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The Rule in Shelley's Case Has Been Abolished

LEGISLATION

THE RULE IN SHELLEY'S CASE HAS BEEN ABOLISHED.— *Sed Quaere.*—Conceived in the mists of antiquity, receiving its nourishment in the fruits of the feudal system, and cast in the mold of a rule of property, the Rule in Shelley's Case[1] presents the spectacle of an obsolete doctrine tenaciously clinging to the legal structure in defiance to legislative onslaughts. Though the legislatures of nearly all the states have been wrestling with the Rule for almost a century and a half,[2] the courts are still encountering litigation requiring a determination of its precise status.[3] Statutory imperfections resulting from insufficient familiarity with the Rule and inefficient draftsmanship, have entangled in controversy the question of whether the Rule has in truth been abrogated in the thirty-three jurisdictions having statutes on the subject.[4] A brief review of the history and content of the Rule is preliminarily requisite to an understanding of the statutory problems.

History of the Rule

While there is evidence that the doctrine commonly known as the Rule in Shelley's Case received recognition and application as early as 1325,[5] the celebrated case of Wolfe v. Shelley,[6] decided in 1581, is the best known depository of the Rule and provides the most correct expression of the principle it embodies,[7] to wit:

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1. 1 Co. 88b, 104a, 76 Eng. Reprints 199, 234 (1581).

2. The first legislative attack directed at the Rule took place in Massachusetts in 1791. Mass. Acts 1791, c. 60, § 3. The phraseology of this statute has been somewhat altered to correct certain objectionable features. Mass. Gen. Laws (1921) c. 59, § 9.

3. Aside from the numerous cases appearing in jurisdictions which have not attempted to abrogate the Rule, troublesome cases continue to arise under the statutes. *E.g.*, Gardner v. Anderson, 116 Kan. 431, 227 Pac. 743 (1924) noted in (1924) 22 Mich L. Rev. 483; Allen v. Pedder, 119 Kan. 773, 241 Pac. 696 (1925); Albin v. Parmele, 70 Neb. 740, 98 N. W. 29 (1904); Yates v. Yates, 104 Neb. 678, 178 N. W. 262 (1920); Sutphen v. Joslyn, 111 Neb. 777, 198 N. W. 164 (1924); Williams v. Haller, 13 Ohio N. P. (N. S.) 329 (1912); Carter v. Reserve Gas Co., 84 W. Va. 741, 100 S. E. 738 (1919).

4. See note 39, *infra.*

5. Abel's Case, Y. B. 18 Ed. II, 577. A translation of this case is contained in 7 M. & G. 941, n. (c). The clearest of the early decisions on the Rule is Provost of Beverly's Case, Y. B. 40 Ed. III, 9 (1367), for a thorough discussion of which see 1 PRESTON, ESTATES (1828) 305. Other early cases applying the Rule are to be found in the Year Books. 24 Edw. III, f. 36b (1351); 27 Edw. III, f. 87a (1354); 40 Edw. III, f. 9ab (1367).

6. 1 Co. 88b, 76 Eng. Reprints 199 (1581).

7. 3 HARGRAVE, JURISCONSULT EXCERCITATIONS 317. The circumstance that the Rule was not directly enunciated by the court but was stated by counsel for the defense in the course of the argument, has led some writers to suggest that the Rule was not decided in Shelley's Case. 3 JARMAN, WILLS (7th ed. 1930) 1815, n. (d); TUDOR, LEADING CASES ON REAL PROPERTY (3d ed.) 599; Note (1911) 29 L. R. A. (N. S.) 963, 979. But Coke's account of the decision and the reasons assigned therefor by the Lord Chief Justice demonstrates conclusively that the Rule was positively recognized and upheld by the court. 1 Co. 88b, 106a, 76 Eng. Reprints 199, 238 (1581). See also Blackstone, J., in Perrin v. Blake, HARGRAVE'S LAW TRACTS 407 (1772); 1 FEARNE, CONTINGENT REMAINDERS (4th Am. ed. 1845) 181; 1 PRESTON, ESTATES (1828) 347; CHALLIS, REAL PROPERTY (3d ed. 1911) 131-132.

"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."[8]

The reasons for the generation of the Rule are variously given by different commentators,[9] but the most authoritative commentators concur in fixing its origin in the feudal policy of preserving to the lord the profitable perquisites of wardship, marriage, escheat and the like, which under feudal law attended the descent of an estate but were denied the lord where the estate was acquired by purchase.[10] Throughout the six centuries of its life, the Rule has been provocative of conflicting criticism.[11] At times it is characterized as a wise and salutary doctrine of the common law;[12] at other times, as a relic of feudal

8. 1 Co. 88b, 104a, 76 Eng. Reprints 199, 234 (1581). The expressions "words of limitation" and "words of purchase" are used in contradistinction to each other. 1 PRESTON, ESTATES (1828) 36. Words of limitation are such as measure the duration and define the estate of the first taker. Doyle v. Andis, 127 Iowa 36, 102 N. W. 177 (1905). They describe the extent and define the boundaries of that estate. 2 REEVES, REAL PROPERTY (1909) § 893. Peacock v. McCluskey, 296 Ill. 87, 129 N. E. 561 (1920). Words of purchase, on the other hand, are *descriptio personae,* words designating the persons entitled to take under the instrument. RESTATEMENT, PROPERTY (Tent. Draft, 1929) § 34; 1 PRESTON, ESTATES (1828) 36; Doyle v. Andis, *supra.* Thus it is said that purchase is any mode of acquiring property other than by descent. Rogers v. Rogers, 3 Wend. 503 (N. Y. 1829); Hawkins & Roberts v. Jerman, 35 P. (2d) 248 (Ore. 1934); 2 BL. COMM. *241. If, for the phrases "words of limitation" and "words of purchase" the corresponding definitions be substituted, Coke's statement of the Rule becomes more intelligible: "When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited mediately or immediately, to his heirs in fee or in tail, that always in such cases 'the heirs' are words describing the extent and quality of the estate conveyed, and not words describing the persons who are to take it." Note (1911) 29 L. R. A. (N. S.) 963, 971.

9. 2 STEPH. COMM. (19th ed. 1928) 115.

10. *Id.* at 115-116; Hargrave, *Observations Concerning the Rule in Shelley's Case* HARGRAVE'S LAW TRACTS (1787) 551; FEARNE, CONTINGENT REMAINDERS (4th Am. ed. 1845) 83; 1 PRESTON, ESTATES (1828) 295; 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1927) 107; 4 KENT'S COMM. *216, *217; CHALLIS, REAL PROPERTY (3d ed. 1911) 123. By stressing the importance of preserving the legal distinction between the acquisition of property by descent and acquisition by purchase, however, the Rule conferred a distinct benefit upon the tenant as well as the lord. Fearne, *op. cit. supra.* During the formative years of the Rule, the lord of the fee was entitled to the valuable rights of wardship and marriage where the heir succeeded to the estate by inheritance [Rogers v. Rogers, 3 Wend. 503 (N. Y. 1829)], but not where the heir came in by purchase. 4 KENT'S COMM. *217.

11. During the protracted litigation in the celebrated case of Perrin v. Blake the entire bar of England is said to have been divided into the "Shelleyites" and the "Anti-Shelleyites." Doyle v. Andis, 127 Iowa 36, 102 N. W. 177 (1905). A fierce controversy followed the decision of the court of Exchequer Chamber which reversed the judgment of the King's Bench. Lord Mansfield, Lord Thurlow, Fearne and Hargrave participated in the hostilities. Van Grutten v. Foxwell [1897] A. C. 658, 670. So vehement were the attacks that a lifelong friendship between Lord Thurlow and Hargrave terminated in a heated dispute. Van Grutten v. Foxwell, *supra.*

12. Williams v. Foster, 3 Hill, L. 193 (S. C. 1836); Pierce v. Hubbard, 10 Pa. Co. Ct. 63, 64 (1891), *aff'd* 152 Pa. 18, 25 Atl. 231 (1892); Hileman v. Bouslaugh, 13 Pa. St. 344 (1850).

barbarism[13] and an artificial technicality.[14] The chief ground of adverse criticism has been the assumption that the Rule is an inflexible doctrine which flies in the face of the settlor's intention.[15] But this assumption, it is submitted, is based upon an erroneous conception of the nature of the doctrine. As long as the rule of primogeniture and the preservation of great landed estates remained the keystones of the English law of inheritance,[16] the Rule in Shelley's Case effected a just result for, while it concededly thwarted the particular intent, it did so only that the paramount intent might be effectuated.[17] In this country, how-

One court, somewhat given to panegyrics, has described the Rule as "a gothic column found among the remains of feudality . . . preserved in all its strength to aid in sustaining the fabric of the modern social system." Polk v. Farris, 9 Yerg. 209, 233 (Tenn. 1836).

13. See Spurr, *Sir William Blackstone's Influence on the Rule in Shelley's Case* (1910) 17 CASE & COMM. 284.

14. King v. Beck, 15 Ohio St. 559 (1846).

15. Turman v. White's Heirs, 53 Ky. 450, 459 (1854); Tayloe v. Gould, 10 Barb. 388 (N. Y. 1851); Quick v. Quick, 21 N. J. Eq. 13 (1870). Text writers are almost unanimous in assailing the Rule as one calculated to defeat the intention of the settlor or testator. For an illuminating collection of illustrative comment of English and American writers, see Foster, *The Rule in Shelley's Case in Nebraska* (1929) 8 Neb. L. Bull. 124, 133 n.

16. When feudalism was transplanted into England, the primogenitary principle had already established itself as a part of the system. WHITE, MAKING OF ENGLISH CONSTITUTION (1908) 309; KENNEY, LAW OF PRIMOGENITURE IN ENGLAND 10. By the beginning of the fourteenth century, practically all free tenures in England were subject to the law of primogeniture [WHITE, *op. cit. supra* at 218], and for nearly eight hundred years it was accepted in England almost without question. Lee, *Recent Changes in English Law of Property* (1926) 12 A. B. A. J. 573, 576. But beginning with the year 1836, the land reform movement rapidly gained momentum, the climax being reached in 1925 when the first-born was dethroned as the sole heir by the ADMINISTRATION OF ESTATES ACT. 15 Geo. V, c. 23, § 45.

17. Appelman, *The Rise and Decline of the Rule in Shelley's Case* (Unpublished thesis in the Fordham Law School Library, 1934) 41-46. But see Foster, *loc. cit. supra* note 15. By the particular intent is meant the intent of the settlor concerning the quantity of the estate given to the first taker, *i.e.*, it is concerned with the question of whether he is to receive a life estate, or an estate for years, or a fee simple, *etc.* The general or paramount intent, on the other hand, has reference to the course the property is to take following the termination of the life estate, *i.e.*, it is the intent that the property shall be transmitted in accordance with the established laws of descent, or that it shall follow some other course. Appelman, *supra* at 43; Robinson v. Robinson, 1 Burr. 38, 97 Eng. Reprints 177 (K. B. 1758). In cases in which the Rule in Shelley's Case is in issue the particular intent is obviously to give the ancestor merely a life estate. And when it is realized that adherence to the primogenitary principle became a "habit" deeply ingrained in the English mind and perpetuated into future generations by settlements and wills which embodied the aristocratic preference of eldest sons [KENNEY, LAW OF PRIMOGENITURE IN ENGLAND 9], the conclusion is irresistible that in almost every case arising in England until recent years, the paramount intent was to create an estate which would be transmitted to the descendents of the first taker in accordance with the law of intestate succession,—primogeniture. The English courts were therefore confronted with this situation: The estate was to be held by the first taker for life and was to *descend* to his heirs upon his death. But it is elementary that a tenancy for life cannot be the source of inheritable succession. Hileman v. Bouslaugh, 13 Pa. St. 344 (1850). In order that the property may *descend*, the person constituting the source of descent must have the fee. 1 PRESTON, ESTATES (1828) 353;

ever, owing to a distinctly different concept of hereditary succession, the Rule has operated almost universally to subvert the paramount intent of the settlor.[18] Though the predominance of the eldest male originally established itself as the law of inheritance in eight of the thirteen American colonies,[19] it was not for long. The basic inconsistency between the levelling influence of colonial life on the one hand,[20] and the maintenance of the arbitrary barriers of class distinction on the other,[21] compelled a speedy abandonment of the primogenitary principle immediately after the Revolution.[22] With primogeniture torn from the legal fabric, the Rule in Shelley's Case had no *ratio essendi*,[23] but when its applicability came up for determination the American courts adopted it with little discussion or question of its propriety.[24] Pennsylvania acknowledged the binding authority of the Rule in the case of Jame's Claim,[25] decided in 1780.

Seybert v. Hibbert, 5 Pa. Super. Ct. 537 (1897). In other words, only one of the intents could be given effect, for the execution of both would have required the existence of incompatible estates. Seybert v. Hibbert, *supra*. The Rule in Shelley's Case, in recognition of the problem, selected the paramount intent as the more important one, and of necessity ignored the particular intent. Daniel v. Whartenby, 84 U. S. 639 (1873); McGraw v. Davenport, 5 Port. 319 (Ala. 1838). Thus stripped of all its mystery, the Rule merely means that where it appears that the grantor intended the heirs of the first taker to take in succession from generation to generation following the laws of descent, then, even though it may also appear that he intended the first taker to receive only a life estate, the latter intent must yield and the immediate grantee or devisee becomes entitled to the entire fee. Perrin v. Blake, HARGRAVE'S LAW TRACTS 487 (1772). The Rule sought to carry out a somewhat contradictory intent in a way which would most closely follow the intention of the settlor, since his entire wishes could not be satified. Hileman v. Bouslaugh, *supra;* Brown, *The Rule in Shelley's Case in Pennsylvania* (1932) 80 U. OF PA. L. REV. 522, 526, 527.

18. Appelman, *supra* note 17, at 71-72.

19. 1 BEARD AND BEARD, RISE OF AMERICAN CIVILIZATION (1930) 135. The predominance of the eldest male prevailed in New York and the southern colonies, but with the exception of Rhode Island, the New England states observed the rule of partible descent. Morris, *Primogeniture and Entailed Estates in America* (1927) 27 COL. L. REV. 24, 25.

20. From the very beginning economic and political conditions in America militated against the acceptance of the law of primogeniture. 1 BEARD AND BEARD, *op. cit. supra* note 19, at 138.

21. *In re* Estate of Miller, 48 Cal. 165, 170 (1874).

22. Georgia abolished primogeniture in 1777 [19 GA. COL. REC. pt. 2 (1912) 455]; North Carolina in 1784 [24 N. C. STATE REC. (1905) 572-577]; Virginia in 1785 [12 STAT. AT LARGE (Hening, 1823) 148]; Maryland and New York in 1786 [2 MD. LAWS (Maxcey, 1871) 16; 1 N. Y. LAWS (Greenleaf, 1792) 206]; South Carolina in 1791 [5 S. C. STAT. AT LARGE (1839) 162]; Rhode Island in 1798 [R. I. LAWS 1798, p. 287]. In Massachusetts and Pennsylvania, where the eldest son had been given the Mosaic double portion, statutes were enacted establishing partible descent. 1 MASS. LAWS 1801, p. 124; 3 PA. LAWS 1810, 143.

23. Without primogeniture and the traditional preservation of landed estates, there was no ground for the inference that the phrase "to his heirs" was intended to embrace an indefinite succession to heirs. Appelman *supra* note 17, at 71-72; (1933) 31 MICH. L. REV. 854.

24. Siceloff v. Redman's Adm'r, 26 Ind. 251 (1866).

25. 1 Dallas 47.

Virginia affirmed it in 1794,[26] followed by South Carolina,[27] New York,[28] Connecticut,[29] New Jersey,[30] Massachusetts,[31] and Maryland.[32] Ohio,[33] Tennessee[34] and North Carolina[35] joined the movement in the following decades. When the courts awoke to the danger it was too late. Gripped as they were in the relentless grasp of *stare decisis,* no court was bold enough to break the spell with an overruling decision.[36] Proceeding on the hypothesis that "it is often more important that the law should be certain than that it should be ideally perfect,"[37] it was concluded that adherence to the Rule was imperiously demanded. The history of the Rule in Shelley's Case in America affords a striking illustration of the truth that "the doctrine of *stare decisis* still holds first place in the legal order."[38]

Repeated manifestations of the fear of judicial legislation and constantly recurring demands for reform, culminated in the enactment of statutes abrogating the Rule in thirty-three jurisdictions.[39] Nor has the rule escaped the

26. Roy v. Garnett, 2 Wash. 9.

27. Dott v. Cunningham, 1 Bay 453 (S. C. 1795).

28. Brant v. Gelston, 2 Johns. Cas. 384 (N. Y. 1801).

29. Bishop v. Selleck, 1 Day 299 (Conn. 1804).

30. Den, M'Ginnis v. M'Peake, 2 N. J. Law 273 (1807).

31. Davis v. Hayden, 9 Mass. 514 (1813).

32. Horne v. Lyeth, 4 Harr. & Johns. 431 (Md. 1818).

33. McFeeley's Lessee v. Moore's Heirs, 5 Ohio 464 (1832).

34. Polk v. Farris, 9 Yerg. 209 (Tenn. 1836).

35. Kiser v. Kiser, 55 N. C. 27 (1854); Hodges v. Little, 52 N. C. 164 (1859).

36. See Schoonmaker v. Sheely, 3 Denio 485 (N. Y. 1846); McGregor v. Davidson, 14 Pa. Super. Ct. 230 (1900). When the Illinois court was asked to abandon the Rule, the reply was: "We confess we have not the courage to do it. We dare not enter that edifice consecrated by ages, and with rude hand hew down any one of its pillars." Baker v. Scott, 62 Ill. 86, 98 (1871). In Kentucky and Hawaii decisions were rendered rejecting the Rule as one not in harmony with American institutions. Turman v. White's Heirs, 53 Ky. 450 (1854); Thurston v. Allen, 8 Hawaii 392 (1892). But neither of these jurisdictions was hampered by precedent.

In time judicial abrogation became undesirable because of the retrospective character of the process. See (1935) 4 FORDHAM L. REV. 128. Many estates had been created in reliance on the existence of the Rule. Baker v. Scott, 62 Ill. 86, 96-97 (1871).

37. SALMOND, JURISPRUDENCE (8th ed. 1930) § 58. See also Lord Eldon in Sheddon v. Goodrich, 8 Ves. 481, 497, 32 Eng. Reprints 441, 447 (1803).

38. KENNEDY, CASES ON PERSONAL PROPERTY (1932) preface. See also Kennedy, *Men or Laws* (1932) 2 BROOKLYN L. REV. 11.

39. ALA. CODE (Michie, 1928) § 6907; ARIZ. REV. CODE (Struckmeyer, 1928) § 2769; CALIF. CIV. CODE (Deering, 1924) § 779; CONN. GEN. STAT. (1930) § 5002; DIST. OF COL. CODE (1929) tit. 25, § 133; GA. CODE (Michie, 1926) §§ 3659, 3660; IDAHO COMP. STAT. (1932) § 54-206; IOWA CODE (1931) §§ 10059, 10060; KAN. REV. STAT. ANN. (1923) c. 22, § 256; KY. STAT. (Carroll, 1930) § 2345; ME. REV. STAT. (1930) c. 87 § 12; MD. ANN. CODE (Bagby, 1924) art. 93, § 342; MASS. GEN. LAWS (1932) c. 184, § 5; MICH. COMP. LAWS (1929) § 12948; MINN. STAT. (Mason, 1927) § 8058; MISS. CODE ANN. (Hemingway, 1927) § 2435; MO. REV. STAT. (1929) § 3110; MONT. REV. CODE (Choate, 1921) § 6741; N. H. Pub. Laws (1926) c. 297 § 8; N. J. COMP. STAT. (1910) p. 1921; N. M. STAT. ANN. (Courtright, 1929) § 117-109; N. Y. REAL PROP. LAW (1909) c. 51, § 54; N. D. COMP. LAWS ANN. (1913) § 5322; OHIO GEN. CODE (Page, 1930) § 10578; OKLA. STAT. (1931) § 11766; ORE. CODE ANN. (1930) § 10-526; R. I. GEN. LAWS (1923) c. 296, § 4248; S. C. CIV.

legislative maelstrom in England.[39a] The year 1925 saw parliament effect the dethronement of both the Rule in Shelley's Case[40] and the rule of primogeniture,[41] two doctrines which had combined to erect and preserve a social and economic structure designed to promote the interests of an affluent aristocracy and the development of vast landed estates.[42]

Statutory Defects

It is unfortunate that the draftsmen of the legislation calculated to abolish the Rule in Shelley's Case should not have employed a higher degree of circumspection. Most of the statutes are obviously directed at the complete abrogation of the Rule,[43] but a strict adherence to their terms would in most cases defeat the legislative purpose. Convincing arguments have been advanced for the adoption of a liberal attitude toward the fruit of legislative labors,[44] and it has been ably demonstrated that the rule that statutes in derogation of the common law are to be strictly construed has no place in an advanced system of jurisprudence.[45] These arguments, however, have gone unheeded in the interpretation of the statutes which are the subject of this note. Almost every sug-

CODE (1932) § 8802; S. D. COMP. LAWS (1929) § 329; TENN. CODE (1932) § 7600; VA. CODE ANN. (1930) § 5152; W. VA. CODE (1931) c. 36, art. 1, § 14; WIS. STAT. (1933) § 230.28.

39a. The reversal of the decision in the case of Perrin v. Blake [HARGRAVE'S LAW TRACTS 487 (1772)] had left the status of the Rule somewhat uncertain. 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1927) 109. The uncertainty persisted until 1820 when the House of Lords unequivocally affirmed, sustained and applied the Rule in the case of Jesson v. Wright, 2 Bligh 1, 4 Eng. Reprints 230 (1820). Its security as a settled doctrine of the English law was further reinforced by the decisions in Roddy v. Fitzgerald [6 H. L. Cas. 823 (1857-8)] and Van Grutten v. Foxwell [(1897) A. C. 667]. But during the nineteenth century agitation for the abrogation of the Rule waxed strong. Tyrell, Suggestions Sent to the Commissioners Appointed to Inquire Into the Laws of Real Property (1829) 341.

40. LAW OF PROPERTY ACT, 15 & 16 Geo. V, c. 20, § 131. The Rule still prevails in Canada. *Re* Gracey, 41 O. W. N. 1 (1932). This case directs the attention of the legislature to the desirability of abandoning the Rule. See (1932) 1 FORT. L. J. 170.

41. ADMINISTRATION OF ESTATES ACT, 15 Geo. V, c. 23, § 45.

42. See 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 239.

43. An exception to this generalization must be noted in the case of the South Carolina statute. As evidence of the intention to effect merely a partial abrogation of the Rule, the title of the statute reads: "Rule in Shelley's Case Abolished in certain respects" and the section commences with the words, "The rule of law known as the rule in Shelley's Case is hereby abolished in the following particulars," *etc.* S. C. CIV. CODE (1932) § 8802. See Davis v. Strauss, 174 S. E. 908 (S. C. 1934).

44. SEDGEWICK, CONSTRUCTION OF CONSTITUTIONAL AND STATUTE LAW (2d ed. 1874) C. 8; Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 383; Comment (1917) 30 HARV. L. REV. 742. But the skeptical attitude toward legislation still has its adherents. ROBINSON, ELEMENTS OF AMERICAN JURISPRUDENCE (1900) § 301; CARTER, LAW, ITS ORIGIN, GROWTH AND FUNCTION (1907) 308 *et seq.*

45. Pound, *supra* note 44, at 387, 388. The strict rule, as Dean Pound has shown, is not the ancient principle that some would make it [CARTER, *op. cit. supra* note 44], but is, in substance, an American product of the nineteenth century.

gestion of statutory insufficiency has been accompanied by judicial reiteration of the doctrine of strict construction.[46]

The inadequacies of the legislation in question result chiefly from the failure to employ terminology comprehensive enough to encompass every case falling within the scope of the Rule. Thus, while it was clearly established at common law that the Rule applied to deeds and wills alike,[47] four statutes have abrogated the Rule only with respect to testamentary dispositions,[48] leaving it operative as at common law in the case of deeds;[49] and in one state the Rule has been abolished only as to deeds.[50] The failure to include all instruments within the scope of these statutes is indefensible, for the objectionable features of the Rule are present whether the statute be created by conveyance or by devise. A similar problem is presented by the absence in most of the statutes of language embracing personal property. While the authorities at common law were not in complete unanimity on the question,[51] the Rule was generally held applicable to personalty as well as realty.[51a] Only six statutes, however, clearly cover personal property.[52] The remaining enactments either refer to real property only,[53] exclude personalty because of language peculiarly descriptive of realty,[54]

46. Allen v. Pedder, 119 Kan. 773, 241 Pac. 696 (1925); Lippincott v. Davis, 59 N. J. L. 241, 28 Atl. 587 (1896); Lamprey v. Whitehead, 64 N. J. Eq. 408, 54 Atl. 803 (1903); Carter v. Reserve Gas Co., 84 W. Va. 741, 100 S. E. 738 (1919). But see concurring opinion of Mason, J., in Gardner v. Anderson, 116 Kan. 431, 442, 227 Pac. 743, 752 (1924). Twice statutes have been enacted in North Carolina which may have been calculated to effect the abrogation of the Rule, but both attempts have proved unsuccessful. In Howell v. Knight, 100 N. C. 254, 6 S. E. 721 (1888), it was suggested that the first statute N. C. REV. CODE (1856) c. 43. § 5 might have the effect of abolishing the Rule. But several years later the contrary was expressly held. Chamblee v. Broughton, 120 N. C. 170, 27 S. E. 111 (1897). Similarly the second act [N. C. CODE, § 1325 (Act of 1874, c. 204, § 5)] was held to have left the operation of the Rule unaffected. Starnes v. Hill, 112 N. C. 1, 16 S. E. 1011 (1893). The recent case of Brown v. Mitchell [207 N. C. 132, 176 S. E. 258 (1934)] indicates that the Rule is still in force in North Carolina.

47. Hickson v. Davenport, 248 Fed. 319 (D. C. S. C. 1918).

48. KAN. REV. STAT. ANN. (1923) c. 22 § 256; N. H. PUB. LAWS (1926) c. 297 § 8; OHIO GEN. CODE (Page, 1930) § 10578; ORE. CODE ANN. (1930) § 10-526.

49. Kirby v. Broaddus, 94 Kan. 48, 145 Pac. 875 (1915).

50. GA. CODE (Michie, 1926) §§ 3659, 3660.

51. Comment (1909) 23 HARV. L. REV. 51.

51a. Lloyd v. Rambo, 35 Ala. 709 (1860); Ham v. Ham, 21 N. C. 583 (1837); Knox v. Barker, 8 N. D. 272, 78 N. W. 352 (1898); Seeger v. Leakin, 76 Md. 500, 25 Atl. 862 (1893). *Contra*: Belleville v. Bank of Aneshaensel, 298 Ill. 292, 131 N. E. 682 (1921).

52. IOWA CODE (1931) §§ 10059, 10060; MD. ANN. CODE (Bagby, 1924) art. 93, § 342; MISS. CODE ANN. (Hemingway, 1927) § 2435; N. J. Laws 1934, c. 204, p. 488; VA. CODE ANN. (1930) § 5152; W. VA. CODE (1931) c. 36, art. 1, § 14.

53. CONN. GEN. STAT. (1930) § 5002; KAN. REV. STAT. ANN. (1923) c. 22, § 256; ME. REV. STAT. (1930) c. 87, § 12; MASS. GEN. LAWS (1932) c. 184 § 5; OHIO GEN. CODE (Page, 1930) § 10578; ORE. CODE ANN. (1930) § 10526; R. I. GEN. LAWS (1923) c. 296, § 4248; S. C. CIV. CODE (1932) § 8802.

54. ALA. CODE (Michie, 1928) § 6907; ARIZ. REV. CODE (Struckmeyer, 1928) § 2769; D. OF COL. CODE (1929) tit. 25 § 133; IDAHO COMP. STAT. (1932) § 54-206; MICH. COMP. LAWS (1929) § 12948; MINN. STAT. (Mason, 1927) § 8058; MO. REV. STAT. (1929) § 3110; N. M. STAT. ANN. (Courtright, 1929) § 117-109; N. Y. REAL PROP. LAW (1909) c. 51, § 54; TENN. CODE (1932) § 7600; WIS. STAT. (1933) § 230.28.

or render their applicability to personal property doubtful.[55]

In most cases wherein the application of the Rule is in issue, there is a grant or devise of a life estate with remainder to the heirs of the life tenant. In some cases, however, another estate is interposed between the life estate and the remainder.[56] The absence of provisions in all but four[57] of the statutes embracing cases of this class has already proved to be a serious defect. The original West Virginia statute, which was substantially identical, so far as this question is concerned, with most of the other acts, was held inapplicable to cases involving such intermediate estates.[58] Similar holdings may be expected under other statutes.

Considerable confusion has been occasioned by the failure of all but a few of the statutes to adequately describe the language limiting the remainder. Many of the statutes, following the example of New York,[59] employ the words "to the heirs or heirs of the body" of the ancestor.[60] Others employ slightly varying phraseology.[61] Resort to the strict rule of construction in cases wherein the

55. CAL. CIV. CODE (Deering, 1924) § 779; GA. CODE (Michie, 1926) § 3659, 3660; KY. STAT. (Carroll, 1930) § 2345; MONT. REV. CODE (Choate, 1921) § 6741; N. H. PUB. LAWS (1926) c. 297, § 8; N. D. COMP. LAWS ANN. (1913) § 5322; OKL. STAT. (1931) § 11766; S. D. COMP. LAWS (1929) § 329.

56. Hawkins & Roberts v. Jerman, 35 P. (2d) 248 (Ore. 1934). This was the case in Shelley's Case itself. Shelley had suffered a common recovery to the use of himself for life, then to others for twenty-four years, then to the male heirs of his body, *etc.* The only difference between such a case and one in which no estate is interposed consists in the quantity of the estate acquired by the first taker. If no provision is made for an intermediate estate, he takes the entire fee as one entire estate. If such provision is made, however, he takes the fee in portions, divided by and subject to the intermediate estate. 1 PRESTON, ESTATES (1828) 37.

57. MD. ANN. CODE (Bagby, 1924) art. 93 § 342; N. J. Laws 1934, c. 204, p. 488; VA. CODE ANN. (1930) § 5152; W. VA. CODE (1931) c. 36, art. 1, § 14.

58. Carter v. Reserve Gas Co., 84 W. Va. 741, 100 S. E. 738 (1919). This decision brought about the revision of the Virginia and West Virginia statutes. See pp. 326-327, *infra*.

59. That the New York statute enacted in 1829 should have furnished the direct model for most of the statutes is regrettable. It has resulted in a wide-spread reproduction of its several defective features. The statute reads as follows: "When a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs, or heirs of the body, of such tenant for life, shall take as purchasers, by virtue of the remainder so limited to them."

60. ARIZ. REV. CODE (Struckmeyer, 1928) § 2769; CAL. CIV. CODE (Deering, 1924) § 779; DIST. OF COL. CODE (1929) tit. 25, § 133; IDAHO COMP. STAT. (1932) § 54-206; MD. ANN. CODE (Bagby, 1924) art. 93, § 342; MICH. COMP. LAWS (1929) § 12948; MINN. STAT. (Mason, 1927) § 8058; MISS. CODE ANN. (Hemingway, 1927) § 2435; MO. REV. STAT. (1929) § 3110; N. M. STAT. ANN. (Courtright, 1929) § 117-109; N. Y. REAL PROP. LAW (1909) c. 51, § 54; N. D. COMP. LAWS ANN. (1913) § 5322; OKL. STAT. (1931) § 11766; S. C. CIV. CODE (1932) § 8802; S. D. COMP. LAWS (1929) § 329; TENN. CODE (1932) § 7600; WIS. STAT. (1933) § 230.28.

61. The Alabama statute uses the phrase, "heirs, issue, or heirs of the body." ALA. CODE (Michie, 1928) § 6907. The Connecticut act employs the word "heir" merely. CONN. GEN. STAT. (1930) § 5002. Kentucky uses the phrase "heirs, or the heirs of his body, or his issue, or descendants." KY. STAT. (Carroll, 1930) § 2345.

terminology is not precisely identical with that of the statute, would preclude argument that the Rule in Shelley's Case was inoperative. Thus where the limiting words are "issue," "children," *etc.*, grave doubts may be entertained as to whether the statutes have accomplished their object. In those states, moreover, wherein the statutes describe instruments limiting the remainder "to his heirs in fee, or by words to that effect,"[62] there is a conflict of judicial expression regarding the proper interpretation. The question of whether such statutes are applicable to limitations in tail has set in motion cross-currents of conflicting tendency. It has been answered in the affirmative by the courts of Massachusetts,[63] and Ohio.[64] But the Supreme Court of Kansas has reached a diametrically opposite result.[64a]

At common law the rule was held to operate wherever the estate limited to the first taker was any freehold less than a fee.[65] Since no case appears ever to have arisen in which the freehold was anything other than a life estate,[66] there would appear to be no valid basis for criticism of those statutes which cover all cases in which a "life estate"[66a] is given to the immediate grantee or devisee.[67] The

62. KAN. REV. STAT. ANN. (1923) c. 22, § 256; ME. REV. STAT. (1930) c. 87, § 12; OHIO GEN. CODE (Page, 1930) § 10578; R. I. GEN. LAWS (1923) c. 296, § 4248. The Massachusetts statute contains the phrase "heirs in fee" but omits the broader phrase following it. MASS. GEN. LAWS (1932) c. 184, § 5.

63. Trumbull v. Trumbull, 149 Mass. 200, 21 N. E. 366 (1889).

64. Williams v. Haller, 13 Ohio, N. P. (N. S.) 329 (1912).

64a. Gardner v. Anderson, 116 Kan. 431, 227 Pac. 743 (1924); Allen v. Pedder, 119 Kan. 773, 241 Pac. 696 (1925). In Gardner v. Anderson, *supra*, the testator devised property to *G* for life and, should she have issue, "then I direct that at her death my property shall descend to them equally share and share alike." *G* was held to have taken a fee tail under the will. On a rehearing the same conclusion was reached, but Mason, J., concurring, wrote: "By the foregoing opinion the section of the statute which is sometimes spoken of as abolishing the rule in Shelley's Case so far as wills are concerned (R. S. 22-256) is confined in its operation to wills giving land to a life tenant and upon his death literally to his 'heirs in fee'." I concur in this interpretation of the section, although with a doubt whether by a liberal, but permissible construction it might not be extended to cover as well wills giving the land upon the life tenant's death to his bodily heirs." *Id.* at 442, 241 Pac. at 752. But in Allen v. Pedder, *supra*, the court wrote: "The word 'heirs' is not qualified in the statute of wills, and I have no authority to qualify it. It means heirs, not a restricted class of heirs, and the rule in Shelley's Case, which is a rule of property and not of interpretation, has not been abolished in this state as applied to a devise to A for life, and, after his death, to his issue." For a discussion of the confusion on this subject in Kansas, see Lee, *Is the Rule in Shelley's Case Abolished as to Wills* (1927) 25 MICH. L. REV. 215.

65. Van Grutten v. Foxwell, [1897] A. C. 671. Of course if the freehold is one of inheritance the ancestor has the fee irrespective of the Rule in Shelley's Case.

66. RESTATEMENT, PROPERTY, (Tent. Draft 1929) § 102, special note.

66a. But see 2 MINOR, INSTITUTES 412.

67. ALA. CODE (Michie, 1928) § 6907; ARIZ. REV. CODE (Struckmeyer, 1928) § 2769; CAL. CIV. CODE (Deering, 1924) § 779; CONN. GEN. STAT. (1930) § 5002; DIST. OF COL. CODE (1929) tit. 25, § 133; IDAHO COMP. STAT. (1932) § 54-206; IOWA CODE (1931) §§ 10059, 10060; MD. ANN. CODE (Bagby, 1924) art. 93, § 342; MICH. COMP. LAWS (1929) § 12948; MINN. STAT. (Mason, 1927) § 8058; MO. REV. STAT. (1929) § 3110; MONT. REV. CODE (Choate, 1921) § 6741; N. M. STAT. ANN. (Courtright, 1929); § 117-109; N. Y. REAL PROP. LAW (1909) c. 51, § 54; N. D. COMP. LAWS ANN. (1913) § 5322; OKL. STAT. (1931) § 11766; S. C. CIV. CODE (1932) § 8802; S. D. COMP. LAWS (1929) § 329; TENN. CODE (1932) § 7600; WIS. STAT. (1933) § 230.28.

same cannot be said, however, of those statutes which describe instruments granting or devising property "to any person for *his* life."[68] The application of these statutes to that class of cases wherein the prior estate is to the ancestor for the life of another, would be attended by insuperable difficulties.

No more glaring illustration of legislative perfunctoriness can be found than that embodied in the Nebraska statute. Sacrificing efficiency for simplicity, it provides that "it shall be the duty of the courts of justice to carry into effect the true interest [intent] of the parties so far as such intent can be collected from the whole instrument and so far as such intent is consistent with *rules of law.*"[69] What the legislature neglected to consider is that the Rule in Shelley's Case, wherever enforced, is decidedly a *rule of law.* It has accordingly been held that this statute has not effected the abolition of the Rule in Nebraska.[70] A similar problem is encountered in the statute in force in Georgia.[71]

The New Mexico statute[72] proves the absurdity of attempting either to understand or to abrogate the Rule in Shelley's Case without a clear perception of the meaning of the terms "words of limitation" and "words of purchase."[73] The general scheme of the statute is identical with that of the New York act,[74] but instead of providing that the heirs of the life tenant "shall take as purchasers," it declares that they "shall be authorized to purchase the same." A more than common fertility of analytical resource would be required to venture a prophecy as to the probable interpretation of such phraseology.

68. KAN. REV. STAT. ANN. (1923) c. 22, § 256; KY. STAT. (Carroll, 1930) § 2345; ME. REV. STAT. (1930) c. 87 § 12; MASS. GEN. LAWS (1932) c. 184, § 5; MISS. CODE ANN. (Hemingway, 1927) § 2435; OHIO GEN. CODE (PAGE 1930) § 10578; ORE. CODE ANN. (1930) § 10-526; R. I. GEN. LAWS (1923) c. 296, § 4248. The Virginia and West Virginia statutes, by embracing all freeholds, preclude decisively any imputation of insufficiency in this respect. VA. CODE ANN. (1930) § 5152; W. VA. CODE (1931) c. 36 art 1, § 14. Similar in effect may be said to be the New Hampshire statute which extends to an estate for life or "other limited estate." N. H. Pub. Laws (1926) c. 297, § 8.

69. NEB. STAT. (1922) § 5594. Italics not in original.

70. Yates v. Yates, 104 Neb. 678, 178 N. W. 262 (1920); Myers v. Myers, 109 Neb. 230, 190 N. W. 491 (1923), noted in (1923) 36 HARV. L. REV. 628; Sutphen v. Joslyn, 111 Neb. 777, 198 N. W. 164 (1924). In Yates v. Yates, *supra,* the court reasoned that the Rule does effectuate the intention of the settlor and that it was therefore not in conflict with nor modified by the statute above quoted. But see note 17 *supra.* For a criticism of this case, see Warren, *Progress of the Law, 1919-1920, Estates and Future Interests* (1921) 34 HARV. L. REV. 508.

71. "If a less estate [than a fee] is expressly limited, the courts shall not, by construction, increase such estate into a fee, but, disregarding all technical rules, shall give effect to the intention of the maker of the instrument, as far as the same is lawful, if the same can be gathered from its contents; and if not, in such case the court may hear parol evidence to prove the intention." GA. CODE (Michie, 1926) § 3659. The draftsmen of this statute evidently regarded the Rule in Shelley's Case as a rule of construction. But it is too well settled to require argument that it is a rule of property, not of construction. Hall v. Hankey, 174 Fed. 139 (C. C. A. 7th, 1909); Ewing v. Barnes, 156 Ill. 61, 40 N. E. 325 (1895); Lytle v. Beveridge, 58 N. Y. 592 (1874). It will be observed that this act repeats the error of the Nebraska statute of requiring that effect shall be given to the intention of the settlor "as far as the same is lawful."

72. N. M. STAT. ANN. (Courtright, 1929) § 117-109.

73. See note 8, *supra.*

74. See note 59, *supra.*

The original New Jersey act and the Oregon statute[75] present a peculiar situation in regard to the disposition of the remainder. After describing wills devising lands to any of several classes of heirs of the person taking the precedent estate, they provide that after the death of such person the land shall vest in his "children." These statutes leave open the question as to the disposition of the property where there are no children, and the New Jersey statute has already been held to be inapplicable to cases involving collateral heirs.[76] More obscure than these is the Connecticut statute[77] declaring as it does that the ancestor shall take a life estate only, but making no provision whatsoever for the allocation of the remainder in fee.

Conclusion

The desirability of abandoning the Rule in Shelley's Case is hardly a subject of controversy.[78] Its utility vanished with the last traces of feudalism as embodied in the rule of primogeniture.[79] But withal, its extirpation has been postponed by lack of statutory precision. Instead of the annihilation by the stroke of a legislative pen of the confusion to which it once gave rise, the problem has been recast in a different but equally troublesome mold.

Profiting by its unfortunate experience of 1919,[80] the West Virginia legislature, to avoid the hazards of strict construction, employed meticulous care in the drafting of its present statute.[81] The new statute, purged of the offensive features of its predecessor, constitutes as perfect a model as could be desired. It reads:

"Wherever any person, by deed, will, or other writing, takes an estate of freehold in land, or takes such an estate in personal property, as would be an estate of freehold, if it

75. N. J. COMP. STAT. (1910) p. 1921; ORE. CODE ANN. (1930) § 10-526.

76. Lippincott v. Davis, 59 N. J. Law 241, 28 Atl. 587 (1896). Land was devised to *G* for life and afterward to his "lawful heirs." *G* died unmarried and childless. In refusing to apply the statute the court expressed the opinion that "the statute does not indicate in the faintest degree that any other regulation than the common law rule is to obtain, except in the single instance where there are children, or the issue of children, in whom the remainder can vest." *Id.* at 246, 28 Atl. at 589. This view was reaffirmed several years later. Lamprey v. Whitehead, 64 N. J. Eq. 408, 54 Atl. 503 (1903). The original New Jersey statute was marred by several deformities. In 1934 the New Jersey legislature enacted a new statute. N. J. Laws 1934, c. 204, p. 488, free from the defects of the original and similar in design to the statute now operative in West Virginia. For the West Virginia statute, see text above.

77. CONN. GEN. STAT. (1930) § 5002.

78. Blackstone's suggestion that the Rule was designed to prevent the inheritance from being in abeyance and to facilitate the alienation of property is still urged as a justification for its continued retention. 1 TIFFANY, REAL PROPERTY (1912) § 133, n. 186. But while it is true that in the formative years of the doctrine the courts were biased in favor of free alienation [3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1927) 106], it is no longer the policy of the law to restrict, invalidate or discourage the creation of life estates. Dissenting opinion of Weaver, J. in Doyle v. Andis, 127 Iowa 36, 102 N. W. 177 (1905); Note (1911) 29 L. R. A. (N. S.) 963, 991.

79. See note 17, *supra.*

80. Carter v. Reserve Gas Co., 84 W. Va. 741, 241 Pac. 696 (1925), cited note 46, *supra.*

81. W. VA CODE (1931) c. 36, art. 1, § 14. This statute was fashioned upon the revised Virginia statute. VA. CODE ANN. (1930) § 5152.

were an estate in land, and in the same deed, will, or writing, an estate is afterwards limited by way of remainder, either mediately or immediately, to his heirs, or the heirs of his body, or his issue, the words 'heirs,' 'heirs of his body,' and 'issue' or other words of like import used in the deed, will or other writing in the limitation therein by way or remainder, shall not be construed as words of limitation carrying to such person the inheritance as to the land, or the absolute estate as to the personal property, but they shall be construed as words of purchase, creating a remainder in the heirs, heirs of the body, or issue; it being the intent and purpose of this section to completely abolish the rule of law known as the Rule in Shelley's Case."

There can be no question as to the sufficiency of this statute.[82] It is clearly comprehensive enough to accomplish the desired object—unqualified abolition of the Rule in Shelley's Case. Manifesting a microscopic precision in the choice of terms, it embraces every conceivable application of the Rule, and, to avoid even the barest possibility of misunderstanding, it declares in bold and unequivocal terms the intention to "completely abolish the rule of law known as the Rule in Shelley's Case." Prompt adoption of this act in other jurisdictions would bring welcome relief from the besetting difficulties and vexatious deformities of existing legislation.[83]

82. It has been suggested that the declaration of the West Virginia act that the words in remainder "shall be construed as words of purchase" is susceptible of an interpretation which would transmit only a life estate to the heirs. Legis. (1932) 45 HARV. L. REV. 571, 576, n. 44. But such an interpretation would have to ignore the very meaning of the Rule in Shelley's Case. It was the purpose of the Rule to construe the words in remainder as "words of limitation." It is the purpose of the statute to place upon these words a construction which would characterize them as "words of purchase," and by so doing it designates the remaindermen as the persons entitled to take the inheritance. See note 8, *supra*.

83. At the fifty-seventh annual meeting of the American Bar Association at Milwaukee, Wisconsin, Dean Fraser of the law school of the University of Minnesota read a paper on *"The Unfortunate Status of Certain Features of Real Property Law, and Suggested Remedies."* One of his suggestions was the selection of an apt statute for abolishing the Rule in Shelley's Case. (1934) 20 A. B. A. J. 642, at 643.