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James A. Webster Jr.

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A RELIC NORTH CAROLINA CAN DO WITHOUT—THE RULE IN SHELLEY'S CASE*

JAMES A. WEBSTER, JR.†

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[1]
>
> The Rule in Shelley's Case . . . is the Don Quixote of the law, which, like the last Knight errant of chivalry, has long survived every cause that gave it birth and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous.[2]
>
> We should not permit the dead hand of the past to weigh so heavily upon the law that it perpetuates rules of law without reason. Unless rules of law are created, revised, or rejected as conditions change and as past errors become apparent, the common law will soon become antiquated and ineffective in an age of rapid economic and social change. It will be on its way to the grave . . . .[3]

Would a court or legislative body today consciously adjudicate or legislate a rule of law upon which no one relies in arranging his affairs; which can never have any effect except by reason of chance, accident or ignorance; which serves to frustrate the legitimate intentions of its citizens one hundred per cent of the times when applicable; which can be easily subverted by the simple employment of one different word or form which in no way changes the user's meaning or intention; which is a prolific producer of lawsuits in an era when courts are overcrowded and modes and means are earnestly being sought to decrease workloads of courts, and in which new

* This article is the third of a series of articles on the improvement of land law. For the first two articles of the series, see Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina Via Marketable Title Legislation,* 44 N.C.L. REV. 89 (1965); and *The Quest for Clear Land Titles—Whither Possibilities of Reverter and Rights of Entry?*, 42 N.C.L. REV. 807 (1964).

† Professor of Law, Wake Forest College.

[1] Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 469 (1897).

[2] Stamper v. Stamper, 121 N.C. 251, 254 28 S.E. 20, 22 (1897).

[3] Chief Justice Arthur T. Vanderbilt in dissenting opinion in Fox v. Snow, 6 N.J. 12, 27-28, 76 A.2d 877, 885 (1950).

echelons of courts are being added to expedite and improve the administration of justice; which has no rational relationship to modern public benefit but instead serves to render the status of land titles uncertain, raising title questions which too often must be adjudicated in courts, thus impairing the freedom of marketability of land which is so necessary to promote the economic development of a rapidly emerging commercial and industrial state?

While the present Supreme Court of North Carolina and the North Carolina General Assembly have not been guilty of the initiative in adjudicating and enacting such a law, they have allowed a law that has these effects and characteristics to remain on the books. Although the Rule in Shelley's Case antedates the reign of Henry IV,[4] the Supreme Court of North Carolina, by strictly following the doctrine of stare decisis has allowed the continuance of this rule to the present date and it is still in full and vigorous force in this state.[5] The General Assembly, not bound by the judicial doctrine of stare decisis and not haunted by the spectre of having to make a judgment or rule with retroactive effect that might upset many land titles and render vested property interests uncertain, has, nevertheless, declined on several occasions to pass legislation to abolish the Rule in Shelley's Case.[6] By its refusals to abolish this judicially declared rule of the common law which dates back to the

[4] Henry IV's reign was from 1399 to 1413. The principle known as the Rule in Shelley's Case had its origin as early as the reign of Edward II, in 1324. See the translation in Harrison v. Harrison, 7 Man. & G. 938, 941 n.(c), 135 Eng. Rep. 381, 383 n.(c) (C.P. 1844). While the Rule derived its name during the reign of Queen Elizabeth I from the famous case of Wolfe v. Shelley, 1 Co. Rep. 93(b), 76 Eng. Rep. 206 (C.B. 1581), evidence that it had been firmly established in the common law long before is afforded by the Provost of Beverly's Case, Y.B. 40 Edw. 3, f. 9ab (1367), decided in the reign of Edward III.

[5] It may even be said that the Rule in Shelley's Case is in stronger force today than ever before. Riegel v. Lyerly, 265 N.C. 204, 143 S.E.2d 65 (1965), is next to the last case decided in North Carolina reaffirming the Rule. That case applied the Rule unequivocally to personal property for the first time since it was applied to limitations relating to slaves over one hundred years ago. Prior to the decision of the Riegel case it was generally felt that the Rule in Shelley's Case did not apply to personal property in North Carolina. Block, *The Rule in Shelley's Case in North Carolina*, 20 N.C.L. REV. 49 (1941); Unpublished Memorandum to N.C. General Statutes Commission by Revisor of Statutes, January 8, 1957. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966), is the latest case involving the Rule in Shelley's Case and also states that the Rule applies to personal property limitations.

[6] Legislative bills have been introduced and defeated on at least two occasions in the North Carolina General Assembly under the sponsorship of the North Carolina General Statutes Commission.

fourteenth century, especially when bills were defeated which would have this effect, the North Carolina General Assembly has strengthened the Rule. The legislative body has indicated to the courts that the Rule, however antiquated and useless, is not contrary to the desires of the parliamentary representatives of the state. It can always be argued that even unwise or erroneous court decisions, which are not acted upon or corrected by the legislature when it convenes biennially, come to represent the will of the electorate. If repealing legislation is attempted and fails, the rules of court decisions, however harmful, become more firmly imbedded. Any tendency that the court otherwise might have to recast the rule will likely be suppressed by this rather direct indication of legislative approval of previous court decisions.

The purpose of this article is to suggest strongly to legislators and lawyers of North Carolina that the Rule in Shelley's Case is a valueless and anachronistic barnacle of the remote past which has no place in the laws of a modern state. It does not represent the real will of the people; it accomplishes no beneficial public purpose, and is actually and affirmatively harmful to the marketability of land titles; it should be abrogated.

Legislation, as opposed to court action through judicial decisions, will be proposed as the proper vehicle for this needed change in the law. The reluctance of the North Carolina Supreme Court to abandon antiquated precedents by judicial fiat, in the field of property law especially, may be defensible on the ground that such changes might have disturbing and disruptive retroactive effects on existing vested property interests.

While the Rule in Shelley's Case has been exhaustively researched and annotated throughout more than six centuries of its existence in judicial decisions, texts and commentaries,[7] here the

[7] Professor Lewis M. Simes states that it is probable that no other rule of the law of property has evoked to such a marked extent the delight of legal technicians and the anathemas of practical men as the Rule in Shelley's Case. SIMES, THE LAW OF FUTURE INTERESTS 63 (1951). In Patrick v. Morehead, 85 N.C. 62, 65 (1881), the North Carolina Supreme Court has also said: "There is perhaps no branch of the law that has given rise to more conflicting decisions, or a greater display of legal learning than the application of the Rule in Shelley's Case to the construction of deeds and wills." An excellent and exhaustive article on the operation of the Rule in Shelley's Case in North Carolina appears in the *North Carolina Law Review.* See Block, *The Rule in Shelley's Case in North Carolina,* 20 N.C.L. REV. 49 (1941). See also, Aycock, *Real Property, North Carolina*

Rule will be defined and analyzed and the purposes of its origin compared with its purposes and effects in North Carolina today since this article is aimed toward today's legislator who may wish to know of its ill effects, and may in turn be induced to introduce legislation to curb or terminate these mischievous effects.

I. Statement Of The Rule

> "*It is a rule in law,* 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." (Emphasis added.)[8]

Stripped of legal jargon, the Rule states that it is a *rule of law,* a rule of property, and not a rule of construction or intention.[9] When an instrument creates a life estate freehold in a person, and in the same instrument purports to create a remainder interest in the life tenant's "heirs" or "heirs of his body," the words "heirs" or "heirs of his body" are read only as words which serve to describe and mark out the extent and quality of the estate that the first taker is to take, and give the first taker absolute ownership instead of a mere life estate. The words "heirs" or "heirs of his body," whatever the intention of the devisor, grantor or donor using them, do not operate to designate the creation of a remainder and do not designate any persons who are to take such remainder. If the magic words "his heirs" or "heirs of his body" are used to describe the remaindermen who are to take after a life estate given to

Case Law, 44 N.C.L. Rev. 1027, 1036 (1966); Comment, 9 N.C.L. Rev. 51 (1931).

[8] This definition comes from the case from which the Rule in Shelley's Case derives its name, Wolfe v. Shelley, 1 Co. Rep. 93(b), 104(a), 76 Eng. Rep. 206, 234 (C.B. 1581). North Carolina's definition is practically identical. See Chappell v. Chappell, 260 N.C. 737, 740, 133 S.E.2d 666, 668 (1963). A more accurate and meaningful definition has also been approved by the court in Martin v. Knowles, 195 N.C. 428, 142 S.E. 313 (1928): "The Rule in Shelley's Case says, in substance, that if an estate of *freehold* be limited to A, with *remainder* to his heirs, general or special, the remainder, although importing an independent gift to the heirs, as original takers, shall confer the inheritance on A, the ancestor." *Id.* at 429, 142 S.E. at 313.

[9] Martin v. Knowles, 195 N.C. 428, 142 S.E. 313 (1928): "It is, therefore, clear that the rule not only defeats the intention *but substitutes a legal intendment directly opposed to the obvious design of the limitation.* A rule which *so* operates cannot be a rule of *construction.*" *Id.* at 430-31, 142 S.E. at 314.

an ancestor by the same instrument, the ancestor will take a fee simple estate. Even an assertion in the instrument that the Rule shall not apply will have no effect.[10]

II. How The Rule Operates

The foregoing statement of the Rule in Shelley's Case accompanied by the judicial interpretation through the ages that it is a rule of law and not a rule of construction or intention sets the stage for considering some of the effects and consequences of the Rule's continued existence in North Carolina.

A. *The Rule Frustrates Legitimate Intentions of Grantors and Devisors*

> A devisor draws his own will.[11] His intention is that his estate is to go to his son "A" for life and upon "A's" death the testator's intention and desire is that his estate is to go to the heirs of the body of "A" who are living at the time of "A's" death,

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[10] "To A for life *only* and then to his bodily heirs" will not suffice. Merchants Nat'l Bank v. Dortch, 186 N.C. 510, 120 S.E. 60 (1923). "To A for life *et non aliter* (and not otherwise)" does not prevent A from taking a fee simple if the remainder is left to his heirs or heirs of his body. See Hampton v. Griggs, 184 N.C. 13, 113 S.E. 501 (1922):

> It is not the estate which the ancestor takes that is to be considered so much as it is the estate intended to be given to the heirs. . . . It has frequently been adjudged that though an estate be devised to a man for his life *et non aliter, or with any other restrictive expressions,* yet if there be afterward added apt and proper words to create an estate of inheritance in his heirs or the heirs of his body, the extensive force of the latter words should overbalance the strictness of the former and make him a tenant in tail or in fee. (Emphasis added.)

Id. at 16, 113 S.E. at 502.

One can conclude from these statements that even if an instrument spells out that "A is to take a life estate *only, and not otherwise,* and that the heirs of A are to take the *remainder* as *purchasers, and not otherwise,* and that the Rule in Shelley's Case shall not apply," that nevertheless A would acquire a fee simple estate to the exclusion of any interest in A's heirs. Nichols v. Gladden, 117 N.C. 497, 23 S.E. 459 (1895), speaking of the Rule in Shelley's Case states:

> It was a rule of property, and not of construction, and therefore no declarations, however unequivocal, when an estate was thus created, that the ancestor should have an estate for life only, or that his estate should be subject to all incidents of a life estate, or that the heirs should take as purchasers, would be operative.

Id. at 502, 23 S.E. at 461.

[11] Lest a lawyer-legislator chortle that the upcoming consequences arise because a "jolly and ignorant testator made his own will" to avoid paying an attorney's fee for drawing a will, it should be noted that in a recent case in North Carolina involving the application of the Rule in Shelley's Case to personal property for the first time in over one hundred years, Riegel v. Lyerly, 265 N.C. 204, 143 S.E.2d 65 (1965), the testator's inten-

probably "A's" children or grandchildren. In drafting his will, however, the devisor writes: "I will my entire estate to my son 'A' for his life only, and after his death I devise and bequeath my estate to the heirs of his body in fee simple forever."

While it is not considered a legal sin for one to draft his own will[12] and the courts repeatedly say that a will should be given effect according to its obvious intent, and that the object of all testamentary construction is to effectuate the intention of the testator,[13] the testator's intent to create a life estate and a remainder would be completely and thoroughly frustrated, and an entirely different disposition of the testator's property would be effected in North Carolina in a devise like the one in the hypothetical situation above.[14] The Rule in Shelley's Case, strictly applicable in this state, dictates that the testator's innocent and legitimate intention must be thwarted because the form by which he has attempted to create a life estate and the remainder has triggered the application of this highly technical rule of law which is at least six hundred and forty-two years old although in modern day law it has no real merit or justification in public policy. In the hypothetical devise above, "A" becomes the absolute owner of the property involved and the beneficiary of a gratuitous windfall.[15] Although the will has said that "A" was to have an estate "for his life only," and though "A" has done nothing to merit receipt of total ownership of the property and has in no

tion was likewise frustrated by operation of the Rule even though it is said that a competent lawyer drew Riegel's will. See appellant's brief filed in the North Carolina Supreme Court in the aforementioned case.

[12] "Any adult person desiring to do so may prepare his own will." State v. Pledger, 257 N.C. 634, 637, 127 S.E.2d 337, 339 (1962). The same rule applies to deeds. There have been, perhaps, thousands of wills and deeds drawn by non-lawyer grantors and devisors for themselves.

[13] This rule of construction, generally applicable in the interpretation of wills, must arise in part to effect the desires of lay testators whose wills have been drawn inartfully by themselves, often without technical legal accuracy due to the non-availability of a lawyer's assistance, especially when compelled to make wills while *in extremis*.

[14] This conclusion is based upon the opinion that it is inconceivable that any devisor or grantor would ever indicate in his will or deed that the first taker is to have only a life estate and the first taker's heirs a remainder if the devisor or grantor intended for the first taker to have a fee simple estate. If a testator means for "A" to have a fee simple title, absolute ownership, he says so. He would never intentionally say "To A for life and then to the heirs of A's body" to accomplish this result.

[15] In Merchants Nat'l Bank v. Dortch, 186 N.C. 519, 120 S.E. 60 (1923), the devise was to testator's named children "for life *only* and then to their bodily heirs." The North Carolina Court held that the Rule in Shelley's Case applied to give testator's children a fee simple estate.

way relied on the rule of law that shoves absolute ownership on him, he winds up profiting from the testator's ignorance, inadvertence or accident, contrary to the testator's desires, solely on the basis of this technical and arbitrary rule. "A's" children, grandchildren and any other heirs of "A's" body, who were to be beneficiaries of the testator, will take nothing under the will. "A" will take all the incidents of absolute ownership of the property. He can immediately sell, convey or devise the property to whomever he pleases to the total exclusion of any rights or claims of his children, grandchildren or other bodily heirs; "A's" absolute interest in the property becomes immediately subject to being reached to satisfy his creditors.[16]

If the hypothetical testator had simply had the foresight and technical knowledge to change his devise in one of several small and seemingly insignificant details, he could have averted the application of the Rule in Shelley's Case. There is no general legal policy against the creation of remainders after a life estate, either vested or contingent, so long as no perpetuities problem is involved.[17] There can be no perpetuities problem involved where a remainder is to take effect (vest) at the termination of the life of some person living at the time the life estate is created. Therefore the hypothetical testator's objective is legitimate and could be accomplished easily by the employment of one of several simple devices by someone who is initiated to the intricacies and characteristics of the Rule. This underscores the fact that the Rule is arbitrary, has no real purpose, and functions only as a trap for the unwary.

[16] See concurring opinion of Clark, C.J., in Cohoon v. Upton, 174 N.C. 88, 91, 93 S.E. 446, 448 (1917).

[17] As a matter of fact, as to legal remainders, it *may* be impossible to have a perpetuities problem in North Carolina. This state has two old cases, Chessun v. Smith, 4 N.C. 274 (1816), and Flora v. Wilson, 35 N.C. 344 (1852), which indicate that the rule known as the "Rule of Destructibility of Contingent Remainders" applies in North Carolina. These cases have never been overruled and if they remain the law of this state today, it would be impossible to have a perpetuities problem involving a legal contingent remainder following a life estate to a living person. The destructibility rule destroys any legal contingent remainder (as distinguished from equitable contingent remainder interests under active trusts) which cannot take effect immediately upon the termination of the preceding life estate. The remainder must necessarily vest then or never at all and consequently vesting could never be postponed so as to be too remote under the Rule Against Perpetuities. See generally, McCall, The Destructibility of Contingent Remainders in North Carolina, 16 N.C.L. Rev. 87 (1938).

B. *Characteristics of Rule Set Out: Modes of Circumvention*

Hampton v. Griggs[18] sets out the characteristics of the Rule and the requisites for its application. That case also suggests the ways available to circumvent the Rule to accomplish the testator's purposes, to create a "life estate in 'A' only and an effective remainder upon his death to the heirs of 'A's' body." The characteristics and requisites of the Rule are listed, followed in each instance by the method that can be employed to make the Rule inapplicable:

> (1) It is generally held that, as prerequisite to the application of the rule, there must be, in the first instance, an estate of freehold in the ancestor or the first taker.

To get around characteristic or requisite number one of the Rule, an informed grantor or testator can prevent the first taker, "A," from taking a fee simple estate by simply making sure that "A," the ancestor-first taker, does not get a freehold estate. If the grantor or testator creates, instead, a term for years in "A," terminable at his death, and an executory interest in "A's" heirs or heirs of his body, "A" will get the property only for his life and at his death it will go to his heirs or the heirs of his body as designated. The grantor or testator can assure that the Rule in Shelley's Case will be inapplicable to frustrate his intention if he makes his conveyance or devise to read: "To 'A' for one hundred years (or more) but in the event that 'A' dies before the termination of this period, the property is to go to the heirs of 'A's' body." By simply preventing "A" from having a freehold estate, the Rule could never apply.[19]

> (2) The ancestor must acquire this prior estate by, through, or in consequence of the same instrument which contains the limitations to his heirs.

A knowledgeable draftsman can easily create the freehold life estate and the future interest via the use of two instruments in lieu of one. If one instrument, a deed, for example, conveys an estate "To 'A' for life," another instrument, either a deed or will, may dispose of the rest of the grantor-testator's interest in the property involved "to 'A's' heirs" or "to the heirs of 'A's' body." The Rule in Shelley's Case will be inapplicable. The heirs or heirs of the body

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[18] 184 N.C. 13, 113 S.E. 501 (1922). The five characteristics discussed in the text are found, *id.* at 16, 113 S.E. at 502.

[19] A determinable estate for years, however long, is not a freehold estate.

of "A" will take the property involved upon "A's" death; during "A's" life he will have only a life estate, simply because a draftsman knew to use two instruments instead of one in order to perfect the intention of the donor.[20]

(3) The words "heirs" or "heirs of the body" must be used in their technical sense as importing a class of persons to take indefinitely in succession, from generation to generation, in the course marked out by the canons of descent.

It is essential to the operation of the Rule in Shelley's Case that the words "heirs" and "heirs of the body," descriptive of the persons to whom a remainder is limited after creation of a life estate in their ancestor, not be used in the limitation to particular persons or a particular class of heirs. The words "heirs" and "heirs of the body" must be used so as to indicate those unnamed persons who will constitute the indefinite line of successors of the freehold life tenant through the ages, which is necessary in law to make them words of "limitation" as contradistinguished from words of "purchase."[21] The words "heirs" and "heirs of the body" must be used in the instrument creating the remainder to mean all the heirs taking in an indefinite line of succession for infinite generations, "as a class of persons to take in succession from generation to generation."[22] If the limitation is to "several heirs to take simultaneous-

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[20] It should also be noted that the future interest created in the "heirs" or "heirs of the body" of "A" in the illustration given is not a *remainder* when the two instruments are used. The interest is, instead, a *reversion,* to which the Rule in Shelley's Case does not apply. See characteristic-requisite number 5 in the text *infra.*

[21] MINOR & WURTS, REAL PROPERTY § 615 (1909).

[22] "To bring a devise within the rule in *Shelley's Case,* the limitation must be to the heirs in fee or tail as *nomen collectivum* for the whole line of inheritable blood." Jones v. Whichard, 163 N.C. 241, 79 S.E. 503 (1913); Puckett v. Morgan, 158 N.C. 344, 346, 74 S.E. 15, 16 (1912). 1 MORDECAI, LAW LECTURES 657 (1916). *But see,* however, Price v. Griffin, 150 N.C. 523, 64 S.E. 372 (1909) in which the remainder was to the life tenant's "surviving heirs" and the Rule was held to apply to give the first taker a fee simple. See also Chappell v. Chappell, 260 N.C. 737, 133 S.E.2d 666 (1963); Ratley v. Oliver, 229 N.C. 120, 47 S.E.2d 703 (1948); Cox v. Heath, 198 N.C. 503, 152 S.E. 388 (1930), which hold that a remainder to the "*nearest* heirs" of the life tenant does not indicate that the word "heirs" was used in any sense other than its technical sense as denoting an indefinite succession of lineal descendants who are to take by inheritance. It would seem that these cases are inconsistent with the orthodox view that the word "heirs" must be used as meaning "heirs in an indefinite line of succession" for the Rule in Shelley's Case to apply. "Surviving" heirs and "nearest" heirs are obviously not "all" the heirs of a person for all time, from generation to generation.

ly,"[23] or the words "heirs" and "heirs of the body" are found to be used as mere "descriptio personarum" designating certain individuals who are only a part and not all of the heirs of the first taker, the Rule does not apply. The grantor-devisor could have evaded the consequences of the Rule in Shelley's Case by limiting the estate granted or devised "To 'A' for life and then to 'A's' children,"[24] or to ' "A's' issue,"[25] to achieve the intention of creating a life estate and a remainder to the heirs of "A's" body. Or the grantor-devisor could have used language in his deed or will to indicate that "heirs" or "heirs of the body" were not to take "in succession from generation to generation," but that the words "heirs" and "heirs of the body" were to signify those persons who fit the description of "heirs" or "heirs of the body" of the life tenant at a particular time.[26] In addition, the grantor-devisor could indicate that "A's" "heirs" or "heirs of 'A's' body" were to take simultaneously upon "A's" death. A limitation "To 'A' for life and then to the heirs of 'A's' body *equally*"[27] will have the effect of creating a simultaneous tenancy in common in the heirs of the body of "A" and the Rule in Shelley's Case will not apply to give "A" a fee simple estate. The words "share and share alike," and to "share equally," accompanying the words "heirs" or "heirs of the body" in the remainder

[23] LEACH & LOGAN, CASES ON FUTURE INTERESTS AND ESTATE PLANNING 117 (1961).

[24] Hutton & Bourbonnais Co. v. Horton, 178 N.C. 548, 101 S.E. 279 (1919); Smith v. Moore, 178 N.C. 370, 100 S.E. 702 (1919). *But see, In re* Wilson, 260 N.C. 482, 133 S.E.2d 189 (1963), which held that a limitation of a remainder to a life tenant's "children & so on" called for the application of the Rule in Shelley's Case and gave the life tenant a fee. The court indicated that the "& so on" following the word "children" showed that the testator had used the word "children" as importing an indefinite line of succession. It is interesting to note that the court also gave as a basis for its decision the reasoning that if a fee simple was not given to the first taker-life tenant, the words "& so on" would cause the Rule Against Perpetuities to apply and result in partial intestacy with reference to the remainder interest. The court apparently did not consider that the "& so on," if illegal under the Rule Against Perpetuities, could have been severed from the limitation "To A for life and then to his children *& so on*," thus leaving the instrument to read, "To A for life and then to his children" which would not call for application of the Rule in Shelley's Case. The court seemed intent on applying the Rule.

[25] Faison v. Odum, 144 N.C. 107, 56 S.E. 793 (1907).

[26] *But see*, note 22 *supra*, for situations wherein limitations of remainders to "surviving heirs" and the life tenant's "nearest heirs" were held not to negate the application of the Rule in Shelley's Case although "surviving heirs" and "nearest heirs" obviously describe only a part of one's heirs at a particular time.

[27] Jenkins v. Jenkins, 96 N.C. 254, 2 S.E. 522 (1887).

will also serve to create a tenancy in common in the heirs or heirs of the body of the life tenant.[28] Instead of the life tenant taking a fee, his heirs or heirs of the body take a per capita remainder interest in the property by *purchase.*[29] To evade the possibility of running afoul of the Rule in Shelley's Case, all that is needed is some slight contextual language in the dispositive instrument that will indicate to the court that the words "heirs" or "heirs of the body" mean less than the whole body of heirs who would take in indefinite succession. The Rule applies only when the words "heirs" or "heirs of the body" are used in their technical sense.[30] If the context of the instrument indicates that these words have been used to describe persons other than that class of persons who would take in succession from generation to generation, or that those persons are to take in any manner or in any other quality than the canons of descent provide, the Rule is said not to apply.[31] There are countless situations in which superadded words have been held by the courts to modify and restrict the meaning of the terms "heirs" and "heirs of the body" to a particular person or class of persons, thus leading the court to take numerous limitations out of the Rule in Shelley's Case.[32] Suffice it to say that a minimum of knowledge and effort need be expended by a careful and technical draftsman to assure that an intended first taker-life tenant will get only a life estate; one simply needs to be aware of the various slight wording changes available to create no more than a life estate in the first taker and a valid contingent remainder to his heirs or heirs of his body.[33]

[28] Welch v. Gibson, 193 N.C. 684, 138 S.E. 25 (1927); Gilmore v. Sellers, 145 N.C. 283, 59 S.E. 73 (1907); Mills v. Thorne, 95 N.C. 362 (1886).

[29] *Ibid.*

[30] It is a well settled rule, however, that when a grantor or testator uses technical words or words of known technical import, he will be deemed to have used such words or phrases in their well known legal or technical sense, unless he shall in some appropriate way indicate in the instrument a different meaning to be ascribed to them. Wachovia Bank & Trust Co. v. Waddell, 237 N.C. 342, 75 S.E.2d 151 (1953); Whitley v. Arenson, 219 N.C. 121, 12 S.E.2d 906 (1941).

[31] Jones v. Whichard, 163 N.C. 241, 79 S.E. 503 (1913).

[32] See Block, *The Rule in Shelley's Case in North Carolina*, 20 N.C.L. Rev. 49, 72 (1941), in which the author catalogs numerous variations of the form of the remainder to the life tenant's heirs as a result of superadded words which have resulted in the non-applicability of the Rule.

[33] A word of caution may be in order, however. In North Carolina, superadded words adequate to take a limitation out of the Rule in Shelley's Case where the instrument involved is a *will* may *not* be adequate if the instrument is a *deed.* For instance, if a will says "I will A my property for life and upon his death to his bodily heirs" in one clause in the will, and

(4) The interest acquired by the ancestor and that limited to his heirs must be of the same character or quality; that is to say, both must be legal, or both must be equitable, else the two would not coalesce.

This requisite-characteristic means that if an instrument creates a "legal" life estate and a "legal" remainder to his heirs or to the heirs of his body, the Rule in Shelley's Case applies to give the ancestor-first taker a fee simple estate. It is also true if an instrument creates an "equitable" life estate in the ancestor and in the same instrument an "equitable" remainder is limited to his heirs or heirs of his body, the Rule in Shelley's Case will apply to give the whole equitable interest to the ancestor and not a mere equitable life estate.[34] If the grantor, devisor or donor creates an active trust

another clause refers to the remaindermen as "children," the superadded word "children" has been held to show clearly that the words "bodily heirs" were not used in their technical sense in the prior clause and the Rule in Shelley's Case was held not to apply. Welch v. Gibson, 193 N.C. 684, 138 S.E. 25 (1927).

On the other hand, if the instrument is a deed, superadded words may be in the instrument but the North Carolina court will not allow them to be employed to show that "heirs" or "heirs of the body" were not used in their technical sense *unless the superadded language appears in the granting clause of the deed.* See Powell v. Roberson, 246 N.C. 606, 99 S.E.2d 782 (1957), in which the granting clause of the deed in question said: "To A for life and then to her heirs." The introductory clause of the deed, however, in the premises stated that the conveyance was "To A during her natural life and at her death to her *children.*" The Supreme Court of North Carolina follows the rule of construction of deeds that "in the event of any repugnancy between the granting clause and preceding or succeeding recitals, the granting clause will prevail." The court, therefore, paid no attention to the premises clause of the deed and therefore the word "children," though clearly designating the children as remaindermen, was not treated as a superadded word to take the deed's provisions out of the Rule in Shelley's Case. "A" took a fee simple estate.

The result is that in a *will,* the court will look to the entire instrument to determine if there are superadded words which render the words "heirs" or "heirs of the body" less than all of the life tenant's heirs to determine whether they are used as *descriptio personarum* and whether the Rule in Shelley's Case applies. In a *deed,* exactly the same superadded words may be employed but they will have no effect to limit the words "heirs" or "heirs of the body," since in a deed the granting clause controls all other clauses of a deed.

It is therefore not enough to know *what* superadded words will make the Rule in Shelley's Case inapplicable in the construction of a deed. It is also necessary, in North Carolina, to know *where* to put the words. Compare Taylor v. Honeycutt, 240 N.C. 105, 81 S.E.2d 203 (1954); Whitson v. Barnett, 237 N.C. 483, 75 S.E.2d 391 (1953).

[34] An "equitable" life estate and an "equitable" remainder arise where there is an active trust for the benefit of one for his life and upon his death for the benefit of his heirs or heirs of his body. The Rule in Shelley's

transferring property "To 'T' (trustee) to hold and manage for 'A's' benefit for 'A's' life and upon 'A's' death 'T' shall hold and manage the property for 'A's' heirs or heirs of his body," the Rule in Shelley's Case will transfer to "A" the entire beneficial ownership of the property devised or conveyed in trust.[35] The heirs of "A" will have no interest. If, however, the instrument creates a *legal* life estate in the first taker-ancestor and an *equitable* remainder in his heirs or heirs of his body,[36] the life estate of the first taker-ancestor and the equitable remainder to his heirs are not of the same quality. The life tenant's estate is *legal*; the remainder is *equitable*. It is likewise true that if the life estate of the first taker-ancestor is only *equitable* and the remainder to his heirs or heirs of his body is *legal*,[37] the life estate of "A" and the remainder estate to his heirs or heirs of his body are not of the same quality. Since there is this diversity of quality in each of these latter two illustrations between the life estate taken by the first taker-ancestor and the remainder limited to his heirs or heirs of his body, the Rule in Shelley's Case does not apply and the interests of the first taker-ancestor cannot coalesce with the remainder interest in his heirs or heirs of his body so as to give the first taker-ancestor a fee simple estate.[38] Therefore, a draftsman skilled in the technicalities of the Rule can readily circumvent its application by creating an active trust interest[39] at one end of the dispositive limitation and a legal interest at

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Case operates to give the first taker-ancestor the entire beneficial ownership in the trust. Williams v. Houston, 57 N.C. 277 (1858).

[35] *Ibid.*

[36] For example, "To A for life and then to T trustee to hold and manage for A's heirs or the heirs of A's body."

[37] For example, "To T trustee to hold and manage for A for A's life and upon A's death to A's heirs or heirs of A's body in fee."

[38] Wells v. Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965); Payne v. Sale, 22 N.C. 455 (1839); SIMES & SMITH, FUTURE INTERESTS § 1552 (2d ed. 1956).

[39] It should be observed that care must be taken to be sure that the trust created in this situation is an "active" trust. If a legal life estate is created in the first taker-ancestor, and the remainder to his heirs or heirs of his body is via passive trust in which the trustee has no active duties imposed, the Statute of Uses (N.C. GEN. STAT. § 41-7 [1950], in North Carolina) executes the purported equitable remainder under the passive trust and converts it into a legal remainder to the first taker-ancestor's heirs. The first taker-ancestor's life estate and the heirs' remainder become of the same quality because of the operation of the Statute of Uses on the passive trust, both becoming "legal" interests, and the Rule in Shelley's Case is made to apply. Compare dissenting opinion of Furches, J. in Hooker v. Montague, 123 N.C. 154, 159, 31 S. E. 705, 707 (1898); see LEACH, CASES ON FUTURE INTERESTS 157 (1940).

the other end.[40]

(5) The limitation must be of an inheritance, in fee or in tail, and this must be made by way of remainder.

The Rule in Shelley's Case applies only to limitations of inheritable estates. The Rule does not apply when no estate of inheritance is limited to the heirs or heirs of the body of the first taker-ancestor.[41] A draftsman of a deed or will can therefore avoid application of the Rule by specifying that the heirs shall take less than an inheritable estate. For instance, limitations "To 'A' for life and then to the heirs of 'A's' body for life" or "To 'A' for life and then to the heirs of 'A's' body for one hundred years" will not call for the application of the Rule in Shelley's Case but will give purchase estates to the heirs of "A's" body.

In addition to the requirement that the future interest created in the heirs be of "inheritable estates," the fifth requisite-characteristic of the Rule also specifies that the limitation must be by way of "remainder."[42] The Rule is inapplicable to executory interests which were unknown to the law at the time of the origin of the Rule.[43] This suggests to the draftsman that he can assure the accomplishment of his client's objectives by using the executory limitation device instead of the remainder form in his deeds or wills. For example, as previously stated,[44] the conveyance or devise could be written: "To 'A' for one hundred years (or more) but in the event

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[40] There may be some difficulty in determining whether a trust is "active." The North Carolina Court has held that a direction to a trustee "to convey" imposes a sufficiently active duty to make the trust "active," thus preventing the trust's execution by the Statute of Uses. The consequence of this will be that a remainderman's interest under a trust directing the trustee "to convey" to the remainderman after termination of a prior life estate will be *equitable* and not *legal*. Therefore, a conveyance or devise "To T in trust for A for A's life" with a direction to "T (trustee) *to convey* to A's heirs or heirs of his body upon A's death" would not call for the application of the Rule in Shelley's Case. In such a situation the Statute of Uses would convert the passive trust for A's life into a *legal* life estate in A. The interest in A's heirs would continue to be an "equitable remainder" because the "to convey" instructions would prevent conversion of the heirs' interest into a legal remainder. There would therefore be a diversity in quality between the life estate of the first taker-ancestor and the remainder in his heirs and the Rule would not apply. Compare Kirkman v. Holland, 139 N.C. 185, 51 S.E. 856 (1905).

[41] TIFFANY, REAL PROPERTY § 352 (3d ed. 1939).

[42] Daniel v. Bass, 193 N.C. 294, 136 S.E. 733 (1927).

[43] The future interests known as executory interests became legal future interests in 1535 upon the passage of the Statute of Uses.

[44] See notes 41 & 42 *supra* and accompanying text.

that 'A' dies before the termination of this period, the property is to go to his heirs (or heirs of his body)." In such case "A" would not have a life estate, the freehold estate required for the Rule's application.[45] A contingent remainder, properly so called, must be preceded by a freehold estate, either a life estate or an estate tail.[46] If the particular estate which precedes it is not a freehold estate, any future interest limited to take effect in the first taker's heirs upon termination of the preceding estate will not be a remainder but will be an executory interest[47] to which the Rule never applies. The drafting trick is to transform the future interest into an interest other than the remainder form. Another way in which the future interest of "A's" heirs or heirs of "A's" body can be made into an executory interest instead of a remainder, with little change except phraseology, is to make a deed or will of the freehold life estate "To 'A' for life" and "one day after 'A' dies to the heirs or heirs of the body of 'A'." The one day gap provided between the date of the termination of the life estate of "A" and the time when the estate of "A's" heirs commences renders the future interest in "A's" heirs an executory limitation thus preventing the application of the Rule in Shelley's Case.[48]

All that a draftsman needs to do to prevent the operation of the Rule in Shelley's Case in order to carry out the dispositive intentions of a grantor or devisor is to take care that one of the essential requisites for application of the Rule is left unsatisfied.[49]

III. THE PURPOSES OF THE RULE EXAMINED IN THE LIGHT OF MODERN TIMES

The foregoing illustrations of modes to circumvent the Rule in Shelley's Case are not set forth for their intrinsic worth or necessarily as counsel to the lawyer or man who wishes to draft his own will or other instrument. They are set forth to demonstrate that the existence of this number of legally approved methods for getting

[45] The Rule does not apply if the ancestor has only a leasehold interest. SIMES & SMITH, FUTURE INTERESTS § 1546 (2d ed. 1956). Professor Powell in POWELL, REAL PROPERTY § 379 (1952), states that no case has been found in the United States in which the Rule has been applied without first finding an estate for life in the first taker-ancestor.

[46] MINOR & WURTS, REAL PROPERTY § 592 (1909); SIMES & SMITH, FUTURE INTERESTS §§ 106-07 (2d ed. 1956).

[47] SMITH, THE LAW OF REAL PROPERTY 149 (1956).

[48] RESTATEMENT, PROPERTY § 312, comment *k* (1940).

[49] *Ibid.*

around the Rule evinces conclusively that there is no public policy to be served by the continued retention of the Rule. A rule of law designed to accomplish a sound public purpose could not be so lightly and easily thwarted.[50]

A. *Feudal Origin Theory*

A number of reasons have been advanced to explain the origin and establishment of the Rule in Shelley's Case.[51] Perhaps the basic and most shared theory for the Rule's development is that it had its origins in feudal considerations. As the feudal law developed, the overlords had important and valuable perquisites which derived from their lordship over their various tenants in the feudal pyramids of land tenure. Upon the death of a tenant, the tenant's heir came to be entitled to succeed to fee simple estates by descent or inheritance. But the overlord was entitled to be paid certain dues or fees before the tenant's succeeding heir could assume his inheritance. A system of charges to which the lords were entitled upon descent of lands came into being. These charges, which were somewhat like inheritance taxes payable to the lords were called "reliefs," "primer seisin," and "wardship and marriage."[52] The obligation to pay these charges to an overlord arose only when lands passed to a tenant's heirs by *descent*. If lands passed to a person by *purchase*, by inter vivos transfer other than by descent and succession, the overlord was not entitled to payment of these charges. It is thus easy to surmise that informed tenants would seek to utilize some rudimentary "estate planning" devices to create estates in their own heirs by inter vivos

[50] Stacy, C.J., compared the Rule in Shelley's Case with the Rule Against Perpetuities in Welch v. Gibson, 193 N.C. 684, 138 S.E. 25 (1927), as showing the necessity for supremacy of a rule of property over the intention of donors and grantors. He wrote: "[t]he rule (the Rule in Shelley's Case) is too intimately connected with the doctrine of estates to be separated from it without breaking the ligaments of property. . . . It is one of the ancient landmarks which the fathers have set in the law as it relates to real property." *Id.* at 686-87, 138 S.E. at 26. Justice Stacy did not point out, however, that the Rule in Shelley's Case, unlike the Rule Against Perpetuities, can be made completely inapplicable by the use of certain evasive phrases. This particular "ligament of property" is tenuous indeed!

[51] The reasons for the origin of the Rule are speculative at best and cloaked in the great obscurity of early legal history. See Block, *The Rule in Shelley's Case in North Carolina*, 20 N.C.L. Rev. 49 (1941), and an exhaustive annotation in Annot. 29 L.R.A. (n.s.) 963, at 979-88 (1911), in which articles various plausible theories have been advanced to explain the origin of the Rule.

[52] Moynihan, Real Property 18, 19 (1962).

transactions to avoid their overlords' tax-like claims against the tenants' heirs which would be applicable if the tenants' heirs took their titles by descent. Instead of waiting until he died and having his land pass to his heir by descent with the concomitant "inheritance tax" obligation on his heir, a tenant would be motivated to attempt to evade these charges by granting his lands to his heir by inter vivos conveyance. If a tenant was permitted to convey "to his son 'A' for life" and to create a purchase estate by way of remainder to the "heirs or heirs of the body of 'A,' " he could completely avoid the "tax" consequences of inheritance by making "A" and his heirs always take by purchase and not by descent. It can be speculated that these procedures were attempted, perhaps successfully. The overlords' frustration from being done out of their revenues can well be imagined. As "taxing" authorities still do, it can be supposed that the overlords would be quick, through their influence in the power structure and in the courts, to seek to stop up these loopholes which were costing them revenues. The Rule in Shelley's Case was such a "loophole stopper" to assure that the overlords would continue to be entitled to collect their profitable perquisites even though their tenants' heirs took the tenants' estates by inter vivos conveyances.[53] This result was accomplished by the development of rules of law which simply operated to convert interests that would otherwise be "titles by purchase" into "titles by descent." The Doctrine of Worthier Title[54] was one such rule and provided that any limitation of a remainder by a grantor to the grantor's own heirs created no remainder interest in the grantor's heirs but operated only to create a reversionary interest in the grantor. The heirs of the grantor took nothing by the attempted remainder. If the heirs ever took any estate they would take by *descent* from their ancestor,

[53] In Cohoon v. Upton, 174 N.C. 88, 91, 93 S.E. 446, 448 (1917), Clark, C.J. states:

> The object of the rule, the law writers state, was to secure the feudal owners of lands against the loss of wardships and other 'rake offs' upon which the feudal lords lived at a time when land was the principal wealth and the foundation of dignity and influence. The rule is a highly technical one, for it contradicts the plain expression of the intent of the grantor or devisor, and could only have been laid down under the pressure of some such motive from a powerful class. It has lead [sic] to much litigation, but the feudal lords needed such protection against the loss of those feudal incidents which would have been ousted if the heir of the grantee or devisee had taken as purchaser and not as successor.

[54] SIMES & SMITH, FUTURE INTERESTS §§ 1601-1613 (2d ed. 1956).

the grantor; they would take nothing by purchase under the inter vivos conveyance.[55] The other rule designed to prevent what the overlords considered to be a fraud[56] on themselves and their rights to be paid these feudal dues was the Rule in Shelley's Case. A conveyance "To 'A' for life and then to 'A's' heirs or heirs of his body" did not give "A's" heirs a title of purchase. "A" was given the fee simple estate, and if his heirs ever took, they would take by descent from "A" and the overlord's entitlement to receipt of the fruits of his seigniory would be preserved upon "A's" death and the passage of title to his heirs.

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[55] North Carolina has modified the Doctrine of Worthier Title by statute. At common law, the doctrine applied only when there was a remainder to the grantor's "heirs" *as such*. If the remainder was limited to a named person or class of persons, and not to "heirs generally," the doctrine did not apply even though the remainderman or remaindermen happened to be heirs of the grantor. A remainder to the grantor's "children" was treated as "descriptio personarum," a description of persons, and the children of the grantor would take a purchase interest by way of remainder. SIMES & SMITH, FUTURE INTERESTS § 1606 (2d ed. 1956). By N.C. GEN. STAT. § 41-6 (1950), limitations to the heirs of a living person are construed to be to the children of such person. Consequently, if a grantor conveys an estate "To A for life and to my (grantor's) heirs," the statute makes it read "To A for life and then to my (grantor's) *children*, the statute converting the word "heirs" into *descriptio personarum*, taking the limitation out from under the Doctrine of Worthier Title. Thompson v. Batts, 168 N.C. 333, 84 S.E. 347 (1915).

It should be noted, however, that N.C. GEN. STAT. § 41-6 (1950) has no effect on the Rule in Shelley's Case in North Carolina. While the statute says that "a limitation by deed, will, or other writing, to the heirs of a living persons, shall be construed to be to the children of such person . . . ," this has been held not to be applicable when a precedent or concurrent estate of freehold is granted to the ancestor of the heirs to whom the limitation is made. Whitley v. Arenson, 219 N.C. 121, 12 S.E.2d 906 (1941); Jones v. Ragsdale, 141 N.C. 200, 53 S.E. 842 (1906). Therefore a conveyance "To A and his heirs" gives "A" the whole estate and the word heirs remains a word of limitation and does not become a word of purchase by reason of the statute since "A" takes a concurrent estate with his heirs. Likewise a conveyance "To A for life and then to his heirs" does not call the statute into operation because "A" takes a precedent life estate with his heirs. The Rule in Shelley's Case continues to apply to this limitation. Starnes v. Hill, 112 N.C. 1, 16 S.E. 1011 (1893). On the other hand, since the ancestor takes no precedent or concurrent estate with his heirs, the word "heirs" is converted into "children" and becomes a word of purchase (*descriptio personarum*) if the conveyance is simply "To A's heirs" (Campbell v. Everhart, 139 N.C. 503, 52 S.E. 201 (1905); Graves v. Barrett, 126 N.C. 267, 35 S.E. 539 (1900)) or "To A for life and then to the heirs of B." (Condor v. Secrest, 149 N.C. 201, 62 S.E. 921 (1908)).

It was thought for a time that N.C. GEN. STAT. 41-6 (1950), may have abolished the Rule in Shelley's Case but the court decided explicitly in Starnes v. Hill, 112 N.C. 1, 16 S.E. 1011 (1893), that the Rule was not abolished by that section. 1 MORDECAI, LAW LECTURES 650 (1916).

[56] Williams v. Houston, 57 N.C. 277 (1858).

When the theory of the feudal origin of the Rule is finally considered, the question occurs: What is relevance of all of this in a modern society? None of the feudal system exists today. If feudal considerations were the basis for the development of such a rule, is there any current rational justification of a feudal law which makes it impossible to create a remainder interest in a life tenant's heirs or in the heirs of his body, simply because the grantor, devisor or donor who attempts to create such interest slips up and uses the fatal magic words "heirs" or "heirs of the body" in describing the remaindermen?

B. *The Acceleration of Alienability Argument*

Another reason sometimes set forth as the basis for the Rule's origin, and perhaps the most often urged basis for its retention, is that the Rule's effect is to facilitate the alienation of land and to put it into potential circulation one generation earlier than would be the case if the Rule was abolished.[57] If an estate is limited "To 'A' for life and then to the heirs of his body" and the Rule in Shelley's Case applies, "A" can immediately sell the land and put it into the thread of commerce, accelerating the land's alienability.[58] On the other hand, if the Rule does not apply to this limitation the remainder must take its course and the land will not be alienable until "A's" death.

It *is* true that the Rule in Shelley's Case makes it possible for the life tenant-first taker-ancestor to have a fee and for the fee simple estate to be conveyable one generation sooner than would be the case if the Rule was not in force. The obvious shortcoming of this argument for the retention of the Rule, however, is that it is bankrupt as a policy argument because the described form of limitation is the *only* situation in which it makes land alienable "one generation sooner," the only situation in which it "prevents the tying up of real estate during the life of the first taker."[59] Except for the proscribed limitations of a life estate in an ancestor and a remainder to his heirs or heirs of his body, contingent future interests following life estates have been allowed by almost every conceivable method. Except for the exceptional situation which calls for application

[57] Cohoon v. Upton, 174 N.C. 88, 93 S.E. 446 (1917).

[58] The land also becomes subject to be sold for the satisfaction of the first taker's debts. Cohoon v. Upton, 174 N.C. 88, 93 S.E. 446 (1917).

[59] Benton v. Baucom, 192 N.C. 630, 135 S.E. 629 (1926).

of the Rule in Shelley's Case, the courts have recognized, upheld and enforced life estates followed by future contingent interests created by other forms of limitations with unvarying regularity. While the Rule in Shelley's Case forbids a donor from giving "a life estate to 'A,' with a remainder to 'A's' heirs, he has been at perfect liberty to give a life estate to 'A,' with a remainder to the heirs of 'A's' wife, or to the heirs of 'A's' mother-in-law, or to the heirs of an entire stranger."[60] In addition, he could have employed any of the techniques previously described to draft around the requisite-characteristics of the Rule.[61] It is obvious that there is no policy of the law which generally abhors life estates and contingent remainders and which generally favors the invalidation of remainders to unfetter titles and to promote their alienability. This so-called "Gothic column found among the remains of feudality,"[62] this "ancient landmark which the fathers have set in the law,"[63] called the Rule in Shelley's Case, operates to effect speedier alienation of land *only* when the remainder is inadvertently left to the heirs of the first taker-life tenant by ignorance, mistake or accident. Whatever the purposes of the Rule, it operates only to penalize the uninformed.

The consequences of a slight ignorance or inadvertance can be illustrated by the following example: If a father desires to grant a life estate in land to his son and a remainder to his son's offspring, and desires to fence against the weakness or misfortune of his own child and to preserve the inheritance for his grandchildren, there is no legal or moral reason which prevents him from doing so. The Rule Against Perpetuities even permits him to tie the land up and to suspend its alienation for the period of a life in being and twenty-one years afterwards. But if he makes a deed "To my son 'A' for his natural life, and after the death of my son to the heirs of his body in fee simple," the father

> "may awake the next day to see that land seized and sold for the son's debt, or to see the son himself squander the entire inheritance in the nearest bucket shop or upon a horse race. Too late

[60] See dissenting opinion of Weaver, J., in Doyle v. Andis, 127 Iowa 36, 71, 102 N.W. 177, 189 (1905).
[61] See notes 18-49 *supra* and accompanying text.
[62] Polk v. Faris, 17 Tenn. (9 Yerg.) 159, 40 Am. Dec. 400 (1836) quoted with approval in Starnes v. Hill, 112 N.C. 1, 16, 16 S.E. 1011, 1015 (1893).
[63] Welch v. Gibson, 193 N.C. 684, 138 S.E. 25 (1927).

> he goes with his troubles to a lawyer, who, after dusting his Kent's Commentaries and making sure that he correctly remembers the rule, tells his client there is no hope. 'It is true,' he says, 'you intended to give your son a simple life estate in the land, and it is equally true you stated that intention in so many plain English words; but unfortunately you gave the remainder after his death to his 'heirs.' If, instead of this word, you had said 'children' or 'wife and children' or had described these persons by their individual names, or had made the heirs of a stranger, instead of your son, the objects of your bounty, the property might have been saved; but you failed to understand that it is sometimes a legal mistake to clearly express a legal intention. Of course, these 'children' will be 'heirs' of your son if they survive him, and you supposed the terms to be convertible, but 'nemo est haeres viventis.' Having used that fatal word, the fact that every person of common sense and intelligence understands that you did not mean to give this land to your son absolutely, the fact that you had the unquestioned legal right to give him a life estate only, and the fact that you have expressed that intention with all the clearness and exactness of which your mother tongue is capable, all these things count as nothing, and the inheritance you designed for your helpless grandchildren must go to swell the list of offerings upon the altar of Shelley's Case."[64]

The Rule is a nautral booby trap for the nonprofessional who is unacquainted with its verbal technicalities. Although the disposition that the grantor sought to make of his land in the example above was natural, commendable and lawful, his purpose is thwarted and his intended beneficiaries deprived of any interest. And for what purpose in public policy? A skilled legal draftsman versed in its intricacies could have circumvented the Rule easily. There is no general policy in the law that life estates followed by remainders are inimical to the welfare or prosperity of the people. The argument that the Rule in Shelley's Case aids alienability is revealed as highly artificial when it is observed that remainders and future interests can be freely created to follow life estates so long as the "magical" words "heirs" or "heirs of the body"[65] are not made to describe

[64] Example and quotations are from the superb dissenting opinion of Justice Weaver in Doyle v. Andis, 127 Iowa 36, 71, 102 N.W. 177, 189 (1905).

[65] If the future interest is written as an executory interest, i.e., "To A for life and then after one day to A's heirs," even the magical word "heirs" is not fatal as the Rule in Shelley's Case does not apply except as to remainders!

remaindermen and so long as the limitations do not violate the Rule Against Perpetuities. The Rule, therefore, does not even pretend to aid the alienability of titles except by accident.

Far from making land titles more marketable, it can be argued that the Rule in Shelley's Case in fact tends to *unsettle titles* and to *impair* their marketability. As previously pointed out, the Rule does not apply when the words "heirs" and "heirs of the body" are so modified by superadded words that the court will be judicially satisfied that the words are not words of limitation but are instead words of purchase. Only a lawsuit, carried to the Supreme Court, can give real and final assurance to the cautious title examiner and conveyancer that the Rule in Shelley's Case does or does not apply to a given title. While from an early date it has been held that the Rule in Shelley's Case operates invariably and automatically "whenever the limitations are such as to call for its application,"[66] the determination of whether "the limitations are such as to call for its application" is not easily made.[67] The Supreme Court of North Carolina has pointed out the often puzzling effects upon those who must advise concerning the meaning of legal expressions where the Rule in Shelley's Case is concerned. In *Welch v. Gibson*[68] Chief Justice Stacy states:

> "A little learning is a dangerous thing, says Pope, which properly interpreted means that expert knowledge in the hands of an inexpert is a dangerous thing. And so it is. But in the language of Huxley, 'If a little knowledge is dangerous, where is a man who has so much as to be out of danger' when he is dealing with the Rule in Shelley's Case? Or forsooth did the student answer with a correct guess, when, on being asked the meaning of the Rule, he said: 'The Rule in Shelley's Case is very simple if you understand it. It means that the same law which was applied in that case applies equally to every other case like it'? And so it does. But when is a case 'just like it,' or so nearly so as to come within the operation of the Rule? That is the puzzling question."

The result is that a conveyancing lawyer called upon to certify

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[66] Van Grutten v. Foxwell, [1897] A.C. 658.

[67] One author says that "for many students the Rule in Shelley's Case is not unlike a communist and is often seen hiding under every bed." CRIBBETT, PROPERTY 60 (1962).

[68] 193 N.C. 684, 690, 138 S.E. 25, 28 (1927). See also Block, *The Rule in Shelley's Case in North Carolina,* 20 N.C.L. REV. 49, 74 (1941): "Deeds and wills are often poorly drafted, with confusing superadded words. A line cannot be drawn exactly describing just what groups of words are sufficient to take the limitation out of the Rule."

the validity of a fee simple title offered to his client cannot take a chance that a court will determine that he guessed wrong in deciding that the Rule in Shelley's Case did or did not apply to a particular limitation in his chain of title. Conveyancing lawyers go to the courts for judicial determination of the status of these land titles via quiet title suits, controversies without action, actions for declaratory judgment, or suits for specific performance of contracts or to construe wills. There have been no fewer than one hundred and twenty-seven suits in North Carolina that have gone all the way to the state's supreme court which have involved the applicability or non-applicability of the Rule in Shelley's Case. It is obvious that instead of promoting the free alienability of land, the marketability of title to the land involved in these suits has been stymied pending the decision to bring the suits into court. The land is necessarily "off the market" during the periods required for preparing and serving pleadings, drafting and procuring lower court judgments, preparing and serving the records. This is in addition to the time the case waits on appeal, briefs are filed with the appellate court, and the period between argument and opinion. Even if the Rule in Shelley's Case has the effect of getting property into circulation "one generation earlier"[69] as a matter of law, if a lawsuit has been required to determine if the limitations "are such as to call for its application," with the delays and expenses attendant on lawsuits and their appeals, marketability and alienability have been impaired in fact.

If one hundred and twenty-seven cases have reached the highest court in North Carolina to determine whether the Rule in Shelley's Case was applicable, how many other transactions must have been squelched by purchasers' attorneys who have declined to take proffered titles because of uncertainties, with neither buyer nor seller ever taking the question to the courts? How many socially valuable contracts have been frustrated at the outset by the existence of the Rule? While one may be proved ultimately to have a fee simple estate by reason of the Rule if the case is tried out to the highest court, before then he may not have a marketable title in the sense that it is free from reasonable doubt in law or fact as to its validity,[70] and freely and practically alienable at anywhere near its true value. Only an opinion of the Supreme Court in North Carolina

[69] Cohoon v. Upton, 174 N.C. 88, 93 S.E. 446 (1917).
[70] Pack v. Newman, 232 N.C. 397, 61 S.E.2d 90 (1950).

can answer with the requisite finality the crucial question of whether the words "heirs" or "heirs of the body," in the many forms of limitations in which they are employed, have been used technically so as to call for application of the Rule in Shelley's Case.

There is still another evil arising from the existence of the Rule in Shelley's Case in North Carolina. This evil, which results from the frustration of explicit intentions of testators and grantors, is that the application of the Rule causes North Carolinians to pay federal succession taxes not obligatory on citizens living in states which do not have the Rule. For instance, in a state where the Rule has been abolished, a will limitation "To 'A' for life and then to the heirs of his body" will create a life estate in "A" and a purchase remainder in the heirs of "A's" body in accordance with the intention of the testator. There would be liability for only one federal succession tax on the basis of the will limitations. On the other hand, in North Carolina where the Rule *does* apply, a will limitation "To 'A' for life and then to the heirs of his body" results in two devolutions of the property by succession, one from the testator to "A" (who will take a fee under the Rule), and the second to "A's" heirs upon "A's" death, since they take only by descent from "A" and not under testator's will. The result is that the federal government collects tax upon the death of "A" to which it would not otherwise be entitled simply because of the inadvertence of the draftsman of the will and the applicability of the Rule in Shelley's Case in North Carolina. The tax coffers of the federal government receive a windfall from this accidental, unplanned and unjust effect of the Rule in Shelley's Case, not applicable in forty-six states of the United States.[71] North Carolinians are discriminated against with regard to this extra levy of federal taxes as a result of the continued vitality

[71] North Carolina is one of only four states in which the Rule in Shelley's Case is definitely in full force today. The other states which have the Rule in full force are *Arkansas,* Bishop v. Williams, 221 Ark. 617, 255 S.W.2d 171 (1953); *Delaware,* Springbitt v. Monaghan, 43 Del. (4 Terry) 501, 50 A.2d 612 (1946); and *Indiana,* Dotson v. Faulkenburg, 186 Ind. 417, 116 N.E. 577 (1917). Colorado, in Barnard v. Moore, 71 Colo. 401, 207 Pac. 332 (1922), has assumed but not decided that the Rule applies in that state. See King, *Future Interests in Colorado,* 21 ROCKY MT. L. REV. 1, 15 (1948), in which the author suggests the Rule is not a rule of property but only a rule of construction in Colorado because of a statement in Barnard v. Moore, *supra,* that "the question is wholly one of construction, and the rule as a rule of property is abrogated." There is still some question as to how much of the Rule survives in Wyoming. In Crawford v. Barber, 385 P.2d 655, 657, 99 A.L.R.2d 1155, 1159 (Wyo. 1963), the Wyoming Supreme Court held that it was not obligated to follow the common law unless "applicable

of this ancient, and useless, rule of property.[72]

IV. Proposed Legislation

From the foregoing it must be apparent that the Rule in Shelley's Case has no plausible justification in modern times. If this is conceded, the question then arises as to how it can be most effective-

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to the habits and condition of our society, and in harmony with the genius spirit and objects of our institutions. Under such a holding, we are doubtful that the Rule in Shelley's Case could be applicable in Wyoming. Certainly . . . there could be no occasion to apply the rule with blind rigidity." See Gerand, *The Rule in Shelley's Case-In Memoriam*, 18 Wyo. L.J. 17 (1964). There have been neither statutes nor judicial decisions on the Rule in Nevada and Utah. Since the common law has never been the law of Louisiana, the Rule has never been considered or applied in that state. Hawaii, Thurston v. Allen, 8 Hawaii 392 (1892) and Vermont, Smith v. Hastings, 29 Vt. 240 (1857) have refused to recognize the Rule judicially without any statute.

Thirty nine states and the District of Columbia have abrogated the Rule by statute. They are: *Alabama*, Ala. Code tit. 47, § 141 (1958); *Alaska*, Alaska Stat. § 13.05.210 (1962); *Arizona*, Ariz. Rev. Stat. Ann. § 33-231 (1956); *California*, Cal. Civil Code § 779 (1960); *Connecticut*, Conn. Gen. Stat. Rev. § 47-4 (1958); *District of Columbia*, D.C. Code Ann. § 45-203 (1961); *Florida*, Fla. Stat. Ann. § 689.17 (Supp. 1965); *Georgia*, Ga. Code Ann. § 85-504 (1955); *Idaho*, Idaho Code Ann. § 55-206 (1948); *Illinois*, Ill. Ann. Stat. ch. 30, §§ 186-87 (Smith-Hurd Supp. 1964); *Iowa*, Iowa Code Ann. §§ 557.20-21 (1950); *Kansas*, Kan. Gen. Stat. Ann. §§ 58-502 to -503 (1949); *Kentucky*, Ky. Rev. Stat. § 381.090 (1962); *Maine*, Me. Rev. Stat. Ann. tit. 30, § 158 (1965); *Maryland*, Md. Ann. Code art. 93 § 366 (1964); *Massachusetts*, Mass. Ann. Laws ch. 184, § 5 (1955); *Michigan*, Mich. Stat. Ann. § 26.28 (1957); *Minnesota*, Minn. Stat. Ann. § 500.14 (1947); *Mississippi*, Miss. Code Ann. § 835 (1942); *Missouri*, Mo. Ann. Stat. § 442.490 (1952); *Montana*, Mont. Rev. Codes Ann. § 67-520 (1962); *Nebraska*, Neb. Rev. Stat. § 76-112 (1943); *New Hampshire*, N.H. Rev. Stat. Ann. § 551:8 (1955); *New Jersey*, N.J. Stat. Ann. § 46:3-14 (1940); *New Mexico*, N.M. Stat. Ann. § 70-1-17 (1953); *New York*, N.Y. Real Prop. Law § 54 (1963); *North Dakota*, N.D. Cent. Code § 47-04-20 (1960); *Ohio*, Ohio Rev. Code Ann. § 2107.49 (Page 1954); *Oklahoma*, Okla. Stat. tit. 60, § 41 (Supp. 1963); *Oregon*, Ore. Rev. Stat. § 114.220 (1963); *Pennsylvania*, Pa. Stat. Ann. tit. 20, § 229 (1950); *Rhode Island*, R.I. Gen. Laws Ann. § 34-4-2 (1957); *South Carolina*, S.C. Code Ann. § 57-2 (1962); *South Dakota*, S.D. Code § 51.0420 (1939); *Tennessee*, Tenn. Code Ann. § 64-103 (1955); *Texas*, Tex. Rev. Civ. Stat. Ann. art. 1291a (Supp. 1964); *Virginia*, Va. Code Ann. § 55-14 (1950); *Washington*, Wash. Rev. Code § 11.12.180 (Supp. 1959); *West Virginia*, W. Va. Code Ann. § 3534 (1961); *Wisconsin*, Wis. Stat. Ann. § 230.28 (1957).

New Hampshire, N.H. Rev. Stat. Ann. § 5.1:8 (1955); *Oregon*, Ore. Rev. Stat. § 114.220 (1963), and *Washington*, Rubenser v. Felice, 58 Wash. 2d 862, 365 P.2d 320 (1961) have abolished the Rule only as to wills. See generally Simes & Smith, Future Interests § 1563 (1956); Legislative Note, 15 Baylor L. Rev. 372 (1963).

[72] Originating as a method whereby the overlord could be assured of no diminution of his feudal "reliefs," a form of inheritance taxes, the Rule in Shelley's Case still has this effect with reference to present day death taxes where applicable!

ly abolished. Although the North Carolina Supreme Court has often criticized the Rule in Shelley's Case,[73] it has shied away from judicial abolition of the Rule because of the doctrine of *stare decisis* and an apparent fear of the potential disruptive effect on property rights as a consequence of retroactive judicial decision. However, the court has frequently stated that the legislature should abolish the Rule if public policy requires a change.[74] This position of the North Carolina Supreme Court is probably justified with reference to a rule of such antiquity, especially in view of the abortive attempts by legislators and the North Carolina General Statutes Commission to abolish the Rule by statute. It is therefore apparent that if the Rule in Shelley's Case is to be changed it must be done by legislation as has been done in so many other states in the country. The following statute is suggested for consideration by the North Carolina General Assembly looking toward its possible adoption:[75]

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[73] *E.g.*, in Chambless v. Broughton, 120 N.C. 170, 175, 27 S.E. 111, 112 (1897), the court said:

> The Rule originated in the Feudal law, . . . *and is based upon reasons which have long ceased to exist*. . . . It is true, the rule contradicts and thwarts the intent of the grantor or devisor whose express purpose to confer an estate for life only upon the first taker is enlarged by an *arbitrary* rule of law into a fee simple, and the expressed purpose to confer all except the life estate upon the heirs is restricted so as to give them nothing. (Emphasis added.)

Hooker v. Montague, 123 N.C. 154, 158, 31 S.E. 705, 706 (1898), states: "The Rule in Shelley's Case *is purely a technical rule*, and being contrary to the general spirit of the law, inasmuch as it tends to defeat the intention of the testator, should be strictly construed." (Emphasis added.) See also the classical judical criticism of the Rule by Justice Douglas in Stamper v. Stamper, 121 N.C. 251, 254, 28 S.E. 20, 22 (1897), quoted in the text accompanying note 2, *supra*, in which he calls the Rule *"the Don Quixote of the law, which, like the last knight errant of chivalry, has long survived every cause that gave it birth and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous."* (Emphasis added.)

[74] See, *e.g.*, Riegel v. Lyerly, 265 N.C. 204, 143 S.E.2d 65 (1965), a recent case involving the Rule, in which the court states that rules of property should not be changed by judicial fiat but that if public policy requires a change it should be made by the legislature, and made prospective in effect only. Hampton v. Griggs, 184 N.C. 13, 15, 113 S.E. 501 (1922) states: "The Legislature alone may change it if it is thought to be unsuited to the needs of our day or to the industrial life of our times." Chamblee v. Broughton, 120 N.C. 170, 175, 27 S.E. 111, 112 (1897): "[I]t is a long established rule of property and cannot be changed except by legislative enactment. This, it seems, has been done in a majority of the states, but it has not been done in North Carolina."

[75] This proposed statute was drafted and proposed by the North Carolina General Statutes Commission for adoption by the General Assembly of North Carolina during the 1957 legislative session, apparently running into heavy opposition. In a memorandum to the General Statutes Commission, Mr. F. Kent Burns, then Revisor of Statutes, explained the refusal of the

AN ACT TO ABOLISH THE RULE IN SHELLEY'S CASE

Section 1. Chapter 41, entitled "Estates," of the North Carolina General Statutes, is hereby amended by adding the following section at the end thereof:

§ 41-14. *Rule in Shelley's abolished; effect of estate to one for life, remainder to heirs, etc.*—(a) The rule known as the Rule in Shelley's Case is abolished.

(b) If an estate in real or personal property is transferred, conveyed, devised or bequeathed to any person for life, and by the same conveyance, a remainder is limited to his heirs, heirs of his body, his distributees, or by other words of like import, such words shall operate to give to that person an estate for life only, and the remainder, in fee simple as to real property and absolutely as to personal property, shall go, in accordance with the applicable intestate succession laws of this State, by purchase to the described persons who, at the date of termination of the life estate, constitute the heirs, heirs of the body or distributees of such tenant for life.

(c) The provisions of this section shall apply only to wills of decedents dying after [effective date of statute] and to deeds, agreements, and other written instruments executed and delivered after [effective date of statute].

Section 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Section 3. This Act shall become effective on [effective date of statute].

The proposed statute would seem to require little explanation. By subsection (a), it is clear that the Rule in Shelley's Case will be abolished.[76] Since statutes in derogation of the common law are strictly construed, it will be well to leave no doubt of the intention of the legislative body that the Rule is to be finally abrogated. Subsection (b) is intended to spell out the factual situations to which the Rule in Shelley's Case currently applies but which will result in the creation of contingent remainders after the adopting of the statute. Analyzed, the statute simply operates to convert "heirs,"

legislature to adopt the bill submitted by stating that, although the form of the bill was satisfactory, the General Assembly simply did not want to abolish the Rule in Shelley's Case at that time. He stated that lawyers in the General Assembly "believe that they understand the Rule and believe also that other lawyers of the State also understand the Rule."

[76] That the abolition of the Rule can be effected by a still simpler statute, see Illinois' statute which states only that "The rule of property known as the rule in Shelley's Case is abolished," followed by a provision that the abolishing statute would have no retroactive effect. ILL. REV. STAT. ch. 30, §§ 186-87 (1959).

"heirs of the body," "distributees" and "words of like import" into words which are *descriptio personarum,* or a "description of persons" when a remainder is left to them. These words will no longer be deemed to designate a class descriptive of the whole line of inheritable blood or as *nomen collectivum* as is the case currently under the Rule. The proposed statute "pins down" the remaindermen designated by the terms "heirs," "heirs of the body," " distributees" and "other words of like import."

When a deed or devise says "To 'A' for life and then to his heirs or heirs of his body," the remaindermen are not *all* of "A's" heirs for infinite generations but only those heirs living at his death. In addition the proposed statute does *not* give the remainder to *all* of "A's" heirs living at his death. The remainder in such case will be limited to those heirs or distributees qualified to take in accordance with the intestate succession laws of the state.[77] At the expiration of the life estate there should be no difficulty in determining who the remaindermen are.

The proposed statute specifically abolishes the Rule as to personal property. While many practitioners had thought that the Rule in Shelley's Case did not apply to personal property in North Carolina,[78] since the decision of *Riegel v. Lyerly*[79] there is a certainty that the Rule *does* apply to personalty as well as to real property under current law. The statute is therefore specifically designed to abolish the Rule as to both types of property.[80] Thus, the statute's specific reference to personal property will not be an over abundance of caution but will be necessary for a complete abrogation of the Rule since the decision of the *Riegel* case.[81]

[77] This provision, making "heirs," "heirs of the body," "distributees" and "words of like import" mean nearest heirs upon the life tenant-ancestor's death (those heirs, etc., who would be entitled to take from him upon intestacy) will negate any possible construction that the remainder interest would go to *all* of life tenant-ancestor's heirs which would result in an undesirable fractionization of the remainder interest. The provision designates which particular heirs are to take at a particular time. This would seem to correct a possible deficiency in a proposed statute in Section 12 of the Uniform Property Act designed to abolish the Rule. Compare MASS. GEN. LAWS ANN. ch. 184 § 5 (1955) and N.Y. REAL PROPERTY LAW § 54 (1945).

[78] See note 5 *supra*. *But see* 1 MORDECAI, LAW LECTURES 650 (1916).

[79] 265 N.C. 204, 143 S.E.2d 65 (1965).

[80] It is a compliment to the draftsmen of this proposed statute in 1957 that they anticipated a possible holding by the North Carolina Supreme Court, in the absence of statute, that the Rule in Shelley's Case applies to personal property.

[81] 265 N.C. 204, 143 S.E.2d 65 (1965).

Subsection (c) is in keeping with the reasoning that the Rule, if abrogated, should be abolished by statute and not by judicial decision. Two reasons dictate that the statute should be prospective in effect only. The first reason is that legislation which is retrospective is unconstitutional if it impairs the obligation of contracts or destroys vested rights.[82] A statute enacted today which automatically and retroactively converted a former conveyance "To 'A' for life, remainder to the heirs of his body" into a mere life estate in "A" with a remainder to his children or grandchildren would certainly take the fee rights from "A" and give them to his children or grandchildren, destroying "A's" "vested rights" under court decisions dating back to 1815.[83] Therefore a statute purporting to abolish the Rule in Shelley's Case retroactively would be clearly unconstitutional. A second reason for making the statute prospective should also be readily apparent. If any legislature should attempt to abolish the Rule retroactively in perfected conveyances and devises, the status of titles would be drastically unsettled.[84] The statutory proposal in subsection (c) is designed to follow this reasoning that the Rule in Shelley's Case shall be abolished prospectively only. The statute will apply to instruments taking legal effect subsequent to the effective date of the statute. As to deeds, agreements and other written instruments executed and becoming legally effective before the effective date of the statute, the Rule in Shelley's Case will not be abolished. If the deeds, agreements or other written instruments are executed and delivered and become legally effective subsequent to the effective date of the statute, the Rule in Shelley's Case shall not apply. It should be noted that the statute recognizes the ambulatory nature of a will as a dispositive instrument and that it is revocable during the life of the testator. The proposed statute's provisions shall apply to wills of decedents who die after the effective date of the statute. In other words, if a testator draws his will before the effective date of the statute leaving his property "To 'A' for life and then to the heirs of 'A's' body" and dies after the effective date of the statute, the statute will prevent the Rule in Shelley's Case from applying and a remainder will be created in the heirs of "A's" body. Being ambulatory the will does not become legally

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[82] Tabor v. Ward, 83 N.C. 291 (1880).

[83] The oldest case found applying the Rule in Shelley's Case in North Carolina was Williams v. Holly, 4 N.C. 266 (1815).

[84] SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 204 (1953).

effective until the death of the testator. The design of the proposed statute is that it shall have this limited retroactive effect with reference to wills although analytically it can be shown that its effect is only prospective in fact in this regard since no will vests any rights until the death of the testator.[85] The proposed statute is to be remedial and beneficial in its nature and ought to be liberally construed to apply to every case which its words could properly include. Since, as has been demonstrated, the Rule in Shelley's Case has the effect of frustrating the legitimate intentions of the testator, taking the property from persons to whom the testator intended to give it and bestowing it upon others, and since the Rule is never relied on by the testator seeking to make a disposition of his property by will, there would seem to be no reason why the proposed statute should not apply to existing wills of decedents who die after the effective date of the statute. The only persons who can claim under the Rule are persons who seek to benefit solely on the basis of technical and arbitrary requirements and to profit from testator's ignorance. There does not seem to be any unjustness or inequity in denying such persons resort to the Rule by reason of the will provision of subsection (c) of the statute.

CONCLUSION

While the doctrine of *stare decisis* tends to produce certainty and reliability in our law, even certainty is desirable only so long as it operates to produce the maximum good and the minimum harm to society. And it has been illustrated that the Rule in Shelley's Case, although assiduously followed by the North Carolina Supreme Court, has too many variable elements to be relied upon by the bar. The fact that no fewer than one hundred and twenty-seven cases have reached the highest court in the state concerning the Rule is evidence of its uncertainties and undesirability in North Carolina. That it is never relied on by persons drafting instruments, that it catches only the unskilled and unwary only by chance, accident or ignorance, that it operates to frustrate the legitimate intentions of testators and grantors one hundred per cent of the time, that it is easily subverted and circumvented by skilled draftsmen, that it renders titles uncertain and unmarketable, that it discriminates against North Carolina grantors and devisors in imposing additional

[85] Reynolds v. Love, 191 Ala. 218, 68 So. 27 (1915).

federal taxes when their deeds and wills are caught by its application, and that it is a prolific producer of unnecessary lawsuits are a series of reasons why the Rule in Shelley's Case should be abolished in North Carolina. It is peculiarly a duty of the legislative body since the Supreme Court of North Carolina has stated its bent against changing laws of property by judicial fiat. A statutory enactment can operate prospectively to abolish the Rule without disrupting or disturbing existing land titles derived prior to the effective date of the statute. This six hundred and forty-two year old rule, scuttled in the country of its origin[86] and almost all other states of the United States[87] should likewise be abrogated in North Carolina by her General Assembly. As Justice Griffin of the Texas Supreme Court said in a concurring opinion in the case of *Sybert v. Sybert*:[88]

> "[E]very case in which the Rule in Shelley's Case applies results in setting aside the intention of the person making the instrument. . . . *That rule is a relic, not of the horse and buggy days, but of the preceding stone cart and oxen days* (Emphasis added). . . . . This rule is only a trap and snare for the unwary and should be repealed. Repeal is the duty of the legislative branch of our government and the judiciary cannot legislate by refusing to follow the Rule." (Emphasis added.)

It has also been aptly observed by another judge, Justice Weaver, in a dissent in the case of *Doyle v. Andis*,[89] that:

> "There is not another doctrine connected with the law of real estate which has been productive of so much strife, not another which the courts have involved in such obscurity and uncertainty, and not another of which it can be so truly said that *its application is invariably a triumph of injustice.*" (Emphasis added.)

The Rule in Shelley's Case is a disused and discredited relic that a fast emerging and progressive state like North Carolina can well do without.

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[86] The Rule in Shelley's Case was abolished by the Law of Property Act § 131 (1925).

[87] See note 71, *supra*.

[88] 152 Tex. 106, 110, 254 S.W.2d 999, 1002 (1953). Texas abolished the Rule in 1963. TEX. REV. CIV. STAT. ANN. art. 1291a (Supp. 1964).

[89] 127 Iowa 36, 102 N.W. 177 (1905).