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ESTATES IN FEE TAIL AND THE RULE IN SHELLEY'S CASE IN FLORIDA

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Estates in fee tail and the Rule in Shelley's Case are part of the common law heritage of most American jurisdictions. Both of these concepts of the law of real property were developed in a feudal society and are the outcome of the centuries-old struggle by the great land-owning families to maintain their supremacy.[1] The estate in fee tail has not been a popular institution in this country.[2] The Rule in Shelley's Case is also in disfavor, because it often operates to defeat the intent of the transferor.[3] In most jurisdictions it is no longer possible to create an estate in fee tail,[4] and the Rule in Shelley's Case has been abolished.[5]

A consideration of estates in fee tail is not, however, of purely academic interest. Statutes prohibiting the creation of estates in fee tail and those abolishing the Rule in Shelley's Case cannot constitutionally operate retroactively to extinguish vested interests that arose prior to passage of the statutes.[6] The Florida Supreme Court as recently as 1952[7] applied the Rule in Shelley's Case in a decision involving a deed that was executed prior to passage of the statute abolishing the Rule.[8]

Individuals unaware of the legal implications continue to make use of language creating an estate in fee tail or calling for the ap-

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1. See Dick v. Ricker, 222 Ill. 413, 420, 78 N.E. 823, 825 (1906) (dictum); Ewing v. Nesbitt, 88 Kan. 708, 711, 129 Pac. 1131, 1133 (1913) (dictum); Note, 4 FORDHAM L. REV. 316, 317 (1935).

2. See *e.g.*, Albers v. Donovan, 371 Ill. 458, 460, 21 N.E.2d 563, 564 (1939) (dictum). *But see, eg.*, Ewing v. Nesbitt, *supra* note 1, at 716, 129 Pac. at 1134 (dictum): "The overweening propensity to perpetuate family name and family property which made estates tail so obnoxious in the middle ages is fairly curbed by the right of a tenant in tail to convert his tenancy into a fee simple and is not a menace to the general welfare of the people of this state; and it will be remembered that this right became one of the characteristics of the estate."

3. 2 TIFFANY, REAL PROPERTY §344 (3d ed. 1939); Foster, *The Rule in Shelley's Case in Nebraska*, 8 NEB. L. BULL. 124, 151, 153 (1929).

4. See 19 AM. JUR. *Estates* §§46, 55 (1939);RESTATEMENT, PROPERTY ch. 5, introductory note at 201-11 (1936).

5. See 26 C.J.S. *Deeds* 953, n.50 (1942); 18 C.J. *Deeds* 320, n.97 (1919).

6. Jensen v. Jensen, 54 Wyo. 224, 89 P.2d 1085 (1939); see 1 TIFFANY, REAL PROPERTY §35 (3d ed. 1939); Day, Real Property 82-86 (unpublished materials used for instruction at the University of Florida College of Law).

7. National Turpentine & Pulpwood Corp. v. Mills, 57 So. 2d 838 (Fla. 1952), 6 U. FLA. L. REV. 578 (1953).

8. FLA. STAT. §689.17 (1959), effective June 11, 1945.

plication of the Rule in Shelley's Case.[9] The ability to recognize a transfer that would have created an estate in fee tail at common law is necessary even in jurisdictions that prohibit entailment. Most statutes prohibiting the creation of an estate in fee tail specify the effect that shall be given to such a transfer,[10] but in order to apply the statute it must first be determined that the instrument in question would have created an estate in fee tail at common law.[11]

PART I. ESTATES IN FEE TAIL

HISTORY AND DEVELOPMENT

Origin

In England prior to 1285, a conveyance of Blackacre "to *A* and the heirs of his body" created an estate in fee simple conditional.[12] The donee, *A*, obtained a fee simple, conditioned on his having heirs of his body. The donor retained a possibility of reverter. If *A* had issue at the time of the conveyance or subsequent thereto, he could convey Blackacre in fee simple absolute; but if *A* died without having conveyed Blackacre and leaving no heirs of his body, the land reverted to *A*'s donor in fee simple absolute.[13] After the birth of a child, *A* could convey Blackacre to *B* in fee simple absolute; and if he did so the fact that he died without heirs of his body would not cause Blackacre to revert to *A*'s donor.

The ability of *A* to alienate the land after the birth of issue defeated the intent of *A*'s grantor that the fee simple conditional estate should terminate if *A*'s lineal descendants should ever become extinct.[14] The great land-owning families were not to stand idly by and see their reversionary interest thus destroyed. In 1285 they secured the enactment of the Statute de Donis.[15]

The purpose of the Statute de Donis was to prevent alienation by the grantee of an estate in fee simple conditional so as to bar his issue or cut off the grantor's possibility of reverter.[16] As a result of the statute, a conveyance after 1285 "to *A* and the heirs of his body"

9. Dolye v. Andis, 127 Iowa 36, 69, 102 N.W. 177, 188 (1905) (dissenting opinion).

10. See RESTATEMENT, PROPERTY ch. 5, topic 2, titles C, D, E, F (1936).

11. Sparks, *A Decade of Transition in Future Interests.* 45 VA. L. REV. 339, 350 (1959); 19 AM. JUR. *Estates* 507 (1939); 26 C.J.S. *Deeds* 924 (1942).

12. See 2 BLACKSTONE, COMMENTARIES *110; 1 TIFFANY, REAL PROPERTY §34 (3d ed. 1939).

13. Sagers v. Sagers, 158 Iowa 729, 138 N.W. 911 (1912); see 19 AM. JUR. *Estates* 498-99 (1939).

14. 1 TIFFANY, REAL PROPERTY §34 (3d ed. 1939).

15. Statute of Westminster 2, 1285, 13 Edw. 1, ch. 1.

16. 1 TIFFANY, REAL PROPERTY 49 (3d ed. 1939).

gave rise to an estate in fee tail instead of an estate in fee simple conditional.[17]

The estate in fee tail has been defined as follows:[18]

> "[A]n estate of inheritance which, if left to itself, will after the death of the first owner, pass to his lawful issue, including children, grandchildren and more remote descendants, so long as his posterity endures, in the regular order of descent from such owner and will terminate on the failure of such posterity."

The estate in fee tail differs from the estate in fee simple conditional in several important respects.[19] The donee of an estate in fee simple conditional becomes the owner of the land in fee on the birth of issue. An estate in fee tail, however, descends to the donee's heirs named in the gift. The grantor of an estate in fee simple conditional retains a mere possibility of reverter,[20] but the grantor of an estate in fee tail has a true reversion[21] and thus may create remainder interests to follow the estate in fee tail.

Creation

In order to convey an estate in fee tail at common law it is necessary to use the word *heirs* in its technical sense as a word of limitation,[22] but the words *of his body* may be replaced by other words of similar import.[23] A conveyance "to *A* and his heirs, issue of his body" creates an estate in fee tail in *A*.[24] The majority of the states recognizing estates in fee tail no longer require the word *heirs* for the creation of an estate in fee tail.[25] Even at common law the word *heirs* is not necessary for the creation by will of an estate in fee tail.[26] Thus a devise "to *A* and the issue of his body" may create an estate in fee tail.[27]

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17. RESTATEMENT, PROPERTY ch. 5, introductory note at 203 (1936).

18. 1 TIFFANY, REAL PROPERTY 49 (3d ed. 1939).

19. See 1 TIFFANY, REAL PROPERTY §§34, 47 (3d ed. 1939).

20. Possibility of reverter is the right of a grantor to have the land revert to him on termination of the estate granted. This right is not an estate but the mere possibility of acquiring an estate. See 2 TIFFANY, REAL PROPERTY §314 (3d ed. 1939).

21. A reversion is an estate that remains in a grantor who transfers less than his entire interest in the land, thus depriving himself of the right to present possession. See 2 TIFFANY, REAL PROPERTY §311a (3d ed. 1939).

22. 1 TIFFANY, REAL PROPERTY §§38, 39 (3d ed. 1939).

23. See 2 BLACKSTONE, COMMENTARIES *115.

24. 1 TIFFANY, REAL PROPERTY §37 (3d ed. 1939).

25. RESTATEMENT, PROPERTY §59, comment *d* (1936).

26. 1 TIFFANY, REAL PROPERTY §39 (3d ed. 1939).

27. See 95 C.J.S. *Wills* §666, 96 C.J.S. *Wills* §862 (1957) for discussion and lists of cases involving use of the word *issue* in wills.

The owner of any inheritable freehold interest in land can create an estate in fee tail,[28] various types of which are possible.[29] A limitation "to *A* and the heirs of his body" creates an estate in fee tail general. An estate in fee tail special is created by a limitation "to *A* and the heirs of his body by his wife, *B*." General and special estates tail may be further restricted to male or female heirs. A limitation "to *A* and the heirs male of his body" creates a fee tail male general. An estate in fee tail female special is created by a limitation "to *A* and the heirs female of his body by his wife, *B*." An estate in fee tail is inherited from generation to generation by lineal descendants of the type specified. Failure of the specified lineal descendants at any time in the future will cause the estate to revert to the original donor or his heirs.

Barring the Entail

The Statute de Donis was unpopular with everyone except the members of the landed aristocracy, who were usually the holders of the reversionary interests protected by the statute.[30] Attempts to amend the statute failed;[31] but the enterprising lawyers of the day, with the aid of the courts and by sufferance of Edward IV, devised a way to circumvent the statute. In *Taltarum's Case*[32] the court held that a tenant in fee tail could, by means of a collusive suit known as a common recovery, convey in fee simple absolute and bar his lineal descendants, the owner of the reversionary interest, and the owners of any remainder interest following the estate in fee tail. Further, the tenant in fee tail could make such a conveyance regardless of whether he had issue. A statute passed in 1541 empowered the tenant in tail to bar the entail by means of another collusive suit known as a fine.[33] A conveyance by fine did not, however, bar the owner of the reversion or the owners of any remainders following the estate in fee tail.[34]

Statutory Changes

Estates in fee tail had been completely abolished in thirty-three

28. 1 REDFERN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA §165 (3d ed. 1957).

29. See 2 BLACKSTONE, COMMENTARIES *113; 1 TIFFANY, REAL PROPERTY §36 (3d ed. 1939).

30. See 2 BLACKSTONE, COMMENTARIES *116 for recital of the "infinite difficulties and disputes" occasioned by estates in fee tails for 200 years after passage of the Statute de Donis.

31. DIGBY, HISTORY OF THE LAW OF REAL PROPERTY 253, n.1 (5th ed. 1897).

32. Y.B. 12 Edw. 4, f. 19, pl. 25 (1473).

33. 32 Hen. 8, ch. 36 (1541).

34. See Ewing v. Nesbitt, 88 Kan. 708, 711, 129 Pac. 1131, 1133 (1913) (dictum)

states and the District of Columbia as of January 1, 1947.[35] In Iowa, Oregon, and South Carolina, neither the Statute de Donis nor statutes prohibiting the creation of an estate in fee simple conditional are in effect;[36] consequently a limitation sufficient since 1285 to create an estate tail at common law gives rise to the old estate in fee simple conditional in those states.[37] In at least four[38] of the remaining jurisdictions it was possible as of January 1, 1947, to create an estate in fee tail.

Jurisdictions abolishing estates in fee tail may be grouped into four categories, depending on the effect given to a limitation purporting to create an estate in fee tail, after entailment has been prohibited. Twenty-five states[39] and the District of Columbia have statutes providing that limitations sufficient at common law to create estates in fee tail now create estates in fee simple absolute. Eight other states[40] have statutes providing that a limitation sufficient at common law to create an estate in fee tail creates an estate for life in the first taker, remainder in fee simple absolute in the surviving issue of the first taker.

A third approach is that of Hawaii, where it was early established by judicial decision[41] that neither estates in fee tail nor estates in fee simple conditional could be created. A limitation that would have created an estate in fee tail at common law creates either an estate in fee simple in the first taker or an estate for life in the first taker, remainder in fee simple to those who become the heirs of his body at his death, depending on the intention of the parties. In case of doubt, the presumption favors the creation of an estate in fee simple absolute.[42]

Texas illustrates the fourth approach. Since 1836 the Declaration

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for discussion of fines and common recoveries and effect on the estate in fee tail. See also 19 AM. JUR. *Estates* §50 (1939).

35. RESTATEMENT, PROPERTY ch. 5, introductory note (1936, Supp. 1948).

36. *Id.* at special note 1.

37. Sagers v. Sagers, 138 Iowa 729, 138 N.W. 911 (1912); Lytle v. Hulen, 128 Ore. 483, 275 Pac. 45 (1929); Blume v. Pearcy, 204 S.C. 409, 29 S.E.2d 673 (1944).

38. Del., Me., Mass., R.I., (by deed but not by will). See RESTATEMENT, PROPERTY ch. 5, introductory note, special note 2 (1936, Supp. 1948).

39. Ala., Ariz., Cal., Ga., (as to some types of conveyances), Ind., Ky., Md., Mich., Minn., Miss., Mont., Neb., N.H., N.J., N.Y., N.C., N.D., Okla., Pa., S. Dak., Tenn., Vt., Va., W. Va., Wis. See RESTATEMENT, PROPERTY ch. 5, introductory note, special note 4 (Supp. 1948), setting out the statutes of these jurisdictions.

40. Ark., Colo., Fla., Ga. (as to some types of conveyances), Ill., Kan., Mo., N.M. See RESTATEMENT, PROPERTY ch. 5, introductory note, special note 5 (Supp. 1948), setting out the statutes of these states.

41. Kinney v. Oahu Sugar Co., 23 Hawaii 747 (1917), *aff'd*, 255 Fed. 732 (1919); Nahaolelua v. Heen, 20 Hawaii 372 (1911).

42. Rosenbledt v. Wodehouse, 25 Hawaii 561 (1920); Kinney v. Oahu Sugar Co., *supra* note 41.

of Rights of the Texas Constitution[43] has prohibited the creation of estates in fee tail without specifying what effect should be given to a will or deed containing a limitation that would have created an estate in fee tail at common law. The position of Texas is similar to that taken by Florida prior to 1941[44] in that entailment was prohibited but the results of a purported transfer in fee tail were not specified. Texas has judicially decided the question, however. In *Calder v. Davidson*[45] the court was called on to construe a conveyance "to *A* and the heirs of her body by her then husband." The court held that such a limitation would have created an estate in fee tail special at common law, but that since estates tail are forbidden in Texas, the deed vested a fee simple title in the first taker.

FEE TAIL IN FLORIDA

Florida adopted the common and statutory law of England as it existed on July 4, 1776, including the Statute de Donis.[46] Fines and common recoveries were part of the common law as adopted by Florida,[47] but they have since been abolished by statute.[48] Although there are no reported cases, presumably it was possible to create an estate in fee tail in Florida prior to November 17, 1829.[49]

November 17, 1829, to July 1, 1941

On November 17, 1829, the Legislative Council of the Territory of Florida enacted the following statute: "No real estate shall be entailed in this state."[50] This statute governs transfers that became operative between November 17, 1829, and July 1, 1941. The statute does not specify the result of a limitation sufficient at common law to create an estate in fee tail, and the question is uncertain today.[51]

The position taken in the *Restatement of Property*[52] is that when entailing is prohibited without any express direction as to what estate will be created by a limitation sufficient at common law to

43. TEXAS CONST. art 1, §26.

44. FLA. COMP. GEN. LAWS §5481 (1927).

45. 59 S.W. 300 (Tex. Civ. App. 1900).

46. See McLeod v. Dell, 9 Fla. 427 (1861); 1 REDFERN, *infra* note 61, §165, *But cf.* Botts, *British Statutes in Force in the State of Florida*, 3 FLA. STAT. 1941, pp. 5-79 (1943).

47. See Newman v. Equitable Life Assur. Soc'y, 119 Fla. 641, 160 So. 745 (1935).

48. FLA. STAT. §689.08 (1959).

49. See 1 REDFERN, *infra* note 61, at 281.

50. FLA. COMP. GEN. LAWS §5481 (1927).

51. Day, Real Property 88 (1952) (unpublished materials used for instruction at University of Florida College of Law).

52. 1 RESTATEMENT, PROPERTY §104 and comment *b* (1936).

create an estate in fee tail, a fee simple absolute construction is preferred. This view is based in part on the fact that the estate in fee simple absolute more nearly approximates the estate in fee tail. The intention of the transferor would more nearly be carried out, therefore, by a construction favoring a fee simple absolute in the first taker rather than a life estate with the remainder in fee to those who will become the heirs of his body at his death.[53]

The Florida case of *Gonzales v. Hooten*[54] has been cited as indicating that the position of the *Restatement* is the law in Florida for the period under consideration.[55] However, the *Gonzales* case is doubtful authority for the position that Florida might take as to the effect of a limitation "to *A* and the heirs of his body" that became operative between November 17, 1829, and July 1, 1941. The Court in *Gonzales* did not consider itself to be confronted with this problem, but the case does seem to favor a fee simple absolute in the first taker under a conveyance purporting to create an estate in fee tail.[56]

Gonzales involved an inter vivos transfer to trustees, who were to convey certain land to Gonzales when he became twenty-one, on the following condition:[57]

> " '[I]f the said Gonzales have heirs of his body in being at . . . his death, the said property shall descend in due course to said heirs, but if at the time of his death, he have no heirs of his body in being, then if the (grantor) be living, the said property shall revert to, and the title thereof revert [*sic*] in the (grantor), or, if at said time the said (grantor) shall have departed this life, then the said property shall belong to' two religious bodies."

When Gonzales reached his twenty-first birthday the trustees conveyed the land to him, but the nature of the conveyance was not disclosed. Subsequently he conveyed the land in fee simple absolute and died survived by a son. Gonzales' grantee successfully defended his title to the land against the claim of Gonzales' son. The Court held that the only way the trustees could comply with the directions of the trust was by conveying title to Gonzales in fee simple absolute, subject to the limitations over in the event he died without heirs of his body. When he died survived by an heir of his body the limitations over were defeated. His grantee, therefore, had title to the land in fee simple absolute.

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53. *Ibid.*
54. 63 Fla. 163, 58 So. 245 (1912).
55. 2 POWELL, REAL PROPERTY §197 (1950).
56. See Day, *supra* note 51, at 89.
57. 63 Fla. at 164, 58 So. at 245.

The later case of *Arnold v. Wells*[58] seems to favor a life estate in the first taker, remainder to the heirs of his body at his death, when the transfer purports to create an estate in fee tail. This result is in accord with Florida's later statutory approach.[59] The *Arnold* case involved a devise to Arnold for life, and at his death to the heirs of his body and their heirs and assigns forever, but if he should die without heirs of his body, to the heirs of the testatrix. The donor died, and Arnold died without heirs of his body. His widow claimed his interest in fee simple absolute. The Court held that Arnold had only a life estate; consequently, the title vested on his death in the heirs of the testatrix.

The Court found that, but for the statute prohibiting entailment in Florida, the limitation would have given Arnold an estate in fee tail through the operation of the Rule in Shelley's Case. The Rule, which was in force in Florida at the time,[60] could not be applied in this instance because of the statutory prohibition. The case is not authority for the position that a limitation "to *A* and the heirs of his body" creates a life estate in the first taker, remainder to those who become the heirs of his body at his death. The limitation was to Arnold for life, remainder to the heirs of his body and their heirs and assigns forever; this limitation could not create an estate in fee tail in Arnold without the application of the Rule in Shelley's Case.[61] The Court held that the Rule could not be applied when the result would violate the statute prohibiting entailment; therefore, by the Court's reasoning, the prohibited estate never arose.

There is language in the *Arnold* case,[62] however, that might lend support to an argument in favor of a construction giving a life estate to the first taker, remainder in fee to those who become the heirs of his body at his death. If a case involving the construction of a purported transfer in fee tail that became operative between November 17, 1829, and July 1, 1941, were to arise today, the Florida Court

58. 100 Fla. 1470, 131 So. 400 (1930).

59. FLA. STAT. §689.14 (1959).

60. 100 Fla. at 1477, 131 So. at 404.

61. 1 REDFERN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA §166 (3d ed. 1957).

62. 100 Fla. at 1477, 131 So. at 404: "Under this statute [FLA. COMP. GEN. LAWS §5481 (1927)] we find no authority for enlarging by construction the life estate expressly given by the will to Campbell Elmore Arnold to a fee-simple estate." *But see* Redfern, *Estates Tail in Florida,* 6 FLA. L.J. 69, 70 (1932) (discussing the *Arnold* case): "As there is no statute in the State of Florida which changes an estate tail into a life estate, it becomes interesting to determine how the Supreme Court of Florida, without violating settled rules of the common law, reached the conclusion that the words in item one of the will under consideration, which under common law rules would create an estate tail, created a life estate in this instance."

could adopt the position of the *Restatement*[63] and find support in *Gonzales*, at least by implication, for a fee simple absolute construction. Later statutory enactments in Florida[64] and some of the language in *Arnold* could support a construction by the Court that the transfer gave a life estate in the first taker, remainder in fee to those who became the heirs of his body at his death.

July 1, 1941 to June 11, 1945

The Florida legislature, by a statute effective July 1, 1941, amended the original statute prohibiting entailment that had been in effect since November 17, 1829.[65] The amended statute reads as follows:[66]

> "No real estate shall be entailed in this state. Any instrument purporting to create an estate tail shall, notwithstanding the rule in Shelly's [*sic*] case be deemed to create an estate for life in the first taker (that is in the donee or tenant in tail) with remainder per stirpes to the issue of the first taker in being at the time of his death."

This statute is not retroactive. It controls transfers that became operative between July 1, 1941, and June 11, 1945. No reported cases construing the 1941 amended statute have been found.

The 1941 statute would apply to the attempted creation of an express estate in fee tail.[67] At common law an express estate in fee is created by a limitation "to *A* and the heirs of his body."[68] The statute applies equally to estates in fee tail that arise through the operation of the Rule in Shelley's Case. A limitation "to *A* for life, remainder to the heirs of his body" will result in *A*'s taking an immediate estate in fee tail through the operation of the Rule in Shelley's Case.[69] Presumably the 1941 statute also applies to estates in fee tail that arise by implication.[70] An implied estate in fee tail arises at common law when there is a transfer "to *A* and his heirs, and upon his dying without issue, then to *B* and his heirs."[71]

The legal effect of all three types of transfers is the same under

63. 1 RESTATEMENT, PROPERTY §104 and comment *b* (1936).
64. Fla. Laws 1941, ch. 20954, §2 at 2505, repealed by FLA. STAT. §689.14 (1959).
65. FLA. COMP. GEN. LAWS §5481 (1927).
66. Fla. Laws 1941, ch. 20954, *2 at 2505.
67. Rogers, *Chapter 20,954, Acts of 1941*, 15 FLA. L.J. 276, 277 (1941).
68. 1 REDFERN, *supra* note 61, at 274.
69. *Id.* at 283.
70. Rogers, *supra* note 67, at 277: "There has been some criticism of this amendment. It is claimed that the statute does not cover an implied estate tail, which by the way, is a rather rare bird. The writer's opinion is that the section covers estates attempted to be entailed either expressly or by implication."
71. 19 AM. JUR. *Estates* §54 (1939); see 1 REDFERN, *supra* note 61, at 274.

the 1941 statute. It is clear that in each instance the first taker or tenant in tail has only a life estate. It is also clear that if the first taker under the deed or devise is survived by issue, the remainder vests in those of his issue that survive him; and the transferor's reversion, as well as any remainder interest following the attempted estate in fee tail, is extinguished. The result under the 1941 statute is not so clear when the first taker is not survived by issue, since the statute does not specify what result obtains when there is a failure of issue. A spokesman for the committee of The Florida Bar responsible for the drafting of the 1941 statute made this statement:[72]

> "The amended statute does not say so, but, of course, failure of issue would result in a reversion to the grantor (or testator) or his heirs or devisees. Perhaps it might have been better to have stated this also."

Presumably the estate would revert to the donor, on failure of issue of the first taker, only after any remainder interests had been satisfied.

June 11, 1945, to Date

Florida's present statute, which became effective June 11, 1945, and which repealed the act of 1941, provides as follows:[73]

> "No property, real or personal, shall be entailed in this state. Any instrument purporting to create an estate tail, express or implied, shall be deemed to create an estate for life in the first taker with remainder per stirpes to the lineal descendants of the first taker in being at the time of his death. If the remainder fails for want of such remaindermen, then it shall vest in any other remaindermen designated in such instrument, or, if there is no such designation, then it shall revert to the original donor or to his heirs."

This statute, like its predecessors, is not retroactive. It controls transfers that became operative on or after June 11, 1945. Implied as well as express estates in fee tail are specifically covered by the present statute. The result obtaining on failure of lineal descendants is set out.

It is interesting to note that the legislature extended the prohibition against entailment to personal property. At common law estates in fee tail cannot be created in personal property.[74] The Rule

72. Rogers, *supra* note 67, at 277.
73. FLA. STAT. §689.14 (1959).
74. 19 AM. JUR. *Estates* §48 (1939).

in Shelley's Case also does not apply to personal property,[75] but under a related doctrine an attempt to create an estate in personalty results in the immediate donee's taking an absolute interest.[76] These common law principles have been recognized in a number of Florida cases[77] arising under the predecessors of the present statute. Some of the cases recognizing the common law rule that the attempted entailment of personal property will vest an absolute interest in the immediate donee[78] have nevertheless suggested that an interest in personal property analogous to an estate in fee tail could be created in Florida. In *Bross v. Bross* the Florida Supreme Court, speaking through Justice Terrell, said:[79]

> "On the question of remainders in personal property it is quite true that in the early period of the law future estates, remainders or estates tail in personal property were not permitted. If language devising realty creates an estate tail it will pass an absolute title if the property is personalty. While not followed by all courts, this rule has been frequently followed in the construction of wills. . . . This rule is not an inflexible one, but like others with reference to the interpretation of wills, it gives way to the intention of the testator. It is of common law vintage and like others of its class it is by necessity being modernized to include personalty as well as realty."

In view of the *Bross* case and others[80] suggesting the possibility of entailment of personal property, the Florida legislature was justified in extending the coverage of the present statute to include personalty.[81]

The present Florida statute prohibiting entailment has removed the uncertainties existent under its predecessors; estates in fee tail apparently have been abolished in Florida.[82] In this respect Florida is more fortunate than some of her sister states, whose statutes purporting to achieve the same results have met with less than complete success.[83]

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75. 47 AM. JUR. *Rule in Shelley's Case* §24 (1943).

76. 1 REDFERN, *supra* note 61, at 274.

77. Bross v. Bross, 123 Fla. 758, 167 So. 669 (1936); Story v. First Nat'l Bank & Trust Co., 115 Fla. 436, 156 So. 101 (1934); McLeod v. Dell, 9 Fla. 427 (1861); Russ v. Russ, 9 Fla. 105 (1860).

78. See Bross v. Bross, *supra* note 77; *cf.* McLeod v. Dell, *supra* note 77; Russ v. Russ, *supra* note 77.

79. 123 Fla. 758, 768, 167 So. 669, 673 (1936).

80. McLeod v. Dell, *supra* note 77; Russ v. Russ, *supra* note 77.

81. FLA. STAT. §689.14 (1959).

82. See 1 REDFERN, *supra* note 61, at 281.

83. See Comments, 10 ARK. L. REV. 181 (1956); 21 U. KAN. CITY L. REV. 210 (1953).

PART II. THE RULE IN SHELLEY'S CASE

HISTORY AND DEVELOPMENT

Origin and Operation

The Rule in Shelley's Case takes its name from the case of *Wolfe v. Shelley*,[84] decided in 1581, but the doctrine embodied in the rule was recognized at least two centuries earlier.[85] The original reason for the development of the doctrine is unknown and is subject to much speculation.

Two basic situations call for the operation of the Rule in Shelley's Case. First, a conveyance or devise "to *A* for life, remainder to the heirs of *A*" will result in *A*'s taking an estate in fee simple absolute.[86] The Rule, operating on the remainder limited "to the heirs of *A*," gives that remainder to *A* in fee simple. *A* then has a life estate and a remainder in fee. At this point the Rule in Shelley's Case is satisfied, and the doctrine of merger[87] comes into play, uniting the two estates held by *A* to give *A* an immediate estate in fee simple absolute.

The second basic situation calling for the operation of the Rule in Shelley's Case arises when there is a limitation by conveyance or devise "to *A* for life, remainder to the heirs of the body of *A*."[88] The Rule operates in this situation to give *A* a remainder in fee tail.[89] Since *A* then holds both estates, the lesser life estate is merged into the greater estate in fee tail, and *A* has an estate in fee tail.

The earliest concise statement of the Rule in Shelley's Case was given by Coke in his report of the case itself:[90]

> "[W]hen 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 . . . ; the heirs are words of limitation of the estate, and not words of purchase."

From this statement of the Rule, five requirements for its application may be distinguished:[91] (1) a freehold estate in the first taker; (2) a limitation by way of remainder to the heir or heirs of the body of

84. 1 Co. Rep. 936, 76 Eng. Rep. 206 (K.B. 1579-81).

85. 2 TIFFANY, REAL PROPERTY 82 (3d ed. 1939).

86. Depley v. Dyer, 312 Ill. 537, 144 N.E. 212 (1924); McElwain v. Whitacre, 251 Pa. 279, 96 Atl. 655 (1916).

87. This doctrine applies whenever a greater and a lesser estate are held by the same person. See, *e.g.*, Walter J. Dolan Properties v. Vonnequt, 133 Fla. 854, 184 So. 757 (1938).

88. 2 TIFFANY, REAL PROPERTY 86 (3d ed. 1939).

89. *E.g.*, Gamble v. Gamble, 200 Ala. 176, 75 So. 924 (1917); Bibo v. Bibo, 397 Ill. 505, 74 N.E.2d 808 (1947).

90. Wolfe v. Shelley, 1 Co. Rep. 936, 76 Eng. Rep. 206, 234 (K.B. 1579-81).

91. 2 TIFFANY, REAL PROPERTY §346 (3d ed. 1939).

the first taker; (3) interests (1) and (2) created by the same instrument; (4) *heirs* used in a technical sense as a word of limitation rather than of purchase; (5) interests (1) and (2) of equal quality, that is, both legal or both equitable.

The difficulties with the Rule arise in its application under a specific set of facts. The fourth requirement has been perhaps the most frequent source of controversy.[92] At common law the word *heirs* is a term of art, presumed to be used as a word of limitation indicating a whole line of unascertained persons to take in succession.[93] Construction of the deed or will as a whole may indicate, however, that the transferor intended to use *heirs* as a word of purchase denoting the particular individuals who will take their estate directly from the transferor and not by succession.[94] For example, a conveyance "to *A*, remainder to *X*, *Y*, and *Z*, heirs of his body" would not call for the application of the Rule in Shelley's Case, despite the use of the word *heirs*.[95] The obvious intention of the transferor is to use *heirs of his body* to denote the particular individuals named. In many situations the intent of the transferor in using *heirs* is not so obvious.[96]

A further complication arises, because in a transfer by will it is not necessary, even at common law, to use the word *heirs* in order to create an estate in fee simple absolute or an estate in fee tail.[97] In many jurisdictions the same rule applies to a transfer by deed.[98] Construction of the instrument as a whole may reveal that the transferor intended *issue* or *children* to mean *heirs* or *heirs of the body*. Thus a limitation "to *A* for life, remainder to the issue of *A*" will call for application of the Rule in Shelley's Case if it is evident that *issue* was intended to mean *heirs* in its technical sense.[99]

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92. 2 *id.* at 91; 47 AM. JUR. *Rule in Shelley's Case* 800 (1943).

93. Tankersley v. Davis, 128 Fla. 507, 515, 175 So. 501, 504 (1937): "It is essential to the operation of the rule in Shelley's Case that the 'heirs,' 'heirs of the body' etc., to whom the future limitation is made shall mean, not particular designated living persons, nor even one or two or more *future generations* of successors, but that *indefinite line of successors through the ages,* which is necessary in law in order to make the words words of limitation, and which is meant when we say that we are the heirs of the body of descendants of Adam, the idea of which, in Biblical language is conveyed by such phrases as 'the children of Israel,' 'the seed of Abraham,' etc."

94. See 47 AM. JUR. *The Rule in Shelley's Case* 802, n.8, for cases concerning *heirs of body* and *bodily heirs* as words of purchase.

95. See Braswell v. Downs, 11 Fla. 62 (1864).

96. See, *e.g.*, Vogt v. Graff, 222 U.S. 404 (1911); Omohundo v. Talley, 100 Fla. 1553, 131 So. 393 (1930); Caulk v. Fox, 13 Fla. 148 (1869); Russ v. Russ, 9 Fla. 105 (1860).

97. *Accord,* 2 BLACKSTONE, COMMENTARIES *115.

98. RESTATEMENT, PROPERTY §§39, 59 (1936).

99. Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409 (1900); Trumbull v. Trum-

The Rule in Shelley's Case is not a rule of construction.[100] Traditionally it is a substantive rule of property, which takes effect regardless of the intent of the transferor.[101] Once the court determines that the transferor intended to use the word *heirs* in its technical sense and that the four other requirements for application of the Rule are present, the Rule must be applied.

A conveyance of Blackacre "to *A* for life, to *B* for life, remainder to the heirs of *A*" will, through the operation of the Rule in Shelley's Case, give *A* the remainder in fee simple absolute.[102] *A* then has a life estate and a remainder in fee, but the two cannot merge because of *B*'s intervening life estate. If *B* should predecease *A*, *A*'s two estates will merge and he will have a fee simple absolute. Similarly, a conveyance "to *A* for life, to *B* for life, remainder to the heirs of the body of *A*" calls for the application of the Rule in Shelley's Case. Through the operation of the Rule, *A* has a remainder in fee tail; but the doctrine of merger cannot operate to merge *A*'s life estate and remainder in fee tail unless *B* predeceases *A*.[103]

Status of the Rule in America

The Rule in Shelley's Case was adopted by most American jurisdictions as part of the common law.[104] The Rule has been widely criticized in this country as antiquated[105] and useless.[106] The fact

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bull, 149 Mass. 200, 21 N.E. 366 (1889); Allen v. Craft, 109 Ind. 476, 482 (1886) (dictum); 47 AM. JUR. *Rule in Shelley's Case* §17 (1943).

100. 2 TIFFANY, REAL PROPERTY §344 (3d ed. 1939); 47 AM. JUR. *Rule in Shelley's Case* 811 (1943); see Annot., 7 L.R.A. (n.s.) 1109 (1906). *Contra*: Albin v. Parmele, 70 Neb. 740, 98 N.W. 29 (1904); Bross v. Bross, 123 Fla. 758, 770, 167 So. 669, 674 (1936) (dictum); Smith v. Hastings, 29 Vt. 240, 241 (1857) (dictum).

101. Depler v. Ayer, 312 Ill. 537, 144 N.E. 212 (1924); Teal v. Richardson, 160 Ind. 119, 66 N.E. 435 (1902); Crockett v. Robinson, 46 N.H. 454 (1866); Brown v. Bryant, 17 Tex. Civ. App. 454, 44 S.W. 399 (1897); 2 TIFFANY, REAL PROPERTY 84 (3d ed. 1939).

102. 2 TIFFANY, REAL PROPERTY 87 (3d ed. 1939).

103. *Ibid.*

104. See, *e.g.*, Crockett v. Robinson, *supra* note 101; Brown v. Bryant, *supra* note 101.

105. *E.g.*, Doyle v. Andis, 127 Iowa 36, 72, 102 N.W. 177, 189 (1905) (dissenting opinion), "a Gothic column found among the remains of feudality"; Stamper v. Stamper, 121 N.C. 251, 254, 28 S.E. 20, 22 (1897) (dictum), "the Don Quixote of the law, which like the last knight errant of chivalry, has long since survived every case that gave it birth and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous."

106. *E.g.*, Doyle v. Andis, *supra* note 105, at 63, 102 N.W. at 186: "The most skillful of the captive brickmakers in Egypt could not make bricks without straw, and the most expert legal dialectician who undertakes to clothe the rule in Shelley's Case with the varnish of plausibility finds himself confronted with a poverty of material compared with which the destitution of the oppressed Israelites

that the Rule usually operates in direct contravention of the donor's intent has made it unpopular with courts[107] and legal writers[108] alike. The obvious intent of a donor who conveys "to *B* for life, remainder to the heirs of *B*" is that *B* take only a life estate. If *B*'s donor in this example had intended that *B* take an estate in fee simple absolute, he would have conveyed to *B* in fee in the first instance. It is doubtful that any donor relies on the operation of the Rule in Shelley's Case to enlarge the estate of the immediate donee to an estate in fee simple or fee tail when the same result can be achieved directly by conveyance in fee or in fee tail.

Critics of the Rule in Shelley's Case have pointed out the ease with which the Rule may be avoided by elimination of any one of the five requirements for its operation.[109] If *A* wishes to convey a life estate to *B* and a remainder to the heirs of *B*, he can do so by conveying to *B* by one instrument and to the heirs of *B* by another. A conveyance "to *X* as trustee to hold and manage Blackacre, paying the income to *B* for life, and at his death to convey to the heirs of *B*" would also avoid the operation of the Rule in Shelley's Case, because *B*'s interest is equitable and the interest of *B*'s heirs is legal. These and other possibilities[110] suggest that the Rule in Shelley's Case often operates as a trap for the unwary and penalizes those who attempt to convey or devise their property without competent legal advice.[111]

England abolished the Rule in Shelley's Case in 1925.[112] As of January 1, 1947, thirty-six American jurisdictions[113] had enacted

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was a wasteful abundance"; Note, 4 FORDHAM L. REV. 316, 326 (1935). *Contra*, Hammer v. Smith, 22 Ala. 433, 441 (1907) (dictum); Hardage v. Stroope, 48 Ark. 303, 309, 24 S.W. 490, 492 (1893) (dictum).

107. Siceloff v. Redman, 26 Ind. 251, 260 (1866) (dictum); see 29 L.R.A. (n.s.), *Note on the Rule in Shelley's Case* 965, 1039 (1911).

108. Foster, *The Rule in Shelley's Case in Nebraska*, 8 NEB. L. BULL. 124, 145-46 (1929); Trumbull, *Precedent Versus Justice*, 27 AM. L. REV. 321, 325 (1893); Comm. on Law Reform Rep., 4 ANN. REP. OF PA. BAR ASS'N 27, 32 (1898).

109. See 2 TIFFANY, REAL PROPERTY §346 (3d ed. 1939); Foster, *supra* note 108, at 160 n.89: "The Rule in Shelley's Case does not prohibit a result. It penalizes a method."

110. See RESTATEMENT, PROPERTY §312, comment *k* (1940).

111. Doyle v. Andis, 127 Iowa 36, 69, 102 N.W. 177, 189 (1905) (dissenting opinion): "The inherent ineradicable vice by which the rule in Shelley's Case is differentiated from all our hitherto accepted rules of law is that it gives to words a meaning and effect diametrically opposed to their universally accepted meaning among the people, including people of education and experience who use and understand the English language, and thus creates a snare by which the average person, learned and unlearned, finds it impossible to express his intent, no matter how lucidly it be stated, with any certainty that it will be respected by the courts."

112. Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, §131.

113. RESTATEMENT, PROPERTY §313, special note 1 (1940, Supp. 1948) (Ala.,

statutes wholly or partially abrogating the Rule. The courts of Hawaii[114] and Vermont[115] early held that the Rule was not a part of their law. Since statutes abolishing the Rule in Shelley's Case are not retroactive, cases continue to arise involving transfers that became operative prior to the effective date of any statute abolishing the Rule.[116]

THE RULE IN FLORIDA

The Florida Supreme Court has held that the Rule in Shelley's Case is in force in this state,[117] but the majority of the cases decided prior to the abolition of the Rule in Florida[118] did not apply it because one or more of the requirements for its application were missing.

Russ v. Russ,[119] decided in 1860, involved devises of slaves to each of the testator's children, *A*, *B*, and *C*. The gift to each child was in the form "to *A* and the heirs of his body." Item 14 of the will provided that "in the event of the death of . . . [*A*, *B*, or *C*] without heirs of their body of the one so dying, . . . his or her property be equally divided between the survivors of them."[120] The Court held that this paragraph referred to a definite failure of issue. Construing the will as a whole, the Court was satisfied that the testator used the word *heirs* in its non-technical sense to mean *children;* hence the Rule in Shelley's Case did not apply. *McLeod v. Dell*[121] and *Braswell v. Downs*[122] involved gifts of slaves to *A* for life, remainder to his children. In neither case was the Rule in Shelley's Case applied. The Court found that the use of the word *children* and the context in which it was used indicated that the donor contemplated a definite failure of issue.

Although at common law the Rule in Shelley's Case applies only

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Ariz., Cal., Conn., D.C., Fla., Ga., Idaho, Iowa, Kan., Ky., Me., Md., Mass., Mich., Minn., Miss., Mo., Mont., Neb., N.H., N.J., N.M., N.Y., N. Dak., Ohio, Okla., Ore., Pa., R.I., S.C., S. Dak., Tenn., Va., W. Va., Wis.).

114. Thurston v. Allen, 8 Hawaii 392 (1891).

115. Smith v. Hastings, 29 Vt. 240 (1857).

116. *E.g.*, National Turpentine & Pulpwood Corp. v. Mills, 57 So. 2d 838 (Fla. 1952); Smith v. Hanna, 215 S.C. 520, 56 S.E.2d 339 (1949); Stephenson v. Knutz, 131 W. Va. 599, 49 S.E.2d 235 (1948).

117. Tankersley v. Davis, 128 Fla. 507, 175 So. 501 (1937); Omohundro v. Talley, 100 Fla. 1533, 131 So. 398 (1930); Arnold v. Wells, 100 Fla. 1470, 131 So. 400 (1930).

118. Story v. First Nat'l Bank & Trust Co., 115 Fla. 436, 156 So. 101 (1934); Omohundro v. Talley, *supra* note 117; Braswell v. Downs, 11 Fla. 62 (1864) (applying Georgia law); McLeod v. Dell, 9 Fla. 427 (1861); Russ v. Russ, 9 Fla. 105 (1860).

119. 9 Fla. 105 (1860).

120. *Id.* at 110.

121. 9 Fla. 427 (1861).

122. 11 Fla. 62 (1864) (applying Georgia law).

to realty,[123] the Florida Court in *Russ, McLeod,* and *Braswell* indicated that the Rule could apply to personalty.[124] Other American authorities are in conflict as to the extent, if any, of the application of the Rule in Shelley's Case to personalty.[125]

In *Bross v. Bross*[126] and *Story v. First National Bank and Trust Co.*,[127] the Florida Court held that the Rule in Shelley's Case is inapplicable to executory trusts. These decisions are in accord with the weight of authority.[128]

In *Arnold v. Wells*[129] the Court held that the Rule could not operate to violate the statute prohibiting entailment in Florida. A limitation sufficient at common law to give rise to an estate in fee tail through the operation of the Rule in Shelley's Case does not create an estate in fee simple absolute. Instead, it gives rise to an estate for life in the first taker, remainder in fee to those who become the heirs of the body of the first taker at his death. Although the *Arnold* decision has been criticized,[130] it appears that the result obtained more closely approximated the intent of the testator.

The Supreme Court of Florida has applied the Rule in Shelley's Case in only two[131] of the cases decided prior to abolition of the Rule in Shelley's Case in Florida.[132] In *Watts v. Clardy*,[133] an 1848 case applying South Carolina law, the Florida Court held that a gift of slaves to *A* for life, remainder to be divided equally among the heirs of her body, gave *A* an absolute interest. The Court first applied the Rule in Shelley's Case to give *A* an interest analogous to an estate in fee tail. *A*'s interest was then enlarged to an absolute interest under the Rule, which was stated by the Court as follows: "[W]here personal estate is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail . . . ."[134] The

123. 1 SIMES, FUTURE INTERESTS §22 (1936).

124. See Braswell v. Downs, 11 Fla. 62, 68 (1864) (applying Georgia law); McLeod v. Dell, 9 Fla. 427, 440 (1861); Russ v. Russ, 9 Fla. 105, 128 (1860). See also Bross v. Bross, 123 Fla. 758, 770, 167 So. 669, 674 (1936) (dictum); 6 U. FLA. L. REV. 578 (1953).

125. 2 TIFFANY, REAL PROPERTY 101 (3d ed. 1939); see Notes: 8 COLUM. L. REV. 573 (1908); 23 HARV. L. REV. 51 (1909).

126. 123 Fla. 758, 167 So. 669 (1936).

127. 115 Fla. 436, 156 So. 101 (1934).

128. 2 TIFFANY, REAL PROPERTY §353 (3d ed. 1939); see Shaw v. Robinson, 42 S.C. 342, 20 S.E. 161 (1894); Note, 23 HARV. L. REV. 488 (1910).

129. 100 Fla. 1470, 131 So. 400 (1930). See discussion at pp. 248-49 *supra*.

130. Redfern, *Estates Tail in Florida*, 6 FLA. L.J. 69, 76 (1932).

131. Tankersley v. Davis, 128 Fla. 507, 175 So. 501 (1937); Watts v. Clardy, 2 Fla. 369 (1848) (applying S.C. law).

132. FLA. STAT. §689.17 (1959) (effective June 11, 1945).

133. 2 Fla. 369 (1848).

134. *Id.* at 390.

rule that a purported entailment of personal property vests an absolute interest in the first donee has been generally followed in this country and in England and has been stated in several Florida cases.[135]

The second case arising prior to the abolition of the Rule in Shelley's Case was *Tankersley v. Davis*,[136] decided in 1937. This case involved a limitation substantially in the form "to *A* for life, remainder to the surviving children of *A* in fee, and, in the event *A* dies leaving no surviving children, to *A's* heirs in fee."[137] *A*, who had a daughter living at the time of the trial, claimed the property in fee simple absolute through the operation of the Rule in Shelley's Case. The Court held that the Rule was inapplicable to the intermediate remainder in fee given to *A's* children, because the words *child* or *children* are not equivalent to the word *heirs*. *A's* child, therefore, took a contingent remainder in fee, conditioned on her surviving *A*. The Court held that the Rule in Shelley's Case did apply to the final remainder in fee limited to the heirs of *A*. As a result of the application of the Rule, *A* took a remainder in fee, which united with her life estate, subject to open on the vesting of the intervening estate of *A's* children. The *Tankersley* decision is in accord with settled doctrine that the Rule in Shelley's Case operates on the remainder interest limited to the heir or heirs of the body of the life tenant, regardless of whether an intervening estate prevents complete merger of the life estate and the remainder interest.[138] The *Tankersley* case also recognizes the principle that the Rule in Shelley's Case will not operate to cut off interests intervening between a life estate and a remainder limited to the heirs or heirs of the body of the life tenant.

Statutory Changes

a. Estates in Fee Tail

The Rule in Shelley's Case as applied to give rise to an estate in fee tail apparently was abrogated in Florida by the act of November 17, 1829, prohibiting entailment.[139] This act did not specify the result of a limitation sufficient at common law to create an estate in fee tail through the operation of the Rule in Shelley's Case. The

135. Bross v. Bross, 123 Fla. 758, 768, 167 So. 669, 673 (1936); McLeod v. Dell, 9 Fla. 427, 440 (1860).

136. 128 Fla. 507, 175 So. 501 (1937).

137. *Id.* at 514, 175 So. at 504.

138. See 2 TIFFANY, REAL PROPERTY 87 (3d ed. 1939); 47 AM. JUR. *Rule in Shelley's Case* §23 (1943); Note, 45 YALE L.J. 354 (1935). *But see* Gehlback v. Briegal, 359 Ill. 316, 194 N.E. 591 (1934).

139. FLA. COMP. GEN. LAWS §5481 (1927).

Florida Supreme Court, however, in *Arnold v. Wells* held that a transfer "to *A* for life, remainder to the heirs of his body" created a life estate in *A* and a remainder in those who became the heirs of *A*'s body at his death. The same result obtains under the act of November 17, 1829, as amended, effective July 1, 1941. The amended statute provided:[140]

> "No real estate shall be entailed in this state. Any instrument purporting to create an estate tail shall, notwithstanding the rule in Shelly's case be deemed to create an estate for life in the first taker (that is in the donee or tenant in tail) with remainder per stirpes in the issue of the first taker in being at the time of his death."

This statute is controlling as to transfers that became operative between July 1, 1941, and June 11, 1945, and it applies to estates in fee tail arising with or without the aid of the Rule in Shelley's Case. Thus the result of a limitation "to *A* for life, remainder to the heirs of his body" and a limitation "to *A* and the heirs of his body" would be the same under the 1941 statute. In both instances *A* would take a life estate and the issue of *A* would take a contingent remainder conditioned on their surviving *A*.

The act of July 1, 1941, was repealed, and the present version of section 689.14 became effective June 11, 1945.[141] This section has no application to estates in fee tail arising through the operation of the Rule in Shelley's Case. Another statute, section 689.17, also effective June 11, 1945, was enacted to cover estates in fee tail, as well as estates in fee simple absolute, arising under the operation of the Rule in Shelley's Case. This section provides:[142]

> "The rule in Shelley's case is hereby abolished. Any instrument purporting to create an estate for life in a person with remainder to his heirs, lawful heirs, heirs of his body or to his heirs described by words of similar import, shall be deemed to create an estate for life with remainder per stirpes to the life tenant's lineal descendants in being at the time said life estate commences, but said remainder shall be subject to open and to take in per stirpes other lineal descendants of the life tenant who come into being during the continuance of said life estate."

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140. Fla. Laws 1941, ch. 20954, §2 at 2505.

141. FLA. STAT. §689.14 (1959): "No property, real or personal, shall be entailed in this state. Any instrument purporting to create an estate tail, express or implied, shall be deemed to create an estate for life in the first taker with remainder per stirpes to the lineal descendants of the first taker in being at the time of his death."

142. FLA. STAT. §689.17 (1959).

Under this statute, a limitation of the type "to *A* for life, remainder to the heirs of his body," results in *A*'s taking a life estate. The lineal descendants of *A* in being at the time the life estate commences take a vested remainder that is subject to open and take in lineal descendants who come into being during the continuance of the life estate.

Section 689.17 does not purport to cover limitations sufficient at common law to create an estate in fee tail *without* the aid of the Rule in Shelley's Case. Limitations of the type "to *A* and the heirs of his body" continue under the present section 689.14 to create a life estate in *A*, remainder in the issue of *A* who survive him.

The effect of a transfer "to *A* for life, remainder to the heirs of his body," depends on the operative date of the transfer. If the transfer became operative after November 17, 1829, and prior to June 11, 1945, *A* takes a life estate and the issue of *A* take a contingent remainder, conditioned on their surviving *A*. If the transfer became operative on or after June 11, 1945, the issue, or the lineal descendants of *A* in being at the time the life estate commences, take a vested remainder, subject to open and take in lineal descendants who come into being during the continuance of the life estate.

b. Estates in Fee Simple Absolute

Prior to June 11, 1945, the Rule in Shelley's Case, as applied to give rise to an estate in fee simple absolute, was in force in Florida.[143] Thus a transfer "to *A* for life, remainder to his heirs" that became operative prior to June 11, 1945, resulted in *A*'s taking an immediate estate in fee simple absolute.

Section 689.17, effective June 11, 1945, abolished the Rule in Shelley's Case. Under this statute a transfer "to *A* for life, remainder to his heirs" creates a life estate in *A* and a remainder in the lineal descendants of *A* in being at the time the life estate commences, subject to open and take in lineal descendants of *A* who come into being during the continuance of the life estate. The same result obtains under section 689.17 in case of a limitation sufficient at common law to create an estate in fee tail through the operation of the Rule in Shelley's Case. Thus, as to transfers operative on or after June 11, 1945, there is no practical distinction in Florida between a limitation sufficient at common law to create an estate in fee simple absolute under the Rule and a limitation sufficient at common law to create an estate in fee tail through the operation of the Rule.

Since the Rule was abolished by statute the Florida Supreme Court

143. National Turpentine & Pulpwood Corp. v. Mills, 57 So. 2d 838 (Fla. 1952); Tankersley v. Davis, 128 Fla. 507, 175 So. 501 (1937).

has decided two cases[144] involving its application to give rise to an estate in fee simple absolute. Both cases dealt with transfers that became operative before the Rule was abolished. In *Elsasser v. Elsasser*,[145] decided in 1947, the Court held that the Rule in Shelley's Case did not apply to a testamentary transfer into trust to pay a portion of the income to the testator's widow for life and on her death to distribute a portion of the corpus to her heirs. The Court found that the will created an equitable life estate in the testator's widow and a legal remainder in her heirs, making the Rule inapplicable.

The most recent case involving the Rule in Shelley's Case is *National Turpentine & Pulpwood Corp. v. Mills*,[146] decided in 1952. The Florida Supreme Court affirmed the lower court's application of the Rule in Shelley's Case to a 1936 transfer by deed to *A* during the term of his natural life, title to vest in his heirs in fee simple, share and share alike. Since the Rule applied, *A* received an immediate estate in fee simple absolute at the time of the conveyance in 1936; and a subsequent grantee of *A* had fee simple title to the land, good as against everyone, including the heirs of *A*.

Both *Elsasser* and *National Turpentine* involved transfers operative prior to the effective date of section 689.17. Neither case, therefore, entailed the interpretation or application of this section. No cases interpreting or applying section 689.17 have been found.

Nature of the Rule

There is an apparent conflict as to the nature of the Rule in Shelley's Case in Florida. Although the Florida Supreme Court has given no indication that it is applied other than as a rule of law, a number of authorities[147] have stated that in Florida the Rule in Shelley's Case is a rule of construction rather than of law. The following dictum appears in *Bross v. Bross*: "The Rule in Shelley's Case is a rule of construction rather than an arbitrary rule of law and does not prevail over the intention of the testator in this State."[148] An eminent Florida textwriter,[149] a prominent member of The Florida Bar,[150] and *American Jurisprudence*[151] have stated that the view

144. National Turpentine & Pulpwood Corp. v. Mills, *supra* note 143; Elsasser v. Elsasser, *infra* note 145.

145. 159 Fla. 696, 32 So. 2d 579 (1947).

146. 57 So. 2d 838 (Fla. 1952).

147. National Turpentine & Pulpwood Corp. v. Mills, *supra* note 143; Tankersley v. Davis, *supra* note 143; Watts v. Clardy, 2 Fla. 369 (1848) (applying S.C. law).

148. 123 Fla. 758, 770, 167 So. 669, 674 (1936).

149. 1 REDFERN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA 284 (3d ed. 1957).

150. Rogers, *Chapter 20,954, Acts of 1941*, 15 FLA. L.J. 276, 277 (1941).

151. 47 AM. JUR. *Estates* §5, n.7 (1943).

espoused by the *Bross* case is the law in Florida.

In *Omohundro v. Talley* the Court indicated that Florida follows the traditional view that the Rule in Shelley's Case operates without regard for the intent of the donor:[152]

> "There can be no question that the rule in Shelley's Case was a common law rule of property when the common law was adopted as the law of Florida and that the rule in Shelley's Case as a rule of property has not been abridged, modified or abolished by statute in this State. If the language above quoted . . . should be construed as a limitation so that the construction of the deed must be based on the Rule in Shelley's Case then under such rule we would necessarily hold that the deed passed a fee simple title . . . ."

Conflict as to the nature of the Rule in Shelley's Case is not unique to Florida. As early as 1769 Lord Mansfield, in *Perrin v. Blake*,[153] attempted to establish that the Rule was one of construction. His position was repudiated in *Jesson v. Wright*[154] and *Van Grutten v. Foxwell*,[155] and the nature of the Rule in Shelley's Case as a rule of law was reaffirmed. A small minority of American jurisdictions,[156] attempting to avoid this harsh application, adopted the view of *Perrin v. Blake* that the Rule was one of construction. However, the majority of jurisdictions[157] and the textwriters[158] have adhered to the traditional view that the Rule in Shelley's Case is a rule of law.

Confusion as to the nature of the Rule has arisen from the fact that courts often have been concerned with the intent of the donor in using the word *heirs*.[159] Once a court has determined that the donor used the word *heirs* in its technical sense as a word of limitation and that the other requirements for the application of the Rule in Shelley's Case are met, the Rule applies regardless of the intent of the donor. Even an express provision stating that the donor

152. 100 Fla. 1553, 1559, 131 So. 398, 400 (1930) (dictum).

153. 1 Bl. Wm. 672, 96 Eng. Rep. 392 (K.B. 1769).

154. 2 Bli. 1, 4 Eng. Rep. 230 (H.L. 1820).

155. [1897] A.C. 658.

156. See AM. JUR. *Rule in Shelley's Case* §5 (1943); 29 L.R.A. (n.s.) 965, 1047 (1911); Annot., 7 L.R.A. (n.s.) 1109 (1906). See also Foster, *supra* note 108, at 131-43 (criticizing minority view).

157. See 47 AM. JUR. *The Rule in Shelley's Case* §5 and cases cited n.1 (1943).

158. *E.g.*, 1 SIMES, FUTURE INTERESTS 198, 208-09 (1936); 2 TIFFANY, REAL PROPERTY §344 (3d ed. 1939); see Foster, *supra* note 108, at 133 n. 24, for list of American and English textwriters following the majority view.

159. Foster, *supra* note 108, at 135-36; 47 AM. JUR. *The Rule in Shelley's Case* 796 (1943); 29 L.R.A. (n.s.) 965, 1054, 1060 (1911); see, *e.g.*, 1 REDFERN, *supra* note 149, in which the author concludes that since the Florida Court may seek the intent of a testator in using the word *heirs*, the Rule in Shelley's Case is a rule of construction in Florida.

does not desire the Rule to apply or that he intends that the first donee shall have no interest whatsoever in the remainder will not avoid the operation of the Rule.[160]

The question of the nature of the Rule in Shelley's Case may yet be presented to the Florida Court, and the Court may be tempted to hold that the Rule is one of construction. Before adopting the minority position, however, the Court should consider the "unspeakable quagmire"[161] that has arisen in other jurisdictions from the attempt to apply an intent-defeating rule of law as a rule of construction.

CONCLUSION

Estates in fee tail are prohibited in Florida, and the Rule in Shelley's Case has been abolished. A limitation sufficient at common law to create an estate in fee tail without the aid of the Rule creates in Florida today an estate for life in the first taker, remainder in the life tenant's issue that become his heirs. A limitation sufficient at common law to create an estate in fee tail, or an estate in fee simple absolute, through the operation of the Rule in Shelley's Case now creates an estate for life in the first taker, remainder to the lineal descendants of the life tenant in being at the time the life estate commences, subject to open and take in lineal descendants who come into being during the continuance of the life estate.

The statutory treatment of estates in fee tail in Florida has been criticized as piecemeal, inconsistent, and provocative of litigation.[162] Regardless of any changes that the legislature may make in the future, the present statutes and their predecessors, inconsistent though they may be, will continue to be controlling as to transfers within their scope and period of effectiveness.

Application of the present Florida statutes and their predecessors necessitates a preliminary determination that the transfer in question would have created an estate in fee tail at common law, either with or without the aid of the Rule in Shelley's Case, or that the limitation in question would have created an estate in fee simple absolute through the operation of the Rule. This determination cannot be made without an understanding of the common law principles applicable to estates in fee tail and to the Rule in Shelley's Case.

160. Foster, *supra* note 108, at 132.

161. GRAY, THE RULE AGAINST PERPETUITIES §882 (2d ed. 1906).

162. Smith & Keathley, *Future Interests in Florida,* 9 U. FLA. L. REV. 123, 141 (1956).