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neys did not offer any evidence to show that Daulton may have been in a state of excitement, but proceeded to put forth some elements of the various rules which are included within the phrase *res gestae.*

Although the courts use the term *res gestae,* the problem still remains to find the particular exception to the hearsay rule under which the evidence is admitted or excluded. No matter what labels the courts apply it still must be determined what the courts actually do. Since that can only be determined by resorting to independent rules of evidence, what purpose does the phrase *res gestae* serve? This writer has failed to find any worthwhile purpose and can only conclude that it has created a great deal of confusion. The definition of the term is broad and ambiguous. It has not been applied to any rules of evidence which have not been previously named and defined. Since it has not been extended to any new principle of evidence, it is not of any value. If resort still must be had to the independent rules of evidence, the phrase *res gestae* should be discarded for more exact definitions and terms.

ERNEST W RIVERS

REMAINDER TO GRANTOR'S HEIRS IN KENTUCKY

In the recent case of *Powell* v *Childers,*[1] the Court of Appeals of Kentucky seems to have permitted the creation of a remainder in the heirs of the grantor contrary to the so-called Doctrine of Worthier Title. It is the purpose of this note to determine the present status of this common law rule in Kentucky and to point out how it might have been applied in the *Powell* case.

The case in issue arose when D. D. Wilder and his wife conveyed real property to one Childers by deed of general warranty Upon an examination of title, a deed by Wilder to his wife was discovered which contained the following granting clause:

> " unto the party of the second part, for and during her natural life, with remainder to the heirs of the first party."

The habendum clause contained this language:

> "It is understood that second party already owns an undivided one-half interest in and to said real estate and first party desires now, and has by this writing conveyed to second party, his wife, his undivided one-half interest therein, same to be and belong to second party during her natural life, and upon her death said property, or at least the one-half undivided interest of first party therein, and now conveyed, shall go to the heirs of first party."

[1] Powell v. Childers, 314 Ky. 45, 234 S.W 2d 158 (1950).

The court held that the deed of D. B. Wilder to his wife conveyed to her a life estate in an undivided one-half interest of the property, and that at her death the fee simple title to this undivided one-half interest went to the heirs of D. B. Wilder, or the issue of such as then might be dead. It was held that a contingent remainder was created in the heirs of D. B. Wilder, and therefore, a good fee simple title could not be conveyed to the grantee, even though the then living children of D. B. Wilder agreed to join in the conveyance. The court devoted most of its opinion to an analysis showing that a contingent remainder existed because the heirs of the living could not be determined. It is submitted that the real question presented in this case was not whether there was a contingent or vested remainder, but whether the language in the instrument created a remainder. If this is the true question in the case and if the doctrine of worthier title exists in Kentucky, the case probably was decided incorrectly as will appear more clearly in the discussion to follow

The application of the doctrine of worthier title as it pertains to inter vivos conveyances is described in the *Restatement of Property* in the following terms:

> "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 convevee nor the tvpe of interest of a conveyee."[2]

This rule applies only to inter vivos conveyances and the interest limited must be to the heirs or next of kin of the grantor; therefore, when it is shown that the intent was to use the words "heirs" or "next of kin" in other than their usual technical sense, i.e., when they are construed to mean "children," the rule is not applicable.[3] Preliminary to further discussion of the rule, a brief summary of its history may be helpful.

As the rule originated and developed in England it was applicable both to testamentary dispositions and to inter vivos conveyances.[4] Some authorities prefer to refer to two separate rules, and suggest that the rule which pertains to testamentary dispositions should be labelled "doctrine of worthier title," and that the rule as it pertains to inter vivos conveyances is called the common law rule prohibiting a

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[2] RESTATEMENT, PROPERTY sec. 314 (1) (1940).

[3] Combs v. Combs, 294 Ky. 89, 171 S.W 2d 13 (1943); 1 SIMES, FUTURE INTERESTS sec. 147 (1936).

[4] 2 BL. COMM. 176; Bingham s Case, 2 Coke s Report, 91a, 76 Eng. Rep. 611 (1598-1600); Bedford v. Russell, Popham 3, 79 Eng. Rep. 1126 (1593).

remainder to grantor's heirs.[5] By the weight of modern authority the doctrine of worthier title contains both of the historical rules.[6] Kentucky accepts the rule as it applies to inter vivos conveyances, but calls it the Doctrine of Reversions.[7] There have been various explanations for the origin and development of this rule in early feudal days, but for present purposes it will suffice merely to note that the rule was originally based on tenurial policy between the lord and tenant.[8] If a tenant obtained possession as a purchaser he would not be burdened with tenurial obligations to his lords, such as wardship and marriage in the case of a minor heir. Therefore, the true reason for the common law rule "that a man cannot make his own right heir a purchaser"[9] is that the lord would be deprived of valuable incidents of relief when an heir took by purchase rather than descent.

The rule should be distinguished carefully from the Rule in Shelley's Case,[10] both historically and at the present time. The two rules are similar in that in neither case are heirs allowed to take as purchasers, but the Rule in Shelley's Case applies only where the remainder is to heirs of the life tenant. Some courts have been confused when applying the two rules to particular fact situations,[11] but the Rule in Shelley's Case is clearly an independent common law concept and has had a separate legislative treatment. It has been abolished by statute in England,[12] and in most American jurisdictions,[13] including Kentucky.[14] Some authorities have contended that such a statute also abolishes the rule here under consideration, but the courts have held that the statute does not abolish the doctrine of worthier title by construing the word heirs in the statute to mean those of the grantee and not the grantor.[15] The Court of Appeals of Kentucky as early as 1883, pointed out that the rule was not abolished by the statute abrogating

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[5] Warren, *A Remainder to the Grantor's Heirs*, 22 TEX. L. REV. 22 (1943).
[6] 1 SIMES, *op. cit. supra* note 3, sec. 144.
[7] Mitchell v. Daupkin Deposit Trust Co., 283 Ky. 532, 142 S.W 2d 181 (1940).
[8] *Ibid.*, Perrin v. Blake, 1 Black W 672, 96 Eng. Rep. 392 (1769).
[9] 8 BACON'S ABR. 305 (1845).
[10] Shelley's Case, 1 Coke, 93 b, 76 Eng. Rep. 206 (1579-1581).
[11] Sutliff v. Aydelott, 373 Ill. 633, 27 N.E. 2d 529 (1940); Loring v. Eliot, 16 Gray 568 (Mass. 1860).
[12] 15 HALSB. STATS. OF ENG. 310 (1930).
[13] 1 SIMES, *op. cit. supra* note 3, sec. 135 (1936).
[14] KY. REV. STAT. sec. 381.090 (1948).
[15] Wilcoxen v. Owen, 237 Ala. 169, 185 So. 897 (1939); Pewitt v. Workman, 289 Ky. 459, 159 S.W 2d 21 (1942); Fidelity & Columbia Trust Co. v. Williams, 268 Ky. 671, 105 S.W 2d 21 (1937); Mayes v. Kuykendall, 112 S.W 673 (Ky. 1908); Alexander v. DeKermel, 81 Ky. 345 (1883); Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919).

the Rule in Shelley's Case and that failure to do so was an indication that the rule was still in effect.[16]

Prior to the application of the rule by the courts in this Commonwealth, other states had recognized and accepted the doctrine as being applicable in situations similar to the instant case.[17] The rule was first applied in Kentucky in the historic landmark case of *Alexander* v *DeKermel*.[18] It is of interest to note that the court in this case adopted the common law rule rather than the statutory law of England,[19] and expressly declared "that the common law rule of reversions prevails in this State." In this first case the testator had conveyed land to a trustee for his own use during his life and to his issue, if any, in fee. If there were no issue, the land was to go in equal parts to his two half-brothers, or the survivor, or to the issue of either; and if both of them should die before him without issue, the property was to go to his heirs. The two half-brothers having died without issue, the grantor afterwards made a will devising the land to another than his heirs at law The heirs of the deceased grantor claimed his property, but the court held the devise to be good, stating:

> " At common law, if a man seized of an estate limited it to one for life, remainder to his 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. "[20]

Since its decision in the case just described the Court of Appeals has consistently adhered to the rule in substantially the same situations as that presented in the *DeKermel* case and the instant case.[21] Perhaps the case most nearly in point with the *Powell* case was *Dooley* v *Goodwin*,[22] where the court held that a deed by a husband to his wife for life and upon her death the property to revert to the grantor,

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[16] Alexander v. DeKermel, 81 Ky. 345 (1883).

[17] McWilliams v. Ramsay, 23 Ala. 813 (1853); King v. Dunham, 31 Ga. 743 (1861); Bowditch v. Jordan, 131 Mass. 321 (1881); Loring v. Eliot, 16 Gray 568 (Mass. 1860); Harris v. McLaran, 30 Miss. 533 (1855) " it is uniformly held that an ultimate remainder limited to right heirs of the grantor is void."

[18] 81 Ky. 345 (1883).

[19] 3 & 4 WM. IV c 106 (1833).

[20] 81 Ky. 345, 352 (1883).

[21] Pewitt v. Workman, 289 Ky. 459, 159 S.W 2d 21 (1942); Mitchell v. Dauphin Deposit Trust Co., 283 Ky. 532, 537, 142 S.W 2d 181, 183 (1940), where Justice Fulton stated "the doctrine of reversions has become firmly ingrained in the law of our state and there is more or less a sound basis for it." Fidelity & Columbia Trust Co. v. Williams, 268 Ky. 671, 105 S.W 2d 814 (1937); Nuckols v. Davis, 188 Ky. 215, 221 S.W 507 (1920); Coomes v. Frey, 141 Ky. 740, 133 S.W 758 (1911); Mayes v. Kuykendall, 112 S.W 673 (Ky. 1908); Dooley v. Goodwin, 29 Ky. L. Rep. 295, 93 S.W 47 (1902); Pryor v. Castleman, 9 Ky. L. Rep. 967, 7 S.W 892 (1888).

[22] 29 Ky. L. Rep. 295, 93 S.W 47 (1906).

if living, but if dead to his heirs, did not create an estate in remainder in the children of the grantor which would deprive the grantor and life tenant of their power to convey a fee simple title to the property

The court again applied the rule in the case of *Mayes* v *Kuykendall*[23] where the grantor, after conveying land to his wife for life with remainder to his heirs, executed a will leaving his entire estate to his wife for life with remainder to his four children. It was held that the reversionary interest in the land passed to testator s children under the will to the exclusion of his grandchildren by a deceased child. The last occasion that the court had to discuss the application of the rule was in the case of *Pewitt* v *Workman,*[24] decided in 1942, where the grantor executed and delivered to his wife a deed which read in part: " and at her death then to the heirs of my body or their heirs in fee." The grantor died testate and in his will revoked the deed and gave his wife an absolute fee simple title. It was contended that a remainder was created in the heirs of the grantor so that when he wrote the will he had no interest to devise. In the opinion, Judge Ratliff said that the question presented was, whether the quoted language "invested the heirs of T. J. Reed [grantor] with the fee to the remainder, or whether the reversion was retained in the grantor which he might dispose of by his will or otherwise." The court cited the case of *Alexander* v *DeKermel,* reiterated the principle therein as the prevailing doctrine in this jurisdiction, and held that a reversion was retained in the grantor which he could properly dispose of by will or otherwise.

From the foregoing, it is clear that the doctrine of worthier title as it pertains to inter vivos conveyances applies in Kentucky and has so applied since *Alexander* v *DeKermel.*[25] But there remains the question whether it is a rule of law or one of construction. The common law courts applied the doctrine as a positive rule of law and held that a grantor could not, as a matter of law, limit a remainder to his own right heirs as purchasers.[26] Since the feudal purposes of the rule no longer exist, a majority of jurisdictions now apply the rule as one of construction, because to apply the doctrine as positive rule of law would often arbitrarily defeat the intention of the grantor.[27]

The New York court through the years has given considerable at-

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[23] 112 S.W 673 (Ky. 1908).
[24] 289 Ky. 459, 159 S.W 2d 21 (1942).
[25] 81 Ky. 345 (1883).
[26] 1 HARGRAVE S LAW TRACTS 571 (1787), as quoted in Doctor v. Hughes, *supra* note 15 where the same principle is spoken of as a positive rule of law; Godolphin v. Abingdon 2 Atk. 57, 26 Eng. Rep. 432 (1740).
[27] See note, 125 A.L.R. 555 (1940) where the modern trend in the application of the rule is discussed.

tention to the nature of the rule.[28] There the problem was first extensively treated in *Doctor* v. *Hughes*,[29] where a trust deed provided for payment of a yearly sum to the grantor, gave the trustee power to sell or mortgage, and provided that upon the death of the grantor the trustee should "convey the said premises to the heirs at law of the party of the first part." The judgment creditors of one of the daughters of the grantor contended that an estate in remainder was created which was subject to the claim of creditors even though the grantor was living. The court held that the trust was subject to revocation at the will of the grantor, because his heirs would take by descent and not by purchase, and had no interest for the creditors to reach. Justice Cardozo, speaking for the court, explained how the rule was to be applied as follows:

> "In the absence of modifying statute, the rule persists to-day, at least as a rule of construction, if not as one of property the ancient rule survives to this extent; That, to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed."[30]

In ruling that a reversion to the grantor was created, in this case, the court concluded that the grantor did not disclose in the instrument sufficient intention to convey an interest to his presumptive heirs which would be completely beyond his power to alter or defeat.

Since *Doctor* v. *Hughes*, the question of determining the intention of the grantor has been the subject of a large amount of litigation in the New York courts.[31] The controversial case of *Whittemore* v *Equitable Trust Co.*,[32] decided in 1929, held that the retention by the settlor of the power to dispose of the corpus by will only, indicated an intention to create a remainder in the settlor's heirs or next of kin. Here the court relied primarily on the fact that the settlor retained only the power to dispose of the corpus by his will, and established the authority for later decisions, which have held that where the settlor has reserved the power to defeat the limitation to heirs by testamentary appointment only, he intends for the heirs to take a remainder.[33] In *Scholtz* v *Central Hanover Bank & Trust Co.*,[34] the

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[28] 1948-1949 *Survey of New York Law*, 24 N.Y.U. L.Q. REV. 1215-1218 (1949); 1949 ANNUAL SURVEY OF AMERICAN LAW 773 at 777· for a collection of cases see 125 A.L.R. 548.

[29] 225 N.Y. 305, 122 N.E. 221 (1919) converted the worthier title doctrine from a rule of property to a rule of construction.

[30] *Id.* at — 122 N.E. at 222.

[31] Richardson v. Richardson, 298 N.Y. 135, 81 N.E. 2d 54 (1948) contains an excellent summarization of the history of the rule as applied in the New York Courts to evidence the intention of the settlor.

[32] 250 N.Y. 298, 165 N.E. 454 (1929).

[33] Richardson v. Richardson, 298 N.Y. 135, 81 N.E. 2d 54 (1948); Engle v. Guaranty Trust Co., 280 N.Y. 43, 19 N.E. 2d 673 (1939); Hammond v. Chemung

New York Court of Appeals established a clear constructional preference in favor of a reversion in the settlor of an inter vivos trust, and thus temporarily put an end to the matter by returning to the constructional preference as laid down in the *Hughes* case. However, the comparatively recent case of *Richardson* v *Richardson*[35] seems to have reopened the question in New York. In the *Richardson* case, the settlor created a trust reserving a life income to herself, and directing her trustee upon the death of the settlor to deliver the corpus to such persons as she might appoint by will or on failure to appoint, to her mother, or if she were not living, "to such persons as would be entitled to the same under the intestacy laws of the State of New York." The Court of Appeals held that the settlor had not created a reversion but a remainder. The court in the course of its opinion approved the doctrine of *Doctor* v *Hughes,* but applied the test of the *Whittemere* case in its holding.

The federal courts clearly recognize the rule and apply it as one of construction as was indicated in the recent case of *Beach* v *Busey*[36] where the court declared. "The intention to create a remainder in the settlor s heirs or next of kin must be clear and the disposition must be complete, or the court is likely to find that the settlor retained a reversionary interest."

In California,[37] the rule has recently been applied in a case where it was held that creation of an irrevocable trust to pay income to settlor for life, remainder to his heirs, failed to create an interest in the heirs, thus leaving the settlor free to revoke the instrument at pleasure. The Supreme Court of California based its decision upon what it construed to be the intent of the settlor.[38]

It is of interest to note that Nebraska[39] is the only state which has

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Canal Trust Co., 141 Misc. 158, 252 N.Y. Supp. 259 (Sup. Ct. 1931); Hussey v. City Bank Farmers Trust Co., 236 App. Div. 117, 258 N.Y. Supp. 396 (1st Dept. 1932), *aff'd.,* 261 N.Y. 533, 185 N.E. 726 (1933). *Contra:* Sinnott v. City Bank Farmers Trust Co., 71 N.Y. Supp. 2d 514 (Sup. Ct. 1947); Guaranty Trust Co. v. Armstrong, 43 N.Y. Supp. 2d 897 (Sup. Ct. 1943), *aff'd.,* 294 N.Y. 666, 60 N.E. 2d 757 (1945).

[34] 295 N.Y. 488, 68 N.E. 2d 503 (1946); *accord,* Sinnott v. City Bank Farmers Trust Co., *supra,* note 32.

[35] 298 N.Y. 135, 81 N.E. 2d 54 (1938).

[36] 156 F 2d 496 (C.C.A. 6th 1946).

[37] Bixley v. California Trust Co., 33 Cal. Rep. 2d 495, 202 P 2d 1018 (1949). The language used by the California Court seems to indicate that the preference for a reversion is similar to that of the Kentucky court and stronger than the prevailing opinion of the highest court of New York.

[38] Note, 1 STAN. L. REV. 774 (1949).

[39] 4 NEB. REV. STAT. sec. 76-115 (1943) provides: "When any property is limited, in an otherwise effective conveyance inter vivos, in form or in effect, to the heirs or next of kin of the conveyor, which conveyance creates one or more prior interests in favor of a person or persons in existence, such conveyance operates in favor of such heirs or next of kin by purchase and not by descent."

adopted the provision of the Uniform Property Act[40] abolishing the doctrine of worthier title as it applies to inter vivos conveyances.

It is submitted that most jurisdictions which have decided the matter apply the rule as one of construction rather than as a rule of law, and that this application of the doctrine has been made both in cases where a reversion has been found and in cases where a remainder has been formed under the particular fact situation.

The first Kentucky case[41] which applied the rule held in the following words that the intention of the grantor is the determining factor:

> "It is undoubtedly the law that Thomas Bullitt Alexander had the right to designate his heirs as purchasers under the deed, but whether he intended to do so depends upon the terms which he employed. We must assume, in the absence of words in the deed expressing a contrary intention, that the language quoted from it was used in its legal sense, and subject to legal interpretation."[42]

In applying the intention test, however, the court declared that the language used in the conveyance did not indicate any intention on the part of the grantor to convey his reversionary interest.

The writer has found but one case in Kentucky where the rule was discussed and the court held that the heirs took by purchase. The grantor in *Frank Fehr Brewing Co.* v *Johnston*[43] had conveyed land to a trustee in trust to pay income to her for life, and then to her heirs after her death, if she died intestate as to the said property; but subject to any disposition she might choose to make of the whole or any part thereof by will or by deed in the nature of a will. The court held that the settlors reservation of the power of appointment by a deed in the nature of a will indicated that the settlor's intention was not to retain a reversionary interest. It was clearly expressed in the decision that the rule of reversions as it applied in Kentucky was one of construction, and not of law, unless a contrary intent is evidenced in the instrument by the grantor. The court distinguished the *De-Kermel* case by saying: "The conclusion in that case evidently satisfied the intent of the grantor in settling the trust."[44]

The rule was applied again as one of construction in *Fidelity & Columbia Trust Co.* v. *Williams*,[45] where a trust agreement was made

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[40] UNIFORM PROPERTY ACT. sec. 14-15.

[41] Alexander v. DeKermel, 81 Ky. 345 (1883).

[42] *Id.* at 349.

[43] 30 Ky. L. Rep. 211, 97 S.W 1107 (1906). Compare with Anderson v. Kemper, 116 Ky. 339, 76 S.W 112 (1903); where the court did not consider the question of reversion and interpreted the trust agreement as creating a life estate with remainder to the heirs of the grantor.

[44] Frank Fehr Brewing Co. v. Johnston, 30 Ky. L. Rep. 211, 214, 97 S.W 1107, 1109 (1906).

[45] 268 Ky. 671, 105 S.W 2d 814 (1937).

by the settlor in which he was the life beneficiary and upon his death the principal was to pass to the settlor's stepson. A clause was included stating that if the stepson should pre-decease the settlor, the principal should pass in accordance with the provision of the settlor's will or to her heirs at law in case of intestacy It was held that the consent of the settlor as sole beneficiary (his stepson having assigned his interest in the trust to him) was sufficient because the heirs of the settlor did not take as purchasers. The *Frank Fehr Brewing Co.* case was reconciled in these words: "The settlor [in that case] intended that the heirs should take as remaindermen. After all, the doctrine of reversion is controlling."[46]

Joseph W Morris has aptly described the Kentucky view as follows: " in Kentucky strong language must be used indicating a clear intention to create a remainder before the presumption in favor of a reversion will be rebutted."[47]

In conclusion, it would appear settled, generally and in Kentucky, that the doctrine of worthier title is now applied as a rule of construction, and that the key to the construction problem is the intent of the grantor as expressed in his instrument. It is submitted, further, that merely directing a transfer of the property to the grantor's heirs upon termination of the life estate is insufficient in and of itself to create a remainder. There must be additional factors present which indicate a clear expression of the grantor's intention to divest himself of all interest in the property At least one attempt has been made to enumerate some of these factors where the property is conveyed in trust: (1) did the settlor make a full and formal disposition of the trust res, that is, disposed of the res on several contingencies other than having it revert, (2) did he reserve a power to grant or assign an interest in the property during his lifetime, (3) did he surrender all control over the trust property except the power to make testamentary dispositions thereof and the right to appoint a substitute trustee, and (4) did he make any provision for the return of any part of the res to himself during his lifetime.[48]

It is interesting to note that the grantor's deed in the *Powell* case contained no manifestation of intent sufficient to overcome the constructional preference for a reversion. The only part of the opinion of the court which can be interpreted as referring to the problem simply says: "There was no reservation, but on the other hand, an

[46] *Id.* at 674, 105 S.W 2d at 815.

[47] Morris, *The Inter Vivos Branch of the Worthier Title Doctrine*, 2 OKLA. L. REV. 133 at 147 (1949).

[48] Richardson v. Richardson, 298 N.Y. 135, at 145, 81 N.E. 2d 54, at 59 (1948).

estate was created, first a life estate in the wife and upon her death the remainder to the heirs of the first party"[49] If this assertion is taken literally, the court must have meant that the grantor "intended" to create a remainder without regard for the legal significance of the language he used. This would amount to establishing a constructional preference or presumption in favor of the remainder, and it would be necessary to show a contrary intent in the instrument to rebut this presumption. Since the court prior to this case has consistently applied the doctrine of worthier title as a rule of construction so as to establish a constructional preference in favor of the reversion, the *Powell* case either changes the law or the true issue before the court was incorrectly analyzed and therefore ignored.

Either interpretation of the decision suggests the importance of appreciating fully the significance of the worthier title doctrine and its application. The fact that the doctrine applies to an inter vivos transfer absolutely or in trust of either land or personalty makes its recognition by the courts of vital significance in a number of potential areas of modern litigation. For instance, the existence of a reversionary interest can be very decisive in federal estate tax liability and, as is apparent in the cases, the power of a settlor to revoke a trust as the sole beneficiary, or the right of creditors to attach the interest of grantor's heirs while the grantor is still alive may depend on application of the doctrine.

At best the decision and opinion in the instant case confuses the present status of the doctrine of worthier title in Kentucky, and the court should clarify the matter at the first opportunity It is submitted that abolition of the rule is properly a function of the legislature, and the Uniform Property Act provision, previously referred to, which abolishes the rule, could serve as a model in this respect. Although the doctrine is primarily historical, its application as a rule of construction is not entirely without merit.

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[49] 314 Ky. 45, 48, 234 S.W 2d 158, 160 (1950).