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Shades Of The Rule In Shelley's Case

Burnham v. Gas & Electric Company[1]

An action in ejectment was brought in the Circuit Court of Baltimore County by the plaintiffs, Burnham and Lee, against the defendant, Baltimore Gas & Electric Company. The suit developed out of a deed executed on June 28, 1852, by which Daniel and Nancy Warfield conveyed certain described real estate to Eliza Ann Lee in trust for the joint lives of her two infant children, Priscilla and Mary Ann Lee, without impeachment of waste, and with remainder to their heirs in fee simple. Eliza Ann Lee died in 1874. Her daughter, Priscilla Lee, who was born in 1843, died in 1861, leaving only one child, from whom the plaintiff, Charles Frank Lee, Jr., was descended. Mary Ann Lee married and had fourteen children, one of whom is the plaintiff, Albert Washington Burnham. She died intestate in 1943. In 1924, Mary Ann Lee purported to grant to the

[1] 217 Md. 507, 144 A. 2d 80 (1958).

defendant, by deed duly recorded, a right of way over the land in question. Pursuant thereto, defendant erected and continuously maintained an electric transmission line across the property.

In their suit to eject the defendant, plaintiffs contended that because Mrs. Burnham (Mary Ann Lee) was only a life tenant, the defendant's easement across the property terminated with her death. Defendant answered that Mrs. Burnham became owner in fee of a one-half undivided interest in the property by virtue of the operation of the rule in Shelley's case.[2] From the trial court's summary judgment sustaining the defendant's contention, plaintiffs appealed, contending that the rule in Shelley's case was not applicable because the life estates to the daughters of Eliza Ann Lee were equitable and the remainder to their heirs was legal, and that the two estates were, therefore, incapable of coalescing under the rule in Shelley's case.

The Court of Appeals rejected plaintiffs' contentions and concluded that the rule in Shelley's case did apply; that the trusts were passive and executed by the Statute of Uses[3] into legal estates; that the rule in Shelley's case operated to transfer the legal remainder interest to the life tenants; and that the two interests merged in the ancestors to give them fee simple estates which passed by inheritance to the plaintiffs. The court held further, however, that the easement which was given by Mrs. Burnham, only one of the joint life tenants, was not binding upon the heirs of Priscilla Lee, whose consent to the grant of the easement was never acquired, but that the easement would be binding upon the heirs of Mrs. Burnham. Judgment of the trial court was affirmed only as to the plaintiff heirs of Mrs. Burnham, and reversed as to plaintiff, Charles Lee, and remanded for further proceedings.

Those who may have believed that the Maryland statute abolishing the rule in Shelley's case[4] placed the rule at eternal rest will be surprised to find the rule applied in the instant case, some forty-six years after enactment of

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[2] *Infra*, n. 6.

[3] 27 Hen. VIII c. 10 (1535), 1 ALEX. BRIT. STAT. (2nd ed. 1912) 292.

[4] 8 MD. CODE (1957), Art. 93, § 366:

"Whenever by any form of words in any deed, will or other instrument executed after the thirty-first day of May, in the year nineteen hundred and twelve, a remainder in real or personal property shall be limited, mediately or immediately, to the heirs or the heirs of the body of a person to whom a life estate in the same property is given, the persons who on the termination of the life estate are then the heirs or the heirs of the body of such tenant for life, shall take as purchasers by virtue of the contingent remainder so limited to them."

the statute. As, however, the statute only abolishes the rule with respect to instruments executed subsequent to May 31, 1912,[5] it should not be too surprising to see it revived here, where the deed was executed in 1852. From time to time such instruments may still be uncovered, but as we progress farther from the date of the statute, the likelihood of there being occasion for applying the rule in Shelley's case substantially diminishes.

The case from which the rule in Shelley's case derives its name was decided in 1581.[6] The statement of the rule which is probably most intelligible to the modern reader is that of Chancellor Kent.[7] In substantially the same language as used by Kent, this rule has been repeated, indorsed and applied by the Court of Appeals of Maryland.[8] From the various statements of the rule, it has been deduced that the following elements are indispensably prerequisite to its application: (1) there must be a freehold estate in the ancestor (sometimes called the "first taker");[9] (2) both

[5] To this effect is the statement of the Court of Appeals in Bowman v. Weer, 204 Md. 344, 350, 104 A. 2d 620 (1954):

> "This rule, which was followed in this state for many years, was abolished by the Legislature, not retroactively, by the Laws of 1912 . . . ."

[6] Shelley's case, 1 Coke 93b, 104a, 76 Eng. Rep. 206, 234 (1581). Lord Coke stated the rule thus:

> "[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."

At the time Shelley's case was decided, the doctrine pronounced in it was considered to be of ancient origin. The case cited several judgments in the Year Books of the time of Edward III in support of it. See cases cited in SIMES & SMITH, LAW OF FUTURE INTERESTS (2nd ed., 1956), § 1542. Although apparently the rule had been long recognized, it seems equally clear that it did not gain widespread prominence until Shelley's case, which is briefly stated in Lyles v. Digges, 6 H. & J. 364, 370 (Md. 1825).

[7] 4 KENT'S COMMENTARIES (12th & 13th eds., 1884) 215:

> "'When a person takes an estate in 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.'"

See 3 RESTATEMENT, PROPERTY (1940) 1740, § 312(1).

[8] Simpers v. Simpers, 15 Md. 160, 186 (1860); Timanus v. Dugan, 46 Md. 402, 416 (1877); Clarke v. Smith, 49 Md. 106, 117 (1878); Handy v. McKim, 64 Md. 560, 573, 4 A. 125 (1886); Waller v. Pollitt, 104 Md. 172, 173-174, 64 A. 1040 (1906).

[9] In 1 AM. LAW OF PROPERTY (1952) 483 it is stated that in the United States, no case has been found in which the rule in Shelley's case has been applied where there was not a life estate in the ancestor. To the same effect are statements in the following authorities: 3 POWELL ON REAL PROPERTY (1952) 243; 3 RESTATEMENT, PROPERTY (1940) 1741; SIMES & SMITH,

the devise or grant to the ancestor and the limitation to his heirs must be contained in the same instrument;[10] (3) the remainder must be to "heirs", in the technical meaning of that term as a word of limitation, not as a word of purchase;[11] and (4) the interest of the ancestor and that limited to the heirs must both be of the same quality.[12] If any one of these elements is absent, the rule in Shelley's case cannot be applied.[13] If they are all present, then the rule will operate to make the remainder to the heirs, a remainder to the ancestor himself. Having in himself both a remainder in fee simple and life estate, the ancestor takes a fee simple through merger of the two estates, provided there is no intervening estate.[14]

Although there are many difficulties incident to determining whether or not any of the aforementioned elements exist in a given case,[15] certainly one of the most perplexing of those difficulties is the requirement that the freehold

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LAW OF FUTURE INTERESTS (2nd ed., 1956) 435. It seems clear that in Maryland, this would also be true since the only existing freehold interest other than the fee simple is the life estate. It is manifestly impossible that the first taker could have a fee simple estate, since no remainder could follow such an interest. 1 AM. LAW OF PROPERTY (1952) § 4.27.

[10] 3 RESTATEMENT, PROPERTY (1940) 1757, § 312i; 26 C.J.S. 951, Deeds, § 123; *cf.* Rhodes v. Brinsfield, 151 Md. 477, 480, 135 A. 245 (1926).

[11] "The word 'limitation', then, as used . . . in the rule in Shelley's case, must be understood as a word of boundary, that is, as a word describing the extent or quality of the estate conveyed, and the word 'purchase', . . . must be understood to mean an estate acquired in a manner to take it out of the ordinary course of descent, that is, as designating certain persons who are to take the estate." 29 L.R.A. (NS) 963, 971.

[12] This is interpreted to mean that the estate of the ancestor and that of the remainderman must both be legal or both be equitable. Ware v. Richardson, 3 Md. 505, 545 (1853); Peter v. Peter, 136 Md. 157, 169, 110 A. 211 (1920); Handy v. McKim, 64 Md. 560, 573, 4 A. 125 (1886). Conversely, the rule is held universally to be inapplicable if the life estate is a legal interest and the remainder an equitable interest, or vice versa. See SIMES & SMITH, LAW OF FUTURE INTERESTS (2nd ed., 1956) § 1552; see also 3 RESTATEMENT, PROPERTY (1940), 1755, § 312h.

[13] *Supra*, ns. 7-12; also see Griffith v. Plummer, 32 Md. 74, 77 (1870); Shreve v. Shreve, 43 Md. 382, 394 (1875); Beggs v. Erb, 138 Md. 345, 349-350, 113 A. 881 (1921).

[14] Professor Powell explains this as follows: When A conveys land "to B for life, then to heirs of B", the unabrogated rule in Shelley's case changes the quoted limitation into one "to B for life, then to B and his heirs". The law of merger then operates upon the changed remainder to transfer it, in effect, into one "to B and his heirs". The process by which the ancestor acquires an estate of inheritance thus falls into two stages: (a) the true operation of the rule in Shelley's case; and (b) the connected operation of the principles of merger. 3 POWELL ON REAL PROPERTY (1952), § 379.

[15] For a scholarly presentation and analysis of the rule in Shelley's case, and an acute discussion of the difficulties inherent in interpreting and applying the rule, see annotation in 29 L.R.A. (NS) 963 *et seq.*, and also, SIMES & SMITH, LAW OF FUTURE INTERESTS (2nd ed., 1956), §§ 1541 to 1572.

estate and the limitation to heirs be of the same quality. Whether or not that requirement was satisfied was one of the principal problems of the subject case, in which the estate of the ancestors was subject to a trust. Whenever trust estates are involved, it is necessary to determine whether the trusts are active or passive. If the trust is active, it cannot be executed under the Statute of Uses;[16] if passive, the equitable trust estate is executed by the Statute of Uses into a legal estate.[17]

The trust estates in the subject case appeared to be passive, for they imposed no expressly stated active duties on the trustee; under that trust, the trustee merely held the trust estates for the benefit of the *cestui que trust.* The plaintiffs contended, however, that despite the complete absence of any expressly stated duties, such duties could be inferred. In support of their contention, they cited *Ware v. Richardson,*[18] an early Maryland case, which held that where property is conveyed or devised to a trustee for the separate use of a married woman, the trustee has a *quasi* active duty to perform in protecting it from the husband and his creditors, and that because of such *quasi* active duty, the Statute of Uses could not execute the trusts. But, as the court notes in the subject case, *Ware v. Richardson*[19] also contains the very significant *dictum* that:

> ". . . the mere interposition of a trustee to protect and secure a trust estate in a third person even though a married woman, will not prevent the use from being executed in the *cestui que use,* unless there is attached to the trustee the performance of some active functions or duties in order to support the trust."

The implication of this statement seems to be that no active duties will be inferred unless the instrument speci-

[16] Handy v. McKim, 64 Md. 560, 569, 4 A. 125 (1886). An active trust is one which imposes upon the trustee the duty of taking active measures in the execution of the trust, as where property is conveyed to trustees with directions to sell and distribute the proceeds among the creditors of the grantor. In addition to the above Maryland case, see In re Buch's Estate, 278 Pa. 185, 122 A. 239, 240 (1923); Welch v. Northern Bank & Trust Co., 100 Wash. 349, 170 P. 1029, 1032 (1918); also *fn.* 17, *infra.*

[17] Handy v. McKim, 64 Md. 560, 569, 4 A. 125 (1886). A passive trust is one ". . . whereby the trustee is merely the depository of the legal title, with no duties except to make a conveyance when called upon by the cestui que trust, and to defend the legal title, or to allow his name to be used for the purpose; . . ." 1 TIFFANY ON REAL PROPERTY, (3rd ed. 1939) 425. Examples of what are apparently passive trusts are contained in Porterfield v. Porterfield, 85 Md. 663, 666, 37 A. 358 (1897); Brandau v. McCurley, 124 Md. 243, 246, 250, 92 A. 540 (1914).

[18] 3 Md. 505 (1853).

[19] *Ibid,* 548.

fically states that the estate is conveyed for the separate use of a married woman, and that where the *cestui que trust* is unmarried and no marriage was in contemplation when the instrument took effect, no active duties will be inferred.[20] But, whether or not an inference that the trustee has active duties to perform will be raised under such circumstances seems to have become practically a moot question since the enactment of legislation to protect married women in their separate property rights.[21]

Rejecting the plaintiffs' contention that active duties might be inferred where the beneficiary of a trust is an infant, the Court cited several cases in support of its conclusion that "[t]he fact that the beneficiary of a trust is an infant is not of itself enough to convert a trust which imposes no active duties upon the trustee from a passive trust to an active one."[22] But, the Court pointed out that whether or not active duties should be inferred in the case of the trustee for minor children was not determinative in the instant case, for even if such duties were to be inferred, a familiar rule of the law of Trusts would have operated nevertheless. Under that rule, a trust, active in its inception, becomes passive when the purposes for its creation have ended.[23] Thus, in the instant case, where one of the daughters died before attaining her majority and the other married, but outlived her husband, those events terminated the trusts even if it were assumed, on any of the bases contended for, that they were initially active.

Under either approach, therefore, (a) that the trusts were initially passive or (b) that they were initially active and later became passive, the Court reached the result that at the time of the conveyance of the easement the trusts were passive and the Statute of Uses would execute them

[20] Wherever an inference has been raised that active duties attach to the trustee for a married woman, the deed of trust or will seem always to have contained specific provision that the estate conveyed was for the *separate* and *sole* use of the married woman. For example, see Ware v. Richardson, *supra*, n. 18; Warner v. Sprigg, 62 Md. 14 (1884); Bowen v. Chase, 94 U.S. 812 (1876).

[21] Such legislation makes completely unnecessary the use of the trust device as a means of conveying property to a married woman where the only motive for establishing the trust is protection of the property from the husband and his creditors. 4 MD. CODE (1957), Art. 45, §§ 1, 3 and 4.

[22] Hooper v. Felgner, 80 Md. 262, 30 A. 911 (1894); Warner v. Sprigg, 62 Md. 14 (1884); Owens v. Crow, 62 Md. 491 (1884); Lee v. O'Donnell, 95 Md. 538, 52 A. 979 (1902); Potomac Lodge v. Miller, 118 Md. 405, 84 A. 554 (1912).

[23] Owens v. Crow, *ibid* (personalty); Numsen v. Lyon, 87 Md. 31, 39 A. 533 (1898); Thompson v. Ballard, 70 Md. 10, 17, 16 A. 378 (1889); Lee v. O'Donnell, 95 Md. 538, 545, 52 A. 979 (1902); Potomac Lodge v. Miller, 118 Md. 405, 417, 84 A. 554 (1912).

into legal estates.[24] As the plaintiffs and defendant both conceded that the remainder to the heirs was a legal interest, both the life estate and the remainder were of the same quality and capable of coalescing through operation of the rule in Shelley's case.

In this case, the court seemed to have no hesitancy in holding that the rule would be operative wherever there was a legal remainder interest preceded by an equitable life estate which subsequently became legal. SIMES AND SMITH,[25] however, state their belief that if the rule in Shelley's case was inapplicable to such a conveyance when the limitations first took effect, there is no reason why it should be applied thereafter. They say:

> "The rule in Shelley's case is absurd enough as usually applied; but to extend it so as to transform a contingent remainder in the heirs into a vested remainder in the ancestor years after the original conveyance and just because the ancestor's equitable life estate became a legal one is even more ridiculous.
>
> "The primary notion of the application of the rule in Shelley's case is that it arbitrarily says certain words in a deed or will mean something which the one who used them did not intend. But it is an effect given to the words *in* a deed or will *when* the instrument takes effect, not an effect given to subsequent events. It is much more consistent with the great bulk of the cases on the rule to say that it applies only at the time the instrument takes effect and not at any subsequent period."[26]

Despite the objection of authors SIMES AND SMITH to application of the rule in Shelley's case in such circumstances, there are some Pennsylvania cases[27] which support the court's decision that the rule should so operate. In *Steacy v. Rice*[28] property was devised to a trustee for the separate use of a married woman for life. She subsequently became a widow. In holding that the woman took an estate in fee simple at the time her husband died, by operation of the rule in Shelley's case, the Court stated:

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[24] Handy v. McKim, 64 Md. 560, 569, 4 A. 125 (1886).

[25] SIMES & SMITH, LAW OF FUTURE INTERESTS (2nd ed., 1956) 472, § 1562.

[26] *Ibid*, 473.

[27] McKee v. McKinley, 33 Pa. 92 (1859); Steacy v. Rice, 27 Pa. 75 (1856); Nice's Appeal, 50 Pa. 143 (1865); Dodson v. Ball, 60 Pa. 492 (1869).

[28] *Supra*, n. 27.

> "The life estate she took was legal after the special trust had ended, and there was then nothing in the quality of the two estates to prevent them from uniting. * * * Can it make any difference that it was not executed immediately, if it was executed at all, within the period of its duration? I cannot see why it should."[29]

There seem to be no Maryland cases in which the question arose or an answer to it was intimated; nor does the problem seem to have arisen in any jurisdiction other than Pennsylvania.[30] The court then, in the subject case, was confronted with a choice between the view espoused by the Pennsylvaina court in the aforementioned cases, all of which are quite old, and that of the authors, SIMES AND SMITH, whose views are presumably founded on the modern tendency to avoid application of the rule wherever it is reasonably possible. It chose to follow the former view. One must admit that this choice is somewhat surprising in view of the attitude toward application of the rule which the court manifested in *Bowman v. Weer*,[31] decided just a few years earlier. There, the court said:

> "The Courts in this State, however, have always endeavored to hold that the rule does not apply and

[29] *Ibid*, 82. Similar facts were involved in McKee v. McKinley, Nice's Appeal and Dodson v. Ball, *supra*, *n.* 27, and in each of those cases, the court had no qualms about applying the rule in Shelley's case where estates to ancestor and to heirs were originally not of the same quality, but subsequently became so.

[30] The court, in the instant case (516) cites Brown v. Renshaw, 57 Md. 67 (1881) as supporting the rule that "[u]pon the termination of any . . . active trust . . . the Rule in Shelley's case would then operate." This writer is unable to find anything in the Renshaw case which declares or supports such a rule directly or inferentially.

Also cited by the court in the subject case is 3 RESTATEMENT, PROPERTY (1940) 1756, which makes this statement:

> "At the time the conveyance takes effect the estate for life in the ancestor may be of one quality and the required remainder another, but later this situation may change so that both become legal or both become equitable. If such change does occur after the effective date of the instrument and occurs automatically as a result of the term of the first conveyance, the requirement that the estate for life and the required remainder both be legal or both equitable is then satisfied and the rule . . . applies, if the other requirements for the application of this rule are satisfied . . . ."

Citing this section of the RESTATEMENT and also Dodson v. Ball, *supra*, n. 27, as authority, 1 AM. LAW OF PROPERTY (1952) 492 contains the more succinct statement: ". . . in these cases where the requirements of the rule are not met at the inception of the instrument, the rule is applied when the requirements are met."

One sees easily the circularity of the authority used to support this view. Ultimately, one returns to the four Pennsylvania cases cited *supra*, n. 27, as being the only authority for it.

[31] 204 Md. 344. 104 A. 2d 620 (1954).

> have sought some 'inconsistent provision or word which would exclude its application'. The decisions of this Court require that we adopt the restrictive construction which gives effect to the natural and primary meaning of the words used, rather than an arbitrary meaning by an artificial rule of law."[32]

On the facts of the *Bowman* case,[33] there is little doubt that the rule in Shelley's case was not applicable there, but what is of interest in that case is not the court's decision, but its reaffirmation of disfavor toward the rule and its clear statement of intention to do all possible to avoid applying it. Confronted in the *Burnham* case[34] with a question of first impression in Maryland, the court chose to adhere to a view which made possible the application of the rule.

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[32] *Ibid*, 350.
[33] *Ibid.*
[34] 217 Md. 507, 144 A. 2d 80 (1958).