

## A PLEA FOR A STATUTE.

The well-known tendency of the lawyer engaged in the drafting of conveyances is to adhere as closely as possible to the beaten paths; to follow the forms handed down from the fathers; to view with suspicion and close scrutiny any departure therefrom, and to insert new clauses and covenants only when convinced that they are demanded by the necessities engendered by conditions and enterprises unknown to a former day.

It is comparatively rare, however, to see him look upon this beaten path and doubt; to take up one of the time-honored forms and pause; to study a rule of law propounded in the reign of Edward II., and in drawing an instrument with the intention of avoiding the operation of that rule, to feel that the use of one synonym instead of another will result in the enforcement of the rule and the defeat of his purpose.

Yet this is the situation to-day of the Pennsylvania lawyer who has been employed to draw a deed or will creating an estate for life in the first taker with remainder to his issue, offspring, heirs or children. The advice may be given him to stop, look, and ponder, for the beaten path is treacherous.

The case of *Grimes v. Shirk*, 169 Pa. St. 74 (May 20, 1895), is the latest thus far officially reported touching the Rule in Shelley's Case. It was an appeal from the Common Pleas of Lancaster County, and the judgment was affirmed by the Supreme Court upon what was justly pronounced "the able and exhaustive opinion" of the court below, Livingston, P. J.

The ruling was upon the proper construction to be given to the following clause in a will:

"I give and devise to my adopted daughter Hester . . . all that certain message . . . for and during the term of her natural life. And after the death of my said adopted daughter, I give and devise the reversion or remainder of the real estate herein devised to her, to her lawful issue, to have and to hold the same to them, their heirs and assigns forever. And in case the said Hester should die without leaving lawful issue, then the aforesaid real estate shall revert to my estate, and I give and devise the same to my heirs under the intestate laws."

*Held*, that Hester took an estate in fee in the land devised to her.

There should have been nothing surprising in this ruling except, perhaps, to the lawyer who drew the will and thought that he was effectuating the intention of the testator. The Rule in Shelley's Case has been a landmark of real estate law for centuries, and the court followed a host of authorities in holding that this devise was within the rule. Another case involving the same point (*Heister v. Yerger*, 166 Pa. St. 445) had been decided four months earlier in the same way, though the opinion was not so full. That was the case of a devise to a nephew for life and after his decease, to his then surviving heirs in fee simple. *Held*, that the nephew took a fee simple estate in the land.

Just here arises the difficulty and commences, in the language of Judge Brewster, (III Practice, Sec. 3940) "such a clashing of authority as tends to perplex and bewilder the practitioner"—"an evil unquestionably serious". The question is, as above stated, how is an instrument to be drawn under the Pennsylvania authorities which will vest a life estate in the first taker with remainder to his heirs, with the same degree of certainty as is incident to an ordinary conveyance to a grantee in fee?

There ought to be some way of effecting it. It is not intricate or complex; on the contrary, it is one of the first modes of disposing of an estate that suggests itself to a testator. I assert, nevertheless, that without legislative intervention it cannot be done upon any other foundation than the hope that the Supreme Court will follow a certain line of its own decisions rather than another.

In 1876, Mr. Joseph P. Gross, of the Philadelphia Bar, prepared a set of nine "Tabular Statements of the Decisions of the Supreme Court of Pennsylvania upon the Rule in Shelley's Case," of which five hundred copies were printed for the use of the State Senate. It evinces a careful examination of the authorities and affords proof by diagrams of the confusion referred to; one table containing a summary of the special features in each case where certain words received one construction, and the succeeding table containing the cases giving *the same words* precisely the opposite construction; and so on, throughout the tables.

There are to be found in our Supreme Court Reports more than one hundred cases involving the Rule in Shelley's Case. They may be classified as follows, it being understood, of course, that words of limitation carry the fee to the first taker, those of purchase giving him only a life estate and preserving the remainder :

	Limitation.	Purchase.
Heirs . . . . .	21	6
Heirs of the Body . . . . .	6	2
Issue * . . . . .	12	16
Children . . . . .	7	27
Offspring . . . . .	1	
Words equivalent to Heirs . . . . .	1	

Upon an account stated of the foregoing figures, it would seem that the word "Children" is the only one that can be safely employed for the end in view. This conclusion is strengthened by the fact that the six decisions of the Supreme Court since 1887, construing this word, have held it a word of purchase, although in that year the same court, in *Mason v. Ammon*, 117 Pa. 127, held a devise to a sister "and at her death to her child, children or other lineal descendants," to vest a fee-tail, converted by the statute into a fee-simple, in the first taker, the latter words qualifying the words "child or children" and making them words of limitation.

In more than one of the latter cases, such as *Keims Appeal*, 125 Pa. 480 (1889), reference is made to *Cote v. Von Bonnhorst*, 41 Pa. 243 (1861), where the court say: "We spend no time in showing that, under a devise to one for life with a remainder to his or her *children*, the first taker has no freehold of inheritance. That such is the general rule is beyond doubt." Yet, in *Haldeman v. Haldeman*, 40 Pa. 29 (1861), the Supreme Court, speaking by the same judge (Strong), held a devise to three daughters, executors to pay them the rents and income during their lives, and at their deaths the estate "to descend and go to the *child*, and if *children*, share and share alike, and in default of issue," then over, to be an estate tail converted into a fee.

And, in *McKee v. McKinley*, 33 Pa. 92 (1859), the court

\*The sixteen cases construing the word "Issue," it will be remembered, have now been overruled by *Grimes v. Shirk* (*supra*).

held a devise to a daughter for her sole use "revertible" after her death to her *children*, and in case of no children or issue of children, then over, to vest a fee simple in the daughter.

(It ought, perhaps, to be noted that the report of this case states that "Strong, J., was absent at *Nisi Prius*.")

These cases followed *Stewart v. Kenover*, 7 W. & S., 288 (1844); *Williams v. Leech*, 28 Pa. 89 (1856), and *Naglee's Appeal*, 33 Pa. 89 (1859), but still we are told, in *Cote v. Von Bonnhorst*, that the doctrine stated is the general rule and beyond doubt. Attention may, therefore, well be called here to the case of *Oyster v. Knull*, 137 Pa. 448 (1890), where the court below, Simonton, J., had construed the word "children" as equivalent to "heirs." While the Supreme Court reversed this construction, it remarked (p. 453): "It cannot be said that the construction we have adopted is entirely free from doubt."

And it cannot be said that this doubt has been lessened by the recently reported case of *Ralston v. Truesdell*, 178 Pa. 430. In that case the language of testator was:

"I leave and bequeath unto my granddaughter N. all the real property that my wife enjoys during her life, and at my wife's death I bequeath the same property that she held during her life to N. and *the heirs of her body*; but if she should die and leave no *child or children*, then in such a case the said property shall be sold to the best advantage and equally divided among my other legatees and their heirs."

The Supreme Court affirmed the judgment of the court below on the opinion of McIlvaine, P. J., holding that the words "heirs of the body" created an estate tail in N., which the words "child or children" did not affect; that although this estate was enlarged by the statute into a fee-simple, the other legatees and their heirs took an executory estate in fee; that N. dying leaving no children, the estate tail (though now a fee simple) was to be abridged by the happening of that contingency and the estate in fee vested in the "other legatees and their heirs;" but, finally, that N., having executed a deed under the act of Jan. 16, 1799, to bar the entail (the grantee immediately reconveying the property to her) also by such deed barred the executory devise to the "other legatees" of the testator.

Lack of space forbids further elaboration of detailed cases, but it will be well to note, at this point, the fact that nearly all the decisions upon the subject have been upon cases where the title has been claimed or attacked through a *will* and an effort made to arrive at the intention of the testator. Now, it is recognized law that a distinction exists in point of strictness between the construction of wills and that of deeds, the latter being presumed to have been made "with forethought and care." We are forced to wonder how, under the Pennsylvania decisions, a greater degree of care *can* be employed than that shown to be necessary in the preparation of an instrument always construed with indulgence.

Judge Brewster (III Practice, p. 101), in Section 3953, entitled "To avoid defeat of testator's intention," recommends the avoidance of the words "heir" or "heirs" unless the heir is named; and also the avoidance of the words "heirs of his body," "issue" and "children," unless the cases classified by him under the heads "Issue, a Word of Purchase" and "Children, a Word of Purchase," are closely followed. But if certain children are mentioned by name, will the estate open and let in those subsequently born and not named? If not, the intent of a testator who desires all to share alike will certainly be defeated.

It has been suggested that the employment of trustees for the use of the life tenant and, at his death, to pay over the estate to the remaindermen might, in some way, affect the situation and effectuate the deviser's or grantor's intent. But the Supreme Court has repeatedly ignored that medium and recognized *a fee simple in the equitable life tenant*. The leading case on this point is that of *Ogden's Appeal*, 70 Pa. 501 (1872), cited approvingly in *Grimes v. Shirk* (*supra*).

The conclusion of the whole matter, it is again submitted, is that, in the present condition of the decisions, there can be no absolute certainty without legislative intervention. Such intervention has been obtained in New York, Massachusetts, Connecticut, New Jersey, Mississippi, Virginia, Kentucky, Ohio (as to wills), Maine, Michigan, Tennessee, Wisconsin, Minnesota, Missouri, Alabama, and New Hampshire (as to

wills). Why can not *we* have a statute by which a distinct line of demarcation will be drawn and instruments for these purposes lifted out of the "seeming clear" and the conjectural "if there be enough on the face of the will," and placed finally upon a foundation which will make it unnecessary for our courts to say, as the Supreme Court very properly said in *Heister v. Yerger* (*supra*), "*We must apply the rule governing cases of this kind, although by so doing we defeat the particular intent of the testator?*"

The following is suggested as a form of such a statute :

"*Be it enacted, etc.*, that where any estate in real property is given by deed or will to any person for his life, and after his death to his heirs or the heirs of his body, issue, children or offspring, by whatever words of equivalent import they may be designated, the conveyance or will shall be construed to vest an estate for life only in such person and a remainder in fee simple in his heirs, the heirs of his body, issue, children or offspring."

(NOTE.—As is pointed out in II. Minor's Institutes (Virginia), p. 405, this form would not toll the effect of the rule where any estate of freehold other than an estate for the life of the ancestor is first granted—*e. g.*, an estate for the life of another. Instances of this kind are, however, rare, and for conveyancing purposes it is believed that the above would suffice.)

Pennsylvania may safely be pronounced a most conservative state in regard to the adoption of amendments to her established laws. Indeed, she may be said to carry this conservatism at times to a perilous extreme. A rule of law may be gray with age and therefore venerable; but it may also be gray with mildew and absurd, to describe it by no harsher term. Only in 1855 was the Statute of Frauds, in the form that had obtained since 29 Car. II in England, and for decades prior to 1855 in most of the American states, completed in this state. Only in the same year was passed the act abolishing estates-tail. Only in 1874 was a constitution adopted which prohibited local or special legislation—an evil, which, had it continued much longer, must have resulted in the necessity of legal specialists for each county. And not yet has a uniform Practice Act been provided to take the place of the differing rules of court of the fifty-four judicial districts of the state.

No serious opposition to a movement for this advance in our real estate law should be anticipated. As soon as its merits

are explained to the layman they will be acknowledged by him; for one of the anomalies which he holds in greatest dread is a legal instrument which says one thing and means another—the reason of the difference being in this case simply impossible of explanation to him.

Will not one of the lawyer-members of the General Assembly, now in session, take up this matter and by securing the enactment of a statute similar to that suggested put an end to the “perplexity and bewilderment” of the practitioner and earn the thanks of all who believe in a quiet title?

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*Titusville, Pa., April 15, 1897.*