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Some Aspects of the Uniform Property Act In Ohio

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Seldom do modern lawyers realize the ancient origin of many of the laws with which they deal from day to day. Particularly is this true in the field of property law. Rules born as far back as Merry England sometimes thrive in Ohio today. Of course, concepts which are old are not necessarily bad. Their very age may demonstrate a rugged vitality and merit which enables them to stand well the test of time. But an aged concept may remain in force because it has never been questioned, having always been imbued with a certain reverence and awe. Like heirlooms, frequently lacking in inherent value but depending, for preservation, on sentiment alone, a particular concept may have been handed down from generation to generation with that peculiar veneration accorded cherished and intimate possessions.

Should not Ohio examine its property law at this time in order to weed out and correct existing deficiencies of this sort? No better starting point for such an examina-

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tion could be found than the Uniform Property Act,[1] under the joint authorship and bearing the joint approval of the National Conference of Commissioners on Uniform State Laws (which has successfully sponsored so much other uniform legislation) and of the American Law Institute (which seldom adopts this method of obtaining advancement in the law). Drafted by recognized experts in the field of property law, it seeks to abolish anachronisms in the law and "to assimilate interests in real and personal property to each other, to simplify their creation and transfer and to protect the owners of present and future interests, and to make uniform the law with reference thereto."[2]

Should Ohio consider the adoption of the entire Act? There are some who are prone to answer this question in the negative.[3] There may be valid reasons for a different answer, however.

At the outset it is clear that piecemeal legislation is rarely enough to keep non-statutory law abreast of current customs and thought, for it does not view the picture broadly enough. In the fields of property law the Uniform Property Act takes this broad view. It suggests potential deficiencies in existing law. Moreover, its provisions are clear and simple. It codifies the various advantages appearing in the reforms already attempted in the several states. In sum, the Act presents sound, substantive principles and concise terminology, wherever revision of existing law is found necessary.

In addition, there are benefits to be gleaned from uniformity amongst the states. An out-of-state lawyer who is preparing a will or a deed concerning Ohio land need

[1] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1938), p. 262.

[2] *Ibid.* This is the stated purpose of the Act.

[3] See White, *Uniform Laws of Real Property* (1938) 12 CIN. L. REV. 549.

only refer to a manual to determine that Ohio has the Uniform Property Act, and in turn refer to his copy of that Act, in order to determine the exact status of Ohio in regard to the estates permissible in things other than land,[4] the ability to alienate future interests [5] and to subject them to claims of creditors,[6] the ability to convey successfully in a combination of grantees which includes the grantor or grantors,[7] fees tail,[8] the construction of "die without issue,"[9] the destructibility of contingent interests,[10] the implication of cross remainders,[11] the damages recoverable for waste,[12] the Doctrine of Worthier Title,[13] the matters discussed in this article and other matters of interest to such a lawyer. No longer need he consume bothersome hours in locating Ohio statutes or cases because the Act has been drafted with a view toward clarity upon first

[4] Section 3 assimilates land and personalty by providing that any interest which can be created in land can also be created in personalty. The Section is purely an enabling act and does not prescribe new or changed old methods of creation, however.

[5] Section 7 makes all future interests alienable.

[6] Section 8 subjects all future interests to the claims of creditors.

[7] Section 18 makes this possible, in various combinations.

[8] Section 10 abolishes fees tail. Wherever language appropriate thereto is used, a fee simple is created in the person who would have taken the fee tail.

[9] Section 11 establishes a rule of construction under which these words are interpreted to mean a definite rather than an indefinite failure of issue unless a contrary intention is manifested. A substitutional construction, in so far as this may relate to the death of the creator of the instrument, is similarly precluded.

[10] Section 16 makes contingent interests indestructible.

[11] Section 17 establishes a rule of construction favoring the implication of cross remainders. For instance, if a tenancy in common were granted to *A* and *B* for life, and upon the death of the survivor, to *C* in fee, the survivor would receive a life estate in the share held by the deceased, by implication.

[12] Section 21 eliminates the possibility of multiple damages for waste and prevents forfeiture therefor. Recovery for waste is limited to compensatory damages.

[13] Sections 14 and 15 abolish the Doctrine of Worthier Title in respect to both wills and deeds. A will or conveyance to the testator's or grantor's heirs effectively creates an estate in the heirs, under the rule of law enunciated in these Sections.

reading. In addition, Ohio courts may derive some benefit from interpretations already placed upon the Act by other states, such as Nebraska,[14] which have already adopted it, although complete unanimity of interpretation may not, of course, be obtainable.

It is apparent that this article could not deal properly with each single topic. Therefore, attention will be confined to two ancient rules which the Act seeks to abolish as anachronisms. The first of these is the rule in Wild's Case which is a rule of construction dealing with a limitation to a person and "his children" or "his issue." The second is the Rule in Shelley's Case which is a rule of law dealing with limitations such as "to *A* for life and then to his heirs." Such limitations are all too frequently made without adequate appreciation of the actual meaning of the words used or of the legal consequences thereof.

The Rule in Wild's Case

Generally speaking, the Rule in Wild's Case as applied in the United States results in a fee tail in the parent if there were no children in existence at the date the instru-

[14] Nebraska, Laws of 1941, Chapter 153. To date, Nebraska is the only state which has adopted the Uniform Property Act in its entirely. For other discussions of the Act, *see*: English, *The Uniform Property Act in Pennsylvania* (1941) 46 Dickinson L. Rev. 26; Ginsburg, *Uniform Property Act, Nebraska* (1939), 18 Neb. L. B. 132; Myerberg, *Maryland Examines the Uniform Property Act* (1939) 4 Md. L. Rev. 1; Sims, *The Desirability of Statutory Restatement of Alabama Property Law* (1940) 1 Ala. Lawyer 75. House Bill 184, as passed by the House of Representatives of Alabama, contains both the Uniform Property Act (described in this article) and the Uniform Estates Act, as modified by Henry Upson Sims of the Alabama Bar. The latter Act, prepared and approved by the National Conference of Commissioners on Uniform State Laws (but this time acting alone), seeks to codify and clarify current concepts of estates. The Uniform Estates Act can be enacted either separately or concurrently with the Uniform Property Act, for it has been drafted with the latter possibility in mind. For its provisions, *see* Handbrook, *op. cit. supra,* n. 5, p. 272. *See,* also, Note, *The Uniform Property Act* (1939) 52 Harv. L. Rev. 993.

ment went into effect, but in a fee simple held concurrently by the parent and his children if the opposite were the case.[15]

This doctrine originally appeared in dicta as far back as 1599. *Wild's Case* [16] involved a devise of land to *A* for life, remainder to *B* and the heirs of his body, remainder to "*W* and wife, and after their decease to their children." *C* and *D*, children of *W* and wife, were alive when the will was executed. Subsequently, the following events happened in succession: the testator, *A*, *B* (without issue), *W* and wife died; *C* had a child, *E*, and then died. The court was asked to determine *E*'s share in the testator's estate. Of course, *E* would take nothing from the will if anything less than a fee tail had been created in *W* and wife. The court held that to be the case, for *W* and wife received only a joint life estate, with a remainder for life in their children.

Because a will was involved, the technical words "heirs of the body" were not required in order to create a fee tail, although the court recognized these words to be necessary for that result had an *inter vivos* conveyance been before it. No intention to vary the ordinary construction of the words used had been manifested by the testator, said the court, while observing ". . . if *A* devises his lands to *B* and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; . . . but if a man devises land to *A* and to his children or issue, and they then have issue of their bodies, there his express intent may take effect . . . and they shall have but a joint estate for life."

The court based its holding on its belief that an immediate gift was not required by the unrebutted language

[15] *See*, 2 SIMES, FUTURE INTERESTS (1936), Sec. 409; Casner, *The Rule in Wild's Case* (1940), 7 U. of CHIC. L. REV. 438, at 446, 456.

[16] 6 Co. Rep. 16b, 77 Eng. Rep. 277 (1599).

in the will, which lent itself primarily to a life estate and remainder construction. In its first dictum, or "resolution," however, the court discerned a desire to benefit the children, while noting that the gift purported to be immediate in nature. Since no children were in being at the execution of the will (under the facts supposed), the best way to effectuate the testator's intention, in the court's opinion, was to treat the word "children" as a word of limitation and to grant *B* a fee tail.

Similarly, in the second "resolution," the court desired to give effect to the testator's probable intention, but the ordinary machinery of the common law could achieve this aim. Thus, *A* and his children were said to have but a joint estate for life, for words of inheritance were lacking, and there was no apparent intention to create a fee. (At this period the common law favored joint tenancies over tenancies in common.)[17] Moreover, since children were *in esse* when the will was made, a construction of the word "children" as a word of purchase accorded with the testator's obvious desire to transmit an immediate gift to the children, in the opinion of the court.

These dicta were carried over into actual holdings in England during the ensuing years.[18] In the United States today, the Rule in Wild's Case is a rule of construction and not a rule of law; each of the two presumptions is subject to rebuttal by the manifestation of a contrary intention.[19]

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[17] See Moushand v. Rodetzky, 5 Ohio N. P. 256, 7 Ohio D. 225 (1898); Hinkson v. Adkins, 25 Ohio N. P. (N.S.) 16 (1924); 2 SIMES, FUTURE INTERESTS (1936), Sec. 409; 2 TIFFANY, REAL PROPERTY (3rd Ed. 1939), Sec. 421.

[18] See SIMES, *op. cit. supra* n. 17, Sec. 401, and cases cited.

[19] RESTATEMENT, PROPERTY, Sec. 283; SIMES, *op. cit. supra* n 17, Sec. 403; Casner, *The Rule in Wild's Case* (1940) 7 U. OF CHIC. L. REV. 438, at pp. 446 and 456.

Both resolutions in *Wild's Case* would appear to be law in Ohio today, generally speaking.[20]

Soteldo v. *Clement*[21] states both resolutions but confines its holding to the second. There was a devise of land in trust for "*A* and her children," there being two children who were living at the testator's death; however, it is not clear from the opinion whether they were living when the will was executed. The holding was that *A* and the two children took to the exclusion of all after-born children. The court employed what it thought to be an alternative form of stating the second resolution, when it stated the rule of class gifts which requires the class to close its ranks to after-born members at the time of the distribution of the gift.

Hoover v. *Gardner*[22] cites *Soteldo* v. *Clement, supra,* in applying the first resolution, although without express mention of *Wild's Case*. Here, the devise of land was to *A* for life, then to *B* and *C* "and their children," but if either die without issue, to the survivor. No children of *B* or *C* were *in esse* either at the time of the making of the will or at the time of the death of the testator. The court held that fees tail were created in remainder in *B* and *C*. A prior decision[23] in this same case stated that the word "children" was used here as a word of limitation. It should be noted, however, that there was no extensive discussion in either opinion as contained in the published reports.

Other cases would seem to bear these cases out,[24] al-

[20] See 41 OHIO JURISPRUDENCE (1935), Sec. 676.

[21] 11 Ohio Dec. (Rep.) 802, 29 W. L. Bull. 384 (1893).

[22] 2 Ohio L. Abs. 135 (1924).

[23] 1 Ohio L. Abs. 770 (1923).

[24] With regard to the first resolution, *see*:

Soteldo v. Clement, *supra,* n. 21; Long v. Olinger, 16 Ohio L. Abs. 182 (1933). *But see:* Moushand v. Rodetzky, *supra,* n. 17 (garbled opinion; where will gave realty and personalty to wife for life, then to *A,* and to her children and grandchildren or their legal representatives, and where there were

though there is no authoritative holding on the subject in the Ohio Supreme Court. *Harkness* v. *Corning*,[25] handed down in 1873, comes about as close as any case in the Supreme Court to touching on the point. There, the devise was to *A* for life, then to *B* "and her issue," with a *habendum* clause, "to have and to hold to *B* and her issue and their heirs." A gift over to *C* was limited on *B*'s dying before 21 without issue then living. *A*'s life estate having been disposed of because *A* (the testator's wife) failed to elect to take under the will, *B* reached 21 and then died without issue. The question before the court was whether *B*'s husband was entitled to curtesy, and the court held that he was, since *B* had gotten a fee tail. Counsel expressly argued the Rule in Wild's Case, stressing the fact that there were no children *in esse* at any time. The court expressly held that *B* got a fee tail, not a life estate, expressly construed the word "issue" as a word of limitation and not of purchase, expressly announced its satisfaction that such was the rule upon "authority," but expressly refused to consider the case as if the word "children" had been used instead of "issue."

The court did not refer specifically to the wording used in the *habendum* clause, but instead seemed inclined to rest its conclusion squarely upon an interpretation of the word

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no children *in esse* either at the date of the will or at the death of the testator, *held*: fee simple vested in *A*. Court cited *Wild's Case*, but stated only that the word "children" was usually a word of purchase, but here the additional reference to the grandchildren showed an intention to make it synonymous with the word "heirs", and thus it was a word of limitation. Of course, if the latter ground was the chief basis of the decision, it would indicate that the rule of construction had been rebutted by a contrary intent, but, unfortunately, the tenor of the rest of the opinion does not support that conclusion. Consequently, it is difficult to explain or to classify this case).

With regard to the second resolution, *see*: Clark v. Clark, 13 Ohio App. 164, 31 Ohio C. C. (n. s.) 472 (1920); Moushand v. Rodetzky, *supra*, n. 17; Sheets v. Mouat, 5 Ohio N. P. (n. s.) 22, 18 Ohio Dec. 121 (1907); Hinkson v. Adkins, *supra*, n. 17.

[25] 24 Ohio St. 416 (1873).

"issue" as "heirs of the body," entirely apart from any consideration of the Rule in Wild's Case and of the presence or absence of children. *Wild's Case* was not cited in the opinion.

None of the cases cited in *Harkness* v. *Corning* directly involve a gift "to *A* and his issue." The closest they come is *Nightingale* v. *Burrell,*[26] which applies the first resolution where the devise is to "*A* and her children," and which states:

"A devise to one and his children, he having no children at the time, is equivalent to a devise to him and his issue, and creates an estate tail."[27]

It must be concluded that the cases cited, at least, do not support the court's holding. To be sure, the two texts [28] are properly cited; however, they are both of English extraction and bear no supporting American authorities on this point. Jarman, the better reasoned of these, is of the opinion that a gift to "*A* and his issue" should be treated differently from one to "*A* and his children," because of the very principle enunciated in *Wild's Case,* namely, the desire to fulfill the testator's intention to benefit *A's* issue under all conceivable circumstances. The word "issue" is *nomen collectivum,* and normally cannot be limited to descendants of any given period, unless the context indicates a contrary intention. Only by giving A a fee tail can all the issue be benefited, says Jarman, and this whether or not issue are *in esse* at any given time.

But cases, such as *Harkness* v. *Corning,* where no children or issue appear at any time, are scarcely a fair test of that principle. A fee tail would be the result, whether

[26] 15 Pickering 104 (Mass., 1833).

[27] *Ibid,* at 119.

[28] HAWKINS, CONSTRUCTION OF WILLS (Amer. Ed. 1872), 189; 2 JARMAN, WILLS (1st Amer. Ed. 1845), 328.

Jarman's reasoning or the first resolution in *Wild's Case* is followed.[29]

Although the above discussion suffices in so far as the general application of the resolutions in Ohio Law is concerned, nevertheless certain detailed quirks must be supplied in order to obtain the complete picture. As may be expected, Ohio law does not furnish all the answers, although it does pretty well. Thus, both resolutions seem to apply to both deeds[30] and wills,[31] although this would appear to be at variance with most of the cases in other jurisdictions in respect to the first resolution.[32] *Long* v. *Olinger,*[33] which applies the first resolution to a deed, is an interesting case. Realty was conveyed by *A* "to *B,* and the children of his body begotten, and their heirs and assigns forever." *B,* at the time, had been married for fifteen years and had had no children. In this suit, *B* sought to quiet his title, contending that he had received a full fee simple to the entire tract because the intent was to grant him and his children a fee simple as one class. Inasmuch as the class was limited to himself alone at the period of

[29] *Harkness* v. *Corning* has never been cited as denying the application of the second resolution where the gift is to *A* and his issue, and issue are *in esse.* Moreover, several more recent cases in the lower courts, which themselves applied the second resolution to gifts to "children", expressed dicta to the effect that the Rule will apply where the gift is to "issue". Soteldo v. Clement, *supra,* n. 21; Hinkson v. Adkins, *supra,* n. 17.

[30] In respect to the first resolution, *see:* Long v. Olinger, *supra,* n. 24. In respect to the second resolution: Sheets v. Mouat, *supra,* n. 24. *See, also:* Soteldo v. Clement, *supra,* n. 21; Moushand v. Rodetzky, *supra,* n. 17.

[31] See Ohio cases cited on the Rule in Wild's Case in this article other than those set forth in n. 30.

[32] See SIMES, FUTURE INTERESTS (1936), Sec. 406. *The Restatement of Property,* Sec. 283-b, does not follow the first resolution. It states the rule as giving a life estate to the parent and a remainder to the children as a class wherever there were no children at the date the instrument went into effect. According to Comment (a), the rule has always been as stated in respect to all deeds and to wills involving personalty, and consistency demands that it apply to devises, also.

[33] *Supra,* n. 24.

distribution, the entire fee vested in him, ran the argument. On the other hand, the defendants (who were the other children of *A*) apparently contended that *B* received no more than a fee tail. The lower court held that *B* took a fee tail. On appeal, the upper court entered into a protracted discussion of both of the resolutions in *Wild's Case,* while ruling against *B* on the sole issue before it (whether *B* had a fee simple or not), and while expressly refusing to decide just what estate *B* had received by the grant. The opinion clearly implied, however, that the court was inclined to uphold the lower court here also, not only because of what it thought to be the precedent set by other authorities, but also because of the peculiar circumstances of the case. Thus, by departing from the usual terminology here, *A* meant to accomplish something, and that was to benefit *B*'s children. The attempt would fail if *B*'s contention were allowed, so *B* received a fee tail.

This case is interesting for several reasons: seldom is such language used in an immediate grant in an *inter vivos* conveyance; authorities involving devises were cited with regard to deeds without comment as to possible differences.

None of the Ohio cases apply the Rule to personalty. In so far as the first resolution is concerned, this is quite natural, for estates tail in personalty are impossible in Ohio.[34] Thus, if the first resolution were to operate, the fee tail in the personalty would probably be converted into a full fee simple in the parent. This would defeat the whole purpose of the first resolution because the entire control over the personalty would then be in the hands of the parent, and the children would have no assurance of ultimately sharing in the gift. For this reason, the cases in

[34] Fees tail are not possible in personalty in Ohio. King v. Beck, 12 Ohio 390 (1843), reversed on other grounds in 15 Ohio 559 (1846).

other jurisdictions hold the first resolution inapplicable to personalty,[35] although the second resolution continues in full force and effect.[36] The reasons underlying the second resolution apply equally well to realty or personalty.

Several cases[37] suggest that the date the instrument goes into effect is the test date for the operation of the Rule rather than the date of its execution, although these are by no means holdings on the subject. This is at variance with the indications in *Wild's Case* as well as the subsequent English decision.[38] However, if the indications in the Ohio cases are correct, the weight of authority in other American jurisdictions has been followed.[39] Of course, it is apparent that the same test must be adopted in respect to both resolutions in order to avoid conflict.

Several cases apply the rule where the gift is post-

[35] *See* n. 32, *supra.*

[36] See SIMES, FUTURE INTERESTS (1936), Sec. 408.

[37] Soteldo v. Clement, *supra*, n. 21; Moushand v. Rodetzky, *supra*, n. 17.

[38] Seale v. Barter, 2 Bos. & P. 485, 126 Eng. Rep. 1398 (1801), in which the court, in construing a devise to "*J.S.* and his children lawfully begotten" where *J.S.* had no children at the execution of the will but had children at the testator's death, held that *J.S.* received a fee tail, expressly refusing to consider the problem as if *J.S.* had had children at the time of the devise.

But JARMAN, *op. cit. supra*, n. 28, at 308, argues against the English test as frequently frustrating the whole purpose of the Rule. For instance, where a child is alive at the execution of the will but dies prior to the testator's death, the parent may take a fee simple to the entire estate to the exclusion of afterborn children, if the parent and the children are regarded as one indivisible class and there is no lapse statute applying to class gifts. For support Jarman cites Buffar v. Bradford, 2 Atk. 220, 26 Eng. Rep. 537 (1741), the reverse case, where there were no children *in esse* when the will was executed, but some were born prior to the testator's death. *A* predeceased the testator. Against the argument that the entire devise ("to *A* and the children born of her body") lapsed, the court held in favor of the children. However, *Buffar* v. *Bradford* is explained in Byng v. Byng, 10 H.L. Cas. 171, 11 Eng. Rep. 991 (1862) (which is not a decision on the point under discussion) on the ground that the normal presumptions in *Wild's Case* were rebutted by the manifestation of the testator's intention that the devisees should be determined as of the time at which the estate vested in possession.

[39] *See* SIMES, FUTURE INTERESTS (1936), Sec. 404.

poned,[40] as well as where it is immediate,[41] although it should be noted that no case actually applies the second resolution to a postponed gift. Here it might be said that neither the doctrine as enunciated in *Wild's Case* nor the reasons underlying that doctrine would seem to permit its application where the gift in question is postponed because, in distinguishing the holding in *Wild's Case* from the *dicta,* chief stress was laid upon the immediate nature of the gift. Where the gift is not immediate the children can best benefit by a remainder construction for not only will all children, whenever born, share in the gift in accordance with the well-known rule of distribution relating to class gifts, but also these children need not undergo the possibility that their parent might dispose of his share of the tenancy in common rather than passing it along to them.[42]

The above is all the Ohio law discovered on this sub-

[40] Harkness v. Corning, *supra,* n. 30; Hoover v. Gardner, *supra,* n. 27 and 23. *Cf.* Ufferman, Exrx. v. Fry, 20 Ohio O. 39 (C.P., 1938), where the testator gave property to his wife for life, then to "be divided between my children, *A, B, C* and *D,* share and share alike, and to their children, if any, in like manner." After the testator's death, the executrix sought and obtained a declaratory judgment, which construed the will so as to give an estate to the children's children only if their parent had died before the period of distribution. No mention of the Rule in Wild's case, or the presence or absence of children, was made in the opinion. The court interpreted the words "*and* to their children" as "*or* to their children" because the prime objects of the testator's bounty were thought to be his own children. The grandchildren could not properly be regarded as competing with their parents, observed the court.

Moushand v. *Rodetzky,* cited and discussed at some length in n. 24, *supra,* also involved a postponed gift.

[41] See Ohio cases cited on the Rule in Wild's Case in this article other than those set forth in n. 40, *supra.*

[42] *Soteldo* v. *Clement, supra* n. 21, demonstrated the applicability of the resolutions to equitable as well as legal estates. *Clark* v. *Clark, supra* n. 24, *Hoover* v. *Gardner, supra* n. 22, and n. 23, and *Hinkson* v. *Adkins, supra* n. 17, demonstrates the fact that both resolutions operate where the gift is to several parents and their children under one disposition (*e. g.,* "to *A, B* and *C* and their children").

ject. That present-day Ohio law bears a very close resemblance in this respect to rules handed down hundreds of years ago in a different country with different political, social and economic customs can easily be shown. We may well stop and ask ourselves at this time: Should all this be changed? Obviously not if the results obtained from these rules are in harmony with the times today and present the nearest possible approach to the probable intention of the person creating the estate, had he foreseen the exact circumstances which eventuated.

Today, however, most states are moving away from estates tail, even in respect to realty.[43] By far the greater number of states have abolished fees tail entirely.[44] Why should a rule of construction which frequently leads to their creation continue in existence? Is not such a rule highly artificial? To follow the first resolution today, therefore, would seem to involve a complete disregard of the sentiment prevailing against fees tail.

What did the person who created the estate actually intend, in all probability? Apart from the crystallization of artificial concepts down through the years, it would seem that he was anxious about two things, above all, and these two things were more or less related; first, that all children, whenever born, should share in the gift, and second, that the gifts to the parent and to the children should be successive, and not concurrent.

Applying the first consideration to the first resolution, it would seem that Ohio law solves the basic problem in this respect in so far as realty is concerned.[45] The aliena-

[43] RESTATEMENT, PROPERTY (1st. ed. 1936), Chap. 5, Introductory Note.

[44] *Ibid.* All but six states have abolished them in one form or another. These six treat them for most purposes as a fee simple.

[45] Section 10512-8 of the Ohio General Code (Page, 1938) provides, in respect to fees tail:

". . . All estates given in tail, by deed or will, in lands or tenements lying

tion of the fee tail by the parent (the first donee fee tail) has no effect on the interest of the issue,[46] and all children, whenever born, will share in the fee simple transmitted to them by Section 10512-8 if they survive their parent's death.[47] However, the application of the first resolution with a fee tail resulting, rather than a life estate and remainder, has certain incidental effects which require specific mention: instead of being liable for waste and subject to forfeiture therefor as he would be if he were merely a life tenant, the parent as a tenant in tail completely escapes these responsibilities;[48] his spouse is entitled to the modern equivalent of dower or curtesy, because an estate of inheritance has been given;[49] and the issue of the tenant in tail must survive him or the estate will revert to the original grantor or to the testator, as the case may be.[50] Moreover, the desire to benefit the children may go completely amiss in the case of personalty; a fee tail in the parent would be converted into a fee simple absolute,[51] which would be fully alienable by the parent.

Nor does the motive to benefit all children, whenever born, thrive under an application of the second resolution. Where the gift is immediate, the rules of distribution in relation to class gifts exclude those born after the period

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within this state, shall be and remain an absolute estate in fee simple to the issue of the first donee in tail . . ."

[46] Pollock v. Speidel, 17 Ohio St. 439 (1867); Hoover v. Gardner, *supra*, n. 28. *See* Yoder v. Ford, 10 Ohio Dec. (Rep.) 675, 23 W.L. Bull. 54 (1889).

[47] This follows from Section 10512-8, quoted above, n. 45.

[48] Hall v. Rohr, 10 Ohio Dec. (Rep.) 690, 23 W. L. Bull. 121 (1890). *See* Pollock v. Speidel, *supra*, n. 46; Williams v. Haller, 13 Ohio N.P. (n.s.) 329, 27 O. Dec. 343 (1912); (good comparison, here, of respective characteristics of life estate and fee tail).

[49] Harkness v. Corning, *supra*, n. 25; Broadstone v. Brown, 24 Ohio St. 430 (1873). *See* Pollock v. Speidel, *supra*, n. 46; Williams v. Haller, *supra*, n. 48.

[50] Evangelical Lutheran Confession v. Sheffield, 90 Ohio St. 467, 108 N.E. 1119 (1914).

[51] See n. 34, *supra*.

of distribution, *i. e.*, either the death of the testator or the delivery of the deed. True, where the gift is postponed this may not be correct because the second resolution merely determines that the parent and the children take a concurrent estate in fee, while the rules of class gifts hold the class open until distribution. Even here, however, some after-born children may be shut out. Of course, this discussion of the application of the second resolution to postponed gifts is speculative because, as noted above,[52] no cases have arisen on this point in Ohio as yet.

The second resolution, as mentioned above, also seems artificial and not the best solution to the problem because it puts the parent and the child on an equal plane. How frequently can it be said that that is the intended result, rather than one affording the parent possession and control during his life, he to be succeeded in fee by his children? Of course, no one can be certain, but it would appear that any presumption should lean in the latter direction, being subject of course to rebuttal by a manifestation of a contrary intent.

To some extent, at least, a concurrent construction under the second resolution also defeats the intention to benefit the children. Where the parent receives a parcel of the entire estate as a tenant in common in fee simple, his parcel is fully alienable and may never find its way into the hands of his children, as the testator probably intended.

Finally, the doctrine of *Wild's Case* seems completely artificial and unreal because of its very lack of uniformity. The same simple words "to *A* and his children," are construed to mean all sorts of different things, in accordance with the circumstances subsequently found to be present. How much more simple and natural it would seem to interpret these words in one way in every instance. Not only

[52] See discussion immediately following n. 37, *supra.*

would this probably accord more closely to actual intention, but also an increased certainty of result would be obtained therefrom both in respect to draftsmanship[53] and in respect to the avoidance of litigation.

Section 13 of the Uniform Property Act[54] enunciates a rule of construction which changes both resolutions in *Wild's Case*. In the absence of contrary intention, Section 13 creates a life estate in the parent, with a remainder in fee to his children, when the gift or grant reads "to *A* and his children" or "to *A* and his issue", and this whether deed, will, realty or personalty is involved, whether the gift is immediate or postponed, legal or equitable, and irrespective of the presence or absence of children at any time. By so doing, it seeks to bring the law up to date. Time-worn fees tail are avoided. All children, whenever born, are benefited. Successive rather than concurrent estates are created. Simplicity and uniformity are achieved.

This is meritorious legislation, worthy of enactment in Ohio.

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[53] It is, of course, patently clear that no skilled draftsman would employ these words. Instead, he would spell out the precise result intended, thereby avoiding all inherent uncertainties and preventing all potential litigation. But query whether all of the instruments in the many cases on this point were drafted by layman. For the all too numerous cases in other jurisdictions, see Casner, *op. cit. supra*, n. 19.

[54] Section 13 provides:

"When an otherwise effective conveyance of property is made in favor of a person and his 'children,' or in favor of a person and his 'issue,' or by other words of similar import designating the person and the descendants of the person, whether the conveyance is immediate or postponed, the conveyance creates a life interest in the person designated and a remainder in his designated descendants, unless an intent to create other interests is effectively manifested." Section 1, containing definitions of "property," "future interest," "conveyance," "otherwise effective conveyance" and "effectively manifested," defines "property" to include both real and personal, legal and equitable property, and "conveyance" to include both wills and deeds. Some appropriate adjustment should be made of course, if Section 13 is adopted without the remainder of the Act.

The Rule in Shelley's Case

Another well-known anachronism in property law is the Rule in Shelly's Case. Several Ohio cases [55] have quoted Kent's statement of this rule as follows:[56]

"When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

This statement could be more precise, but it will serve present purposes. This Rule converted a gift "to *A* for life, and then to his heirs" into a life estate in *A*, followed by a remainder in fee to *A* and his heirs.[57] The word "heirs" was changed thereby from a word of purchase to a word of limitation. In addition, the doctrine of merger [58] operated wherever possible, so that *A* ultimately received a fee simple absolute, which was freely alienable.

This Rule, originating in England long before the case [59] which gave it its name in 1581,[60] was a product of

[55] Continental Mut. Life Ins. Co. v. Skinner, 4 Ohio C. C. 526, 2 Ohio C. D. 688 (1890), *aff'd without opinion* in 30 W. L. Bull. 307 (1893); Gordon v. Bartlett, 28 Ohio L. Abs. 161 (1938), *motion to certify overruled,* March 8, 1939; Davis v. Saunders, 8 Ohio N. P. 161, 11 Ohio D. 259 (1900).

Other statements of the rule in Ohio can be found in: McFeeley's Lessee v. Moore's Heirs, 5 Ohio 465 (1832) (a leading case: its statement of the rule quoted in many subsequent cases); King v. Beck, 12 Ohio 390 (1843).

[56] 4 Kent's Commentaries.

[57] For additional discussion of this entire topic, *see* 36 Ohio Jurisprudence (1st Ed. 1934), "Shelley's Case, Rule In."

[58] *See:* Brockschmidt v. Archer, 64 Ohio St. 502, 60 N.E. 623 (1901); Kepler v. Reeves, 7 Ohio Dec. (Rep.) 34, 1 W. L. Bull. 58 (1876); Hess v. Lakin, 7 Ohio N.P. 314, 7 Ohio D. 300 (1898). *But see*: Kirby v. Brownlee, 13 Ohio C.C. 86, 7 Ohio C.D. 460 (1894), where it was suggested that the operation of the Rule would result in a fee simple in the ancestor which would swallow up an intervening life estate.

[59] 1 Coke 93b, 76 Eng. Rep. 206 (1581).

[60] Restatement, Property (1st. ed. 1940), Sec. 312, Comment (a), traces the Rule as far back as 1324 A.D.

the feudal system of tenure in land. Incidents of tenure, such as wardships, reliefs and marriage fees, were lost to the overlord if land passed by purchase rather than by descent. Therefore, the landed aristocracy, who were in power, favored the latter method of transfer. The Rule in Shelley's Case, which looked toward transfer by descent, was the natural result.

Although often spoken of as a rule of law,[61] defeating intent, and therefore not subject to rebuttal from an examination of the instrument as a whole, this statement should not stand alone. There was always a preliminary problem of construction to determine whether the word "heirs" was used in the technical, medieval sense as *nomen collectivum,* meaning an indefinite, inheritable line of succession,[62] rather than as a word of description referring to individuals who would inherit from the ancestor if he were to die intestate and who were intended to form a new root of descent.[63] In Ohio, the presumption was in favor of the former interpretation,[64] but if the latter were discovered from the context and surrounding circumstances the Rule had no application.[65] However, if all the requirements of the Rule were found to be present, it was ruthlessly applied

[61] King v. Beck, 15 Ohio 559 (1846); Brockschmidt v. Archer, *supra,* n. 58; Neff v. Abert, 9 Ohio App. 286 (1918); and many others.

Cf. Kiersted v. Smith, 8 Ohio N.P. 378, 10 Ohio D. 279 (1900); Re Dennis, 30 Ohio N.P. (n.s.) 118 (1928).

[62] King v. Beck, *supra,* n. 61; Brockschmidt v. Archer, *supra,* n. 58; Continental Mut. Life Ins. Co. v. Skinner, *supra,* n. 55; Halley v. Hengstler, 3 Ohio C.C. (n.s.) 161, 23 Ohio C.C. 504 (1902), *aff'd without opinion* in 70 Ohio St. 452, 72 N.E. 1158 (1903). *See, also,* 36 OHIO JURISPRUDENCE (1st ed. 1934), "Shelley's Case, Rule In," Sec. 7.

[63] Turley v. Turley, 11 Ohio St. 173 (1860); Watson v. Watson, 34 Ohio App. 311, 171 N. E. 257 (1929). In addition, see cases cited, *supra,* n. 62. *See also,* 36 OHIO JURISPRUDENCE (1st ed. 1934), "Shelley's Case, Rule In," Sec. 13, 15, 16.

[64] Brockschmidt v. Archer, *supra,* n. 58; Halley v. Hengstler, *supra,* n. 62. *See, also,* King v. Beck, *supra,* n. 61.

[65] See cases cited in n. 63, *supra.*

despite the most vigorous of protestations on the part of the grantor or testator in the rest of the instrument.[66]

Ohio first introduced a statute attempting to abolish the Rule in Shelley's Case in 1840.[67] Few changes,[68] other than changes in the number of the section and slight changes in the wording, have occurred in the statute until the recent amendment to Section 10504-70,[69] which went into effect on August 21, 1941. Prior to that amendment Section 10504-70 read as follows:

"When lands, tenements, or hereditaments are given by will to a person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall vest an estate for life only in such first taker, and a remainder in fee simple in his heirs."

However, even a cursory examination of the statute in that form reveals several wide gaps which enable the Rule to descend unexpectedly from its feudal hideout to trap the unwary and to defeat intention. For over one hundred years the statute dealt specifically with wills alone. On its face the statute seemed to leave deeds, personalty and gifts to *A* and then to the heirs of his body untouched. The cases supported the first [70] and the third [71] of these im-

[66] See n. 61, *supra*.

[67] See 36 OHIO JURISPRUDENCE (1st ed. 1934), "Shelley's Case, Rule In," Sec. 22; also, discussion in Ohio cases on this Rule cited elsewhere in this article.

[68] *Ibid.*

[69] OHIO GENERAL CODE (Page, 1938).

[70] Continental Mut. Life Ins. Co. v. Skinner, *supra*, n. 55; Bates v. Winifrede Coal Co., 4 Ohio N.P. (n.s.) 265, 15 Ohio D. 533 (1906), *aff'd without opinion* in 30 W. L. Bull. 307 (1906); Akers v. Akron, etc., Ry. Co., 20 Ohio C.C. (n.s) 352, 41 Ohio C.C. 354 (1912); Neff v. Abert, *supra*, n. 61; Mack v. Champion, 11 Ohio D. 327, 26 W. L. Bull 113 (1890); Jenkins v. Artz, 7 Ohio N.P. 371, 6 Ohio D. 439 (1897); Kepler v. Reevers, *supra*, n. 58; Gordon v. Bartlett, *supra*, n. 55; Hess v. Lakin, *supra*, n. 58; Davis v. Saunders, *supra*, n. 55; Patterson v. Patterson, Dayton, 288.

One minor exception was Kirby v. Brownlee, *supra*, n. 58, where a trust was created by deed for the purpose of a marriage settlement.

[71] Watson v. Watson, *supra*, n. 63.

Contra: Chaffin v. Dixon, 13 Ohio App. 1 (1920), *motion to certify*

pressions. Although text writers stoutly proclaimed [72] that the Rule did not apply to personalty in Ohio, no Ohio cases had specifically discussed the point.[73]

However, this unsatisfactory condition was cleared up greatly with the enactment of the recent amendment to Section 10504-70, which now reads as follows:

"When lands, tenements or hereditaments are given by *deed or* will to a person for his life, and after his death to his heirs in fee, . . . the conveyance shall vest an estate for life only in such first taker,

overruled in 18 Ohio L.R. 44 (1920); Williams v. Haller, 13 Ohio N.P. (n.s.) 329, 27 Ohio D. 343 (1912).

[72] *See* 36 OHIO JURISPRUDENCE (1st ed. 1934), "Shelley's Case, Rule In," Sec. 21. *See,* generally, in respect to the Rule in Shelley's Case as applied to personalty: 1 SIMES, FUTURE INTERESTS (1st ed. 1936), Sec. 220; Kales, *The Rule in Shelley's Case Does Not Apply to Personal Property* (1910), 4 ILL. L. REV. 639.

[73] King v. Beck, appearing in the reports at 12 Ohio 390 (1843) and at 15 Ohio 559 (1846) is the case usually cited in support of the text writers. It does not specifically mention the applicability of the Rule in Shelley's Case to personalty, although it does state that fees tail are possible in land only. The will in question gave all the property owned by the testator to *A*, to be used by him without reservation while he lives; at his death, to *A*'s legal heir or heirs, born in wedlock, and if none, to the children of *B* and *C* (the testator's sisters), in equal shares. The testator died leaving both real and personal property. *A* survived the testator, and then died leaving children living. The question arose as to whether *A*'s administrator or *A*'s children should take. In its first opinion in the case, the court awarded the real property to *A*'s heirs of the body on the ground that the Rule in Shelley's Case gave *A* a fee tail, and the Ohio statute dealing with fees tail give *A*'s heirs of the body an estate in fee simple upon *A*'s death. The court awarded the personalty to *A*'s administrator, however, because *A* had full title thereto. In ruling out the possibility of a remainder in *A*'s heirs of the body, the court observed that the same words of the same sentence of the same bequest, conveying property of both classes, would not receive different meanings. Since fees tail were not possible in Ohio in respect to personalty, however, *A* was given a fee simple absolute. It is submitted that this case, if it stands for anything in respect to the Rule, stands for the proposition that the Rule does apply to personalty, at least where the Rule has been applied to realty passing under identical gift.

In the second opinion in the case, the court reversed the previous decision, giving *A*'s children a remainder in fee in both the realty and the personalty. Since the court interpreted the words "heirs born in wedlock" as "children," the children took as purchasers, and hence there was no occasion whatsoever for an application of the Rule.

and a remainder in fee simple in his heirs; *should the remainder be given to the heirs of the body of the life tenant, the conveyance shall vest an estate for life only in such first taker and a remainder in fee simple in the heirs of his body. The rule in Shelley's Case is hereby abolished and shall not be given force or effect.*"[74]

It is apparent that Ohio has at last abolished the Rule in Shelley's Case in its entirety. Each of the three difficulties under the earlier statute has been removed in one way or another. The statute now covers deeds expressly. Where the grant is to *A* for life and then to the heirs of *A*'s body, there is no longer any doubt but that *A* takes a life estate with the heirs of *A*'s body receiving a remainder in fee simple.[75] Moreover, any remaining uncertainties in respect to the application of the Rule to personalty would seem to be removed.[76] The last sentence in the statute is a direct statement of the legislative intention to abolish the Rule. It is difficult to see how courts could cir-

[74] The words italicized have been added by the recent amendment. The following words have been deleted where the dots (. . .) appear: "or by words to that effect,".

[75] There was some question before the recent amendment to Section 10504-70, as to whether the Rule would apply to remainders to the "children" or "issue" of the life tenant.

Cases holding the Rule inapplicable to remainders to "children," irrespective of any statute on the subject: Turley v. Turley, *supra*, n. 65; Williams v. Mears, 2 Disn. 604, 13 Ohio Dec. (Rep.) 369 (1859); Sheets v. Mouat, *supra*, n. 24. See Akers v. Akron, etc., Ry. Co., *supra*, n. 70.

For *dicta* indicating the Rule does not operate in respect to remainders to "issue," see: Williams v. Mears, *supra* (dictum in case involving "children"); Halley v. Hengstler, *supra*, n. 62 (dictum in cases involving "heirs"). *See, also,* 36 OHIO JURISPRUDENCE (1st ed. 1934), "Shelley's Case, Rule In," Sec. 15. *Contra*: see Watson v. Watson, *supra*, n. 63 (dictum in case involving "issue of her body, then living").

The recent amendment of Section 10504-70 would appear to settle the matter.

[76] See Note, *The Uniform Property Act* (1939), 52 HARV. L. REV. 993, at 999, where it is suggested that personalty is not expressly covered in most of the statutes attempting to abolish the Rule in Shelley's Case. This seems desirable because some courts tend to apply the Rule indiscriminately to personalty as well as realty.

cumvent this declaration even if they so desired, which they undoubtedly do not in view of their previous outcries against the Rule.[77] This declaration was unquestionably inserted to remove all conceivable sources of ambiguity, such as the application of the Rule to personalty, for the long and checkered career of the Rule in Ohio and had aptly demonstrated the grave need for a catchall provision of this type.

Does Section 10504-70, as amended, limit the number of estates available to the practitioner? Not at all. His situation remains exactly the same as before. Whereas the skilled practitioner could avoid the application of the Rule, even before its abolition, by skilful draftsmanship (*i. e.,* by demonstrating his use of the word "heirs" in the more limited sense),[78] the present practitioner is even less pressed to achieve his ends. He needs merely to use long-accustomed language, "to *A* and his heirs," to create a full fee simple, for the statute applies only where *remainders* are limited to the heirs of the life tenant. Similarly, if the desire is to give *A* a life estate, and, either mediately or immediately, a remainder to *A* and his heirs, that also can be done, apart from the doctrine of merger. As was the case under the Rule itself, a preliminary problem of construction[79] exists before a conclusion can be reached as to the application of the statute. Thus, the statute would not be applicable here because it deals only with remainders

[77] The following cases criticize the Rule as unreasonably defeating intention: McFeeley's Lessee v. Moore's Heirs, *supra,* n. 55; King v. Beck, *supra,* n. 61; Kirby v. Brownlee, *supra,* n. 58; Patterson v. Patterson, *supra,* n. 70.

Only one case seemed to favor it. *See* Hess v. Lakin, *supra,* n. 58, where the court believed alienability to be furthered.

[78] *See* note 63, *supra.*

[79] *See In Re* Youtsey, 260 Fed. 423 (D.C., S.D. of Ohio, 1916), for illustration of court's attitude toward problem of construction after the Rule in Shelley's Case had been abolished by statute in Ohio in respect to wills.

to the life tenant's heirs and not with those to the life tenant himself.

What effect will the recent amendment have on the status of fees tail in Ohio? As noted above, a gift "to *A* for life, and then to the heirs of his body," which the combined operation of the Rule in Shelley's Case and the doctrine of merger would ordinarily convert into a fee tail in *A* (which would be subject to the application of Section 10512-8), now results in a life estate in *A,* followed by a remainder in fee simple in those persons who prove to be the heirs of his body at his death. Is Section 10512-8 circumvented by that result, thereby indicating a new trend in the treatment of fees tail in Ohio? No. The abolition of the Rule in Shelley's Case merely allows the words "heirs of his body" to function as words of purchase in accordance with intention. Sections 8510-11 [80] (in respect to deeds) and 10504-72 [81] (in respect to wills) do the rest, for they provide that a full fee simple is created unless an intention to create a lesser estate has been manifested. However, in order to be certain that all conflict between Sections 10504-70 and 10512-8 would be avoided, this situation was expressly covered in the recent amendment to the former section.

Does the amended statute apply if the estate granted to the heirs is not immediate? For instance, suppose a testator devises property to *A* for life, to *B* for life, and then to *A*'s heirs. Once again, the statutory mandate—"The rule in Shelley's Case is hereby abolished and shall not be given force or effect."[82] will come into play. But

[80] OHIO GENERAL CODE (Page, 1938).

[81] *Ibid.*

[82] Section 10504-70 of Ohio General Code (Page, 1938), as amended; quoted n. 74, *supra.*

who are the heirs under such circumstances?[83] Of course, the statute is of no help here; the answer depends on ordinary principles of construction relating to class gifts. Under these, the "heirs" would probably be determined as of the date of *A*'s death, unless the testator had manifested an intention to select some other date. Of course, strictly speaking, the word "heirs" means those persons who inherit *A*'s estate under the Ohio laws of descent and distribution when *A* dies intestate. Although this does not necessarily happen under the circumstances stated above, the nearest approximation to the technical meaning and the one probably intended by the testator would be such persons as would stand in the relationship of heirs at *A*'s death if the statute of descent were brought into operation. However, a court would undoubtedly scrutinize the will closely for an indication that another date for the determination of *A*'s "heirs" was intended, such as the date of the execution of the will, the death of the testator, or the actual distribution of the estate to the "heirs." If discovered, any of these intentions would be honored, thereby closing the class on those who would be *A*'s heirs if he were to die intestate on the prescribed date.

Section 12 of the proposed Uniform Property Act[84] and Section 10504-70, as amended, accomplish the same results, but do so in a slightly different manner. Section

[83] For a more complete treatment of this problem, see Casner, *Construction of Gifts to "Heirs" and the Like* (1939) 53 Harv. L. Rev. 207.

[84] Section 12 reads as follows:

"Whenever any person, by conveyance, takes a life interest and in the same conveyance an interest is limited by way of remainder, whether mediately or immediately, to his heirs, or the heirs of his body, or his issue, or next of kin, or some such heirs, heirs of the body, issue, or next of kin, the words 'heirs,' 'heirs of the body,' 'issue,' or 'next of kin,' or other words of like import used in the conveyance, in the limitation therein by way of remainder, are not words of limitation carrying to such person an estate in the property, but are words of purchase creating a remainder in the designated heirs, heirs of the body, issue, or next of kin."

12 is more explicit in abolishing the Rule in Shelley's Case in respect to gifts to issue or next of kin (and thus in respect to personalty) and to mediate (as contrasted to immediate) remainders in the heirs of the life tenant. Like Section 10504-70, Section 12 expressly states its underlying motive, *i. e.,* to abolish the Rule in Shelley's Case, but it does so in the title instead of the body of the Section. The effect would no doubt be the same whatever the position.

In conclusion, therefore, it would seem unnecessary to enact the proposed Section 12 in Ohio at the present time unless the rest of the Act is likewise adopted. A desire for promoting uniformity as between states would seem to be the sole reason for preferring Section 12 over Section 10504-70, together with the inherent advantages resulting therefrom. Ohio should learn its lesson, however, from the many statutes which attempted to abolish the Rule in Shelley's Case over a period of more than one hundred years before achieving complete success. What could be a more effective demonstration of the fact that piecemeal legislation doesn't pay?