant in tail the power to convey a fee simple by disentailing deed, the only way an entail could be barred prior to 1939 was by the prescribed court action.

In 1939, however, Wyoming followed in the footsteps of most American states by enacting a statute to abolish the estate tail.[55] Here again the statute is copied from that of Ohio.[56] It preserves the fee tail for the life of the first tenant in tail but gives the estate as a fee simple absolute to the next taker. An interesting point decided by *Jensen v. Jensen* is that Wyoming's statute may be applied to estates created before its enactment, so long as such application does not take away rights already vested. The rights in question in the instant case were those of the grandson of the first tenant in tail. The Supreme Court declared that the grandson had no more than a mere expectancy, and quite properly held that the statute, by modifying the law of descent of property held in fee tail, did not violate any vested rights.[57] It would not follow, however, that in other types of situation the 1939 act could affect estates tail already in existence. If, for example, the first donee were still alive, an attempt to apply the statute to him would seem to result in depriving him of vested rights. For several

52. Pollock v. Speidel, 27 Ohio St. 86, 95, declares that a tenant in fee tail has no power to bar the entail by deed, and none of the other Ohio decisions examined would seem to lead to any other conclusion. A possible explanation for this view may be found in the fact that the act abolishing fee tail in Ohio by changing them into fees simple absolute in the hands of the second taker, cited infra note 56, had long been in effect when the disentailing statutes cited infra note 53 were enacted. The fact that the entail was destined to be barred by operation of law upon the death of the first tenant in tail might justify denying him the power to bar the entail by deed. (See Restatement, Spec. Note to Sec. 89).

53. The Ohio statutes establishing disentailment by court action (Throckmorton's Ohio Code, 1936, Secs. 11925-11934), after which Wyoming's legislation cited supra note 51 was patterned, were enacted April 4, 1859, as amended by Acts of March 10, 1860, March 30, 1864, and April 13, 1865. See also note 52 supra.

54. Cited supra notes 43 and 50.

55. "All estates given in tail shall be and remain absolute estates in fee simple to the issue of the first donee in tail". Wyo. S. L., 1939, Ch. 92, Sec. 1, (Comp. Stat., 1945, Ch. 66, Sec. 137.)

56. Act of December 17, 1811, (G. C. Sec. 8622), whose provisions are now found in Throckmorton's Ohio Code, Sec. 10512-8, cited supra note 46.

57. "The interests of the issue of a person having an estate in fee tail are such interests that a statutory enactment made after the creation of the estate in fee tail can alter them." Restatement Sec. 86, Comment b.

centuries after *Taltarum's Case*[58] the rights of a tenant in tail included not only the power to disentail[59] but also the privilege of as full a use of the land as if he held an estate in fee simple. He was not liable for waste.[60] On the other hand, a person who has but a *statutory* estate tail to endure only for a single lifetime is denied the power to make a disentailing conveyance,[61] nor may he use the land in such a way as to constitute waste.[62] Apparently, therefore, an attempt to apply the 1939 statute to a person already holding as tenant in tail at the time of its enactment would result in a destruction of vested rights in violation of the Due Process clause of the Fourteenth Amendment.

The question might conceivably arise as to the applicability of the 1939 statute to a reversioner or remainderman holding the fee simple following the estate tail. Could the new act, which purports to vest a fee simple in the second taker of the estate tail, be applied in such a way as to cut off the rights of such reversioner or remainderman? Here again the answer presumably must be found by asking if vested right would thereby be taken away. Where the law of a jurisdiction happens to be that a disentailing deed could readily destroy such future interest, the interest could hardly be regarded as more than a mere expectancy regardless of its name; and there could be no valid objection to its destruction by legislative action. If the tenant in tail could destroy it by his own deed, there could hardly be any doubt that the legislature could destroy it by statute. In Wyoming, however, where there is strong reason for believing that disentailing may be accomplished only through court action[63]—and carried out only in such a way as to "do no substantial injury to the heirs in tail or others in expectancy, succession, reversion, or remainder[64]—it would seem that the rights of Wyoming reversioners and remaindermen must be regarded as vested and not subject to destruction by retroactive legislation.[65]

58. Y. B. 12 Edw. IV, 19. It is this famous case that marks the end of the period during which estates tail were incapable of disentailment. Thereafter, by the employment of the common recovery (See note 38 supra) or the fine (See note 39 supra), or in more recent times the disentailing deed, it has been relatively easy to bar the entail. But see notes 45, 51, 52 and 58 supra.
59. This matter has been dealt with earlier in this section. However, we have already discussed the limited form in which this right seems to have existed in Wyoming. See supra notes 51-53 incl. See trial court's opinion in Jensen v. Jensen, cited supra notes 43, 50, and 54.
60. Tiffany, Sec. 47, 631. Thompson, Real Property, Sec. 818.
61. Restatement, Sec. 89. See also Turrill v. Northrup, 51 Conn. 33.
62. Restatement, Sec. 91.
63. See supra notes 51 and 59.
64. Wyo. Comp. Stat. 1945, Ch. 3, Sec. 6401, cited supra note 51.
65. Restatement, Sec. 86. "The rule stated in this section safeguards the property interests in the remainderman, reversioner and holder of an executory interest from destruction by act of the legislature, without compensation. It does not prevent a legislative substitution of a more convenient method for the accomplishment of an end theretofore possible, as for example, a legislative substitution of a deed for the recovery or fine. When the property interests of a remainderman, reversioner or holder of an executory interest are destructible by a conveyance made by the owner of an estate in fee tail in the same

Jensen v. Jensen[66] did not involve the rights of reversioners or remaindermen,[67] nor did the Supreme Court discuss the matter;[68] but it is believed that the 1939 statute could no more apply to a reversioner or remainderman who appeared to defend his interests than to a first donee in tail holding as such at the time of the legislative enactment.

In conclusion, therefore, it may be said that if in 1939 there were estates tail in the hands of a first donee in tail, the 1939 statute could have no effect upon the estate of such donee. Similarly the statute would be inapplicable to any reversioner or remainderman whose estate was in existence when the statute was enacted, providing he appeared and defended his interest when properly served with process; but prospective tenants after the immediate issue of the first donee have evidently had their rights taken away by the statute. Conveyances to one and the heirs of his body executed in Wyoming since 1939 will still have the effect of creating an estate tail, but it is necessarily a fee tail of the statutory type, giving a somewhat restricted use to the first donee, and capable of lasting as a fee tail only for the life of the first donee. Upon his death it vests in his issue as a fee simple absolute.

III.

THE RULE IN SHELLEY'S CASE

What is the Wyoming view as to the existence of the Rule in Shelley's Case? The Rule, as stated in the case which gave it its name,[69] is as follows: "When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; that always in such cases, 'the heirs' are words of limitation of the estate, and not words of purchase".[70] Thus, in a conveyance from A "to B for life, remainder to B's heirs", the Rule changes the "remainder to B's heirs" into a remainder in fee to B himself. Therefore, B would have not only a life estate but also the remainder, and the Doctrine of Merger[71] would cause his two estates to merge, giving him

land, then such property interests are subject to alteration or elimination by legislation enacted after the creation of such interests". Comment, Sec. 86 of Restatement.

66. Cited supra notes 43, 50, and 54.
67. The unknown heirs of the grantor of the estate tail were served by publication, but no appearance was made on their behalf.
68. Only the trial court indicated recognition of the existence of a reversion in the grantor's heirs; but it should be remembered that at the time of the trial court's judgment Wyo. S. L., 1939, Ch. 92, Sec. 1, (Comp. Stat., 1945, Ch. 66, Sec. 137) had not yet been enacted. Perhaps the failure of anyone to appear on behalf of the grantor's heirs made a consideration of their interests unnecessary.
69. Wolfe v. Henry Shelley, Court of Kings Bench, 1581, 1 Coke, 93.
70. This is the Rule in the form stated by counsel in Wolfe v. Henry Shelley, cited supra note 24.
71. This Doctrine has no necessary relation to the Rule in Shelley's Case; but in the absence of any intermediate estate between the ancestor's life estate and the remainder in fee given him by the operation of the Rule, the Doctrine will bring about a merger.

the entire fee. Practically unanimous authority indicates that the Rule is an inflexible rule of *property;* and the courts give effect to it even though a contrary intent on the part of the grantor may appear.[72]

The Rule was abolished in England in 1925 by the Law of Property Act,[73] but in America it exists today in at least eleven states.[74] Twenty-seven states seem to have abolished it completely.[75] Five states have rejected the Rule as to wills, but seemingly retain it as to deeds.[76] Apparently in Wyoming, as in Utah and Nevada,[77] the legislature has made no attempt to deal with the matter. Whether the Rule is a desirable one has long been the subject of debate. *For* the Rule, it has been argued that it increased the alienability of land, and that it had the effect of preserving contingent remainders.[78] *Against* the Rule, it has been said that its purpose was really to benefit overlords in a feudal society, and that such a rule has no place in America today. These arguments, however, have been adequately dealt with elsewhere,[79] and need not be discussed here.

Does the Rule exist in Wyoming today? An affirmative answer must be given. The common law of England, which includes Shelley's Rule, remains in force in this state unless changed by statute or judicial decision.[80] As the Rule has not been changed or abolished in Wyoming, it follows that it must still be in force. Furthermore, the 1943 case of *Singleton v. Gordon*[81] seems to leave little doubt on the question; for there the Supreme Court of Wyoming recognized the existence of the Rule and described it in its traditional form, although the court proceeded to declare that the Rule did not apply to the par-

72. See Simes, sec. 117.
73. Sec. 131. Law of Property Act, 1925, (15 Geo. 5, Ch. 20, Sec. 131). Where the Rule is abolished, the ancestor of course takes only a life estate, with a contingent remainder to his heirs.
74. Simes, sec. 135, lists Arkansas, Colorado, Delaware, Florida, Illinois, Indiana, Nebraska, North Carolina, Pennsylvania, Texas and Washington as states retaining the Rule.
75. Simes, sec. 135, states that the following have abolished the Rule: Alabama, Arizona, California, Connecticut, Georgia, Idaho, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin, New Mexico, and the District of Columbia.
76. Simes, sec. 135, lists Kansas, New Hampshire, New Jersey, Ohio, and Oregon.
77. See Simes, sec. 135.
78. There is reason to believe that for a considerable period in England the courts refused to recognize contingent remainders. A remainder to heirs would necessarily be contingent for the reason that, until the death of the ancestor, the identity of the remainderman would be uncertain. It may thus be argued that a doctrine that would transform a remainder limited to such indefinite persons as a living man's heirs into a vested remainder in that living man himself would assure that the remainder receive judicial recognition. See Restatement, Sec. 312a. Professor Plucknett tends to discredit this argument for the Rule, however by showing that contingent remainder to the heirs of living persons were not wholly without recognition even before the development of the Rule in Shelley's Case. Plucknett 2 ed., pp. 502-504.
79. See Simes, sec. 116. See also Brown, The Rule in Shelley's Case in Pennsylvania, 80 U. Pa. L. Rev. 522.
80. Wyo. Comp. Stat., 1945, sec. 16-301.
81. 60 Wyo. 26, 144 P. (2d) 138.

ticular set of facts of the *Singleton* case because the word "heirs" was not used in its technical sense but simply as description of definite persons who were to take directly by the conveyance.[82] The decision leaves little doubt, however, that if the facts were to warrant it, the Rule in Shelley's Case would have been applied. In the absence of any reason to form a contrary opinion, it must be assumed that in Wyoming the Rule is still in force.[83]

IV.

THE DOCTRINE OF WORTHIER TITLE

In the view of the early English judges there was something peculiar about an attempt to convey a remainder to one's own heirs. The idea seems to have been that the donor in such a case really did not intend his gift to take effect according to the terms in which he had limited it; but, even if he did so intend, the feudal courts would not permit his intention to be given effect. Accordingly, a conveyance from A "to B for life, then to A's heirs" was inoperative so far as A's heirs were concerned. Instead, the words purporting to give A's heirs a remainder were interpreted to give the same interest, by way of reversion, to A himself. The heirs, if they were ever to get the land,

82. The Wyoming case involved a conveyance to the grantor's son "and share and share alike to the then living heirs of said primarily named grantee" if he died before the grantor. It is not clear that this is technically "a remainder to the heirs" of the named grantee; and it is believed that the view taken by the Wyoming Supreme Court is sound. Traditionally, English courts applied the Rule in Shelley's Case only when the remainder was to heirs in an indefinite line of inheritable succession. See Restatement, Sec. 312 f. But decisions in America have produced great confusion as to what the word "heirs" must mean for the Rule to apply. In general it may be said that in American jurisdictions where the Rule still is in force it will be given application if the word "heirs" is used to indicate those persons who would inherit the named grantee's property on his death intestate. Restatement, Sec. 312 g. If the reference to "heirs" obviously means neither heirs in an indefinite line of succession nor those persons who will take on the death of this particular named grantee intestate, the Rule should not be applied. Even if the word "heirs" is used, the Rule will not apply where the context shows that it means children. Simes, Sec. 122. Nevertheless, American cases can be found holding the Rule applicable where the remainder is to go to "surviving" heirs, Price v. Griffin, 150 N. C. 523, 64 S.E. 373, 29 L.R.A. (N.S.) 935; Heister v. Yerger, 166 Pa. 445, 31 A. 122), and "to the heirs share and share alike" (Stearns v. Curry, 306 Ill. 94, 137 N.E. 481; Woodbridge v. Jarrard, 101 N. J. Eq., 439, 138 A. 536; Carson v. Fuhs, 131 Pa. 256, 18 A. 1017), in spite of the fairly strong inference that what is meant by the use of such words is children. But contra to the cases just cited is Burges v. Thompson, 13 R. I. 712. There the devise was to a son for life" and upon his decease to his heirs at law, him surviving, share and share alike." The Rhode Island court held that the use of "surviving" and "share and share alike" indicated, not heirs in a technical sense, but particular persons who were to be alive when the son died. Accordingly, the Rule was held inapplicable. The Supreme Court of Wyoming, in the instant case, cited and followed Burges v. Thompson. In doing so, the Court wisely showed its preference for the Rule in its traditional form. No good reason appears for extending the scope of the Rule to new cases not comprehended within it at common law.

83. Singleton v. Gordon dealt with an inter vivos conveyance, so throws no light on the applicability of the Rule as to wills; but since the distinction between wills and conveyances in this situation is one created by statute, the absence of any legislation concerning the Rule in Wyoming would seem to make it clear that in this respect there is no distinction between wills and conveyances in Wyoming.

would do so by descent and not by virtue of the conveyance.[84] This doctrine against remainders to one's heirs ought not be confused with the Rule in Shelley's Case; for the Rule in Shelley's Case transforms the purported remainder into an estate in the *grantee,* whereas the doctrine we are now discussing changes the purported remainder into an estate in the *grantor.*

This doctrine appears to be an ancient one, and it seems to have applied alike to devises and *inter vivos* conveyances. With respect to devises, we find the doctrine stated in reported cases about the middle of the 16th Century,[85] and it appears in case reports involving *inter vivos* transfer before 1600.[86] The brief remarks concerning the doctrine in these early cases creates the impression that it had long been a settled principle of feudal law that one could not give a remainder to one's own heirs.[87]

Although the doctrine may apply equally to devises and to *inter vivos* transfers, the practical effect of its application in the two situations is quite different. It may make rather little difference to the heir in the devise case today whether he is taking by will or by descent,[88] but the application of the rule against remainders to heirs in the case of an inter vivos conveyance is likely to have important practical results. Obviously, if the purported remainder has given the heirs nothing, the estate is still in the grantor; and he may subsequently convey or devise the land to someone else. The interest would likewise be subject to levy and sale by creditors of the grantor.[89] By the operation of this doctrine, therefore, there is a strong possibility that the heirs may never get the interest at all.

Like the Rule in Shelley's Case, the rule against remainders to the conveyor's heirs had its origin and its explanation in the feudal organization. It has been stated that title by descent is worthier than title by purchase.[90] Such an explanation serves to explain the choice of a name for the doctrine, but modern jurists may have difficulty see-

84. Bingham's Case (1599) 2 Co. Rep. 91a, 76 Eng. Repr. 611; Godolphin v. Abingdon (1740) 2 Atk. 57, 26 Eng. Repr. 432. See also cases cited *infra* notes 85 and 86.
85. 2 Dyer 124a (1555), reported without name in 73 Eng. Repr. 271.
86. Fennick and Mitfords Case (1589) 1 Leon. 183, 74 Eng. Repr. 168; Read and Morpeth v. Erington (1591) Cro. Eliz. 322, 78 Eng. Repr. 571.
87. See Blackst. Comm. Bk. 2, pp. 241, 242.
88. In feudal times the Doctrine was of considerable significance even in the case of devises; for although the heir was certain to take, the legal consequences were different if he took by descent rather than by purchase. Not only were the lord's rights of marriage and wardship involved only in case the lands went to the heir by descent (see *infra* notes 91 and 92) but the right of creditors of the testator were affected. If the land had come to the heir by descent, it constituted assets in his hands for the benefit of the testator's creditors. Even today, as applied to wills, the Doctrine may have some significance in questions of priority of the application of assets for the payment of the testator's debts, of the validity of a future interest under the rule against perpetuities, and perhaps in one or two other situations. Simes, Sec. 144.
89. See Simes, Sec. 146.
90. "A * * * will devising lands to an heir at law is void, because the better title prevails." Ellis v. Smith, 1 Ves. Jun. 11, 17, 30 Ang. Repr. 205, 208.

ing wherein the one is more worthy than the other. Especially is it hard to see wherein this worthiness lies in those situations in which the application of the doctrine results in the heir getting no title at all.[91] The true basis for the doctrine probably lies in the fact that, if the heirs had been permitted to take by way of remainder, the grantor's overlord would have been deprived of his feudal rights of wardship[92] and marriage.[93] Feudal incidents like these depended upon the process of inheritance of a tenant's lands; and any voluntary transfer, whether *inter vivos* or by the tenant's will, destroyed the rights of the tenant's overlord in both wardship and marriage. It was apparently for the sole benefit of feudal overlords that an inflexible rule of law grew up to the effect that conveyances and devises to heirs, *of the very same estate that would go to those heirs by descent,*[94] were void. This doctrine against remainders to heirs—this so-called "Doctrine of Worthier Title"—thus appears to be "worthier" chiefly in that it was better for overlords. Recognizing the fact that this feudal doctrine was not in accord with the needs of modern times, England abolished the rule in 1833.[95] It might have been expected that the American states would have done likewise.[96] To the contrary, however, the doctrine persists rather widely in the United States,[97] although perhaps only as to *inter vivos* transfers.[98]

91. "If after the conveyance, the grantor conveys or devises the land to a stranger, the question would not be whether the heir takes by descent or by purchase, but whether the heir takes by purchase or the stranger takes by purchase". Simes, Sec. 145.
92. This was the right of the lord to have custody, as guardian, of the person and lands of an infant heir. The right existed only with respect to military tenures. In the case of male heirs it lasted until the heir was twenty-one, and in the case of females until sixteen. What made the incident so profitable to overlords was the fact that the guardian was under no duty to account for profits. See Blackst. Comm. Bk. 2, p. 67.
93. This was the right enjoyed in feudal days by the lord and guardian of disposing of his ward in marriage. While the infant heir was under wardship the guardian had the power of tendering him or her a suitable match. In case the offer was refused, the ward forfeited to the lord the value of the marriage. If the ward married another without the consent of the guardian, the forfeiture was double the value of the tendered marriage. See Blackst. Comm. Bk. 2, p. 70.
94. The Doctrine was not applicable unless the estate conveyed was precisely the same estate that the heir would take by descent. Thus, in a case where the grantor holds a fee simple, the Doctrine would not deny effect to a conveyance to the grantor's heir of a remainder for life or in fee tail. See Doe dem. Pratt v. Timins, 1 B. & Ald. 530, 106 Eng. Repr. 195 (1818); Ballard v. Griffin, 4 N.C. 237 (1815).
95. Stat. 3 & 4 Wm. IV, c. 106, sec. 3, 73 Stats. at Lge., p. 1002.
96. Provisions for abolishing the Doctrine are contained in the American Law Institute's proposed Uniform Property Act, sec. 14 and15; but only one or two states have adopted the Act.
97. Tiffany, sec. 312. See also Simes, Sec. 146. These authorities list the following as states in which the doctrine of worthier title is recognized: Georgia, Illinois, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, New York, Oklahoma, North Carolina, Pennsylvania, Tennessee, and Texas. It is not suggested that these are the only states where the doctrine might be in force; but they are states in which adjudicated cases have expressly declared the doctrine to exist.
98. The Restatement of Property takes the position that, as to devises, the rule against transfers to the testator's own heirs does not exist in America. Restatement, Sec. 314 (2).

Although more than half of the American states have abolished the Rule in Shelley's Case, there seems to be no such tendency with respect to this rule that says that a grantor cannot give a remainder[99] to his own heirs.[100] On the contrary, if we ignore the devise situation, the tendency in America has been to extend the Worthier Title Doctrine to cases to which no feudal judge would have thought of applying it. It should first be remarked that this doctrine, like the Rule in Shelley's Case, was traditionally an inflexible *rule of property.* It was in no way dependent upon the intention of the grantor.[101] Nor in feudal days was the rule applicable to anything but real property.[102] It seems unlikely that English judges ever applied the Doctrine to remainders in personal property to *next-of-kin.*[103] In modern times, however, American courts have modified the Doctrine in both these respects. In a number of states the Doctrine has been changed from an inflexible rule of property into a rule of construction, which is to be applied or not applied depending upon the supposed intent of the grantor.[104] The idea behind this transformation was evidently the notion that in this way the rigors of an inflexible rule would be reduced.[105] Actually ,the effect has been to *extend* the operation of the Doctrine; for if we take the view that the Doctrine really gives effect to the grantor's intention, we will want to apply it at every opportunity. An argument to the effect that the Doctrine is not applicable to

99. "While not much authority can be produced to that effect, it would seem that a conveyance of an executory interest to heirs of the grantor should come within the rule". Simes, Sec. 146.

100. "Clearly [in the case of an inter vivos transfer] the rule would have no application if the remainder weer granted to a named person who subsequently became the grantor's heir; for, at the time of the conveyance, it could not be determined whether the person designated would be an heir or not". Simes, Sec. 146.

101. Restatement, Sec. 314, Comment on Subsection (1), a. See also Simes, Sec. 147.

102. See Restatement Comment cited supra not 101. As long ago as 1810, however, the Supreme Judicial Court of Massachusetts, in Parsons v. Winslow, 6 Mass. 169, 4 Am. Decc. 107, took the view that the Doctrine was applicable to personalty. A few later cases are in accord. See Simes, Sec. 146, n. 18.

103. "I agree that a person seized cannot make his right heir a purchaser; * * * but here there never was any real interest * * *. The rule is confined to the estate of which a man is seized". Lord Chancellor Northington in Robinson v. Knight, 2 Eden 155, 28 Eng. Repr. 856 (1762).

104. Doctor v. Hughes, 225 N. Y. 305, 122 N.E. 221 (1919). In Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N.E. 454 (1929), the court also recognized the Doctrine as a rule of construction, but took the view that a remainder was actually created, the ground of the decision being that this was what the grantor had intended. It is probably not a coincidence that there are both New York cases; for it is believed that the ultimate explanation of this distortion of an ancient rule of property into a rule of construction is found in the existence of a peculiar New York statute (L. 1896, Ch. 547, Secc. 30; New York Real Property Law, Sec. 40) which defines as "vested" certain future interests in presumptive heirs which would normally be regarded as contingent. In Doctor v. hughes, which has become the leading case for the modern treatment of the Doctrine as a rule of construction, Cardoza, C. J., in order to avoid the consequences of holding that a remainder to a daughter was "vested", decided that there was no remainder at all. It was the Doctrine of Worthier Title that made such a decision possible to reach, and the New York Court of Appeals grasped it.

personalty—on the ground that it referred only to remainders to *heirs* and therefore could not affect remainders of personalty to *next-of-kin* could readily be brushed aside by saying that it is the grantor's *intention* that we are seeking, and that when he used the word "heirs" he might also have meant those persons who would succeed to his *personal property*. Indeed, this view has now found expression in modern American decisions. A considerable number of cases have applied the Doctrine to personalty.[106]

The extension of the Doctrine into new fields seems unfortunate, for the undesirability of the rule is obvious. Suppose, for example, a man has a wife and two sons. He wishes to donate generously to a certain church, but he first wishes to make certain that his family will be cared for financially upon his death. Accordingly, he makes a conveyance of certain property to his wife for life with a remainder in fee to his heirs. Thinking he has thus provided adequately for his family, he subsequently leaves his "entire estate" to the church. As a result of the doctrine against remainders to the conveyor's heirs the sons get nothing. The supposed remainder was really a reversion in the grantor, and it went with the rest of the "estate" to the church, leaving nothing with the granotr's family but the life estate of the wife. Surely the existence of a doctrine that produces the risk of such a result is undesirable. In Wyoming there appear to be neither statutes nor judicial decisions dealing with the Doctrine of Worthier Title; and the inference is that the Doctrine, as an established rule of the common law, must be in force in Wyoming. Perhaps a judicial declaration that this doctrine is not in accord with public policy and is therefore not to be recognized as part of the common law of the State of Wyoming is not beyond the realm of possibility, but it is doubtful that precedents could be found for judicial abolition of the Doctrine. Thus far courts seem to have gone no further than to transform the rule into a rule of construction. A preferable solution would seem to be a legislative one, perhaps by the adoption of the proposed sections of the Uniform Property Act.[107]

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105. The opinion in Doctor v. Hughes, cited supra note 104, refers to the moderated "rigor" of the new rule as compared with the "absolute prohibition" of the Doctrine as an inflexible rule of property. Restatement, Sec. 314, Comment on Subsection (1), a., states that the ancient Doctrine has been "relaxed" and "diluted".

106. Whittemore v. Equitable Trust Co., cited supra note 104; Estate of Warren, 211 Iowa 940, 234 N.W. 835 (1931); Beach v. Busey, (C.C.A. 6) 156 F. (2d) 496 (1946). See also Parsons v. Winslow, cited supra note 102. "When a person makes an otherwise effective inter vivos conveyance of an interest in land to his heirs, or of an interest in things other than land to his next of kin, then, unless a contrary intent is found from additional language or circumstances, such conveyance to his heirs or next of kin is a nullity in the sense that it designates neither a conveyee nor the type of interest of a conveyee." Restatement, Sec. 314 (1).

107. See supra note 96.