Volume 40
Issue 1 *Dickinson Law Review - Volume 40, 1935-1936*

10-1-1935

Legislative Limiting of the Rule in Shelly's Case in Pennsylvania

Harold S. Irwin

LEGISLATIVE LIMITING OF THE RULE IN SHELLY'S CASE IN PENNSYLVANIA

HAROLD S. IRWIN*

The Act of June 19, 1935, P.L. ——, No. 329, reads as follows:— (Title) "To limit the operation of the rule in Shelly's case by providing that certain grants and devises in trust or otherwise shall be construed not to create estates in fee.

Section 1. . . . . That grants or devises in trust or otherwise becoming effective hereafter which shall express an intent to create an estate for life with remainder to the heirs of the life tenant shall not operate to give such life tenant an estate in fee.

Section 2. All laws inconsistent herewith are hereby repealed."

The extra-legislative road of the above act has been a long and arduous one. The act, while short and concise, is not so exoteric that a consideration of this journey prior to enactment would be without aid in solving the problems inherent in the act. The present act is a creature of the Pennsylvania Bar Association acting through its committee on Civil Law, formerly the committee on Law Reform. The question as to whether or not the rule in Shelly's case should be abolished by legislative action was considered first in 1898. The Law Reform committee reported to the Association in July, 1898, in favor of abolishing the rule, called by them, the "venerable hypocrite". The committee chairman was Alex. Simpson, Jr. The report of this committee, containing considerable discussion on the merit of abolishing the rule will be found in Vol IV, Report of the Pennsylvania Bar Association, page 33 et seq. The report lists twenty-three states as having abolished the rule in whole or part by legislation by that year.

The following is the wording of the act suggested by the committee:— (Title). "To abolish the Rule in Shelly's Case and to give effect to the intention of the testator or grantor.

. . . . . That the Rule in Shelly's Case is hereby abolished, and hereafter the intention of a testator or grantor, when not contrary to public policy, shall be carried into effect."

---

*Ph.B., Dickinson College, 1923; M.A., Dickinson College, 1925; LL.B., Dickinson School of Law, 1925; Professor of Law, Dickinson School of Law, 1925——; Faculty Editor, Dickinson Law Review; Member of Pennsylvania Bar.

It will be noted that the act suggested was to *abolish* the rule entirely from the law of Pennsylvania. Among other objections to the proposed act in its then presented wording, voiced by members at the annual meeting of the Association, was the complaint that the act failed to specify affirmatively and specifically what the result should be in cases where the rule normally would have applied. Thirty-seven years has proved insufficient time to remedy this complaint and the present act is still open to the criticism that it fails to state what the result shall be where the rule would otherwise have applied.

After considerable discussion at this meeting, the committee, on the following day, presented a revised report and a revised wording of the proposed act. It then read:— (Title). "An Act to abolish the rule of law known as the rule in Shelly's case. . . . . That the rule of law known as the rule in Shelly's case be and the same is hereby abolished as to all grants and devises taking effect after the passage of this act." The report was agreed to by a vote of 56 to 25.

Thirty years later the committee on Civil Law, George E. Alter, Chairman, reported to the Association on the same subject. The committee was guilty of using some slightly inaccurate language in its report and this inaccuracy may be responsible in part for the inaccuracies apparent in the act as passed by the 1935 legislature. The report says, for example,[1] "The Rule in Shelly's Case applies where, and only where, a life estate is given to A, and, in the same instrument, the remainder in fee thereof is given to the 'heirs' of A. . . . . The effect of the Rule is, of course, to give the whole fee to A, in cases where it applies, thus effectually defeating the intention of the grantor." It will suffice here to suggest that this language does not indicate that the Rule applies where an estate *pur autre vie* is given to A; that it applies where joint life estates are given to A and another and the remainder to their heirs; that it applies where a remainder in fee is given to A's heirs after an interposed remainder for life is given to a third person; that it does not apply where the one interest is legal and the other equitable; that in some cases it does not give the whole fee to A as where there is an interposed life estate to another or where the remainder has some condition precedent attached to it.

The report went on to suggest that total abolition of the Rule was the only sensible course that could be taken today and suggested an act with the following wording:— (Title). "An Act to effectuate the expressed intentions of testators, grantors and settlors, including therein

---

[1] 34 Pa. Bar Assoc. Reports 39.

the abolition of the rule in Shelly's case. . . . . That all grants or devises, in trust or otherwise, becoming effective after the passage ot this act, shall be carried into effect according to the expressed intention of the testator, grantor or settlor, and the Rule in Shelly's Case is hereby abolished as to all such grants and devises." Before this report was discussed by the Association, a discussion of the matter was had by some of the committee with the Chief Justice and one of the other Justices of the Supreme Court. It appeared that the Chief Justice was of the opinion that the Rule does have some useful function. The Chairman did not disclose in his talk just what this useful function of the Rule was or how it was to be retained. The result of this conversation, however, was a revision of the wording of the proposed act and the act as adopted by the legislature in 1935 was offered to the Association. The Chairman further said, "The thought is that in passing such an act as that, (the present one) that the evil of the Rule in Shelly's Case, occasionally causing a defeat of the intent of a testator or grantor, would be avoided, and yet the Rule itself would not be abolished, so that it might remain to be of such use as it seems, from what we learned in discussing the matter with those who have given it more thought, it does occasionally accomplish." Unfortunately what this beneficial use of the Rule is and how it remains available with the act in its present form is not disclosed by the able chairman. The report was unanimously approved by the members of the Association.

The report of the committee on Civil Law to the Association in 1935 mentioned that a bill (the one adopted by the legislature) "in effect abolishing the Rule in Shelly's Case" was in the legislature at that time.

The rule was abolished in England in the Law of Property Act of 1925, 15 Geo. V, Chap. 30, sec. 131. Pennsylvania, by its act *limiting* the operation of the Rule joins at least thirty-two other states and the District of Columbia in which the Rule has been abolished or its operation restricted.

That ultra-conservative Pennsylvania should thus strike down one of the most fruitful sources of litigation in our legal history and a rule that has existed for over four hundred and fifty years is in itself such a notable achievement in legal reform, that we feel hesitant in suggesting that an act slightly more specific in language and results might have been devised during that period of time. Evidently the framers of the act distrusted their own ability to specify in what manner the Rule was being limited in application in contrast with abolition thereof and equally distrustful of their ability to specify affirmatively what interests would be created by grants or devises heretofore within the blighting

effect of the Rule. We believe that the most conspicuous failures of the framers lie in these two vices of the present wording of the act.

Several problems as to the effect of this act will suggest themselves at once. What is meant by the words "in trust or otherwise"? Are these words to be the source of the continued beneficence of the Rule, the source of the reason for limitation of the Rule rather than abolition? A reasonable interpretation of this language must produce the conclusion that there is no loophole here for the continued vitality of the Rule. The act covers grants and devises in trust and otherwise than in trust which can mean nothing if it does not include grants and devises that create legal interests rather than equitable interests or interests in trust. Why then should such language be inserted? Their purpose is explained in a discussion of the report of the committee on Civil Law in 1928.[2] These words were included in the draft of the act to resolve any doubt that equitable interests were to be included and that the exception now recognized where the one estate is legal and the other equitable should hereafter be the law even though both interests were legal or both equitable. As thus explained it will be seen that no escape from the operation of the act can be predicated on this language.

It is to be noted that the act applies to grants or devises "becoming effective hereafter". The date this act became effective and hence the date from which the "hereafter" is to be taken, was September 1, 1935.[3] The act therefore will control all deeds accepted on or after that date and the wills of all decedents dying on or after that date. Since the act is designed to carry out the intention of the creator of the interests no special hardship would be felt by those who had already executed deeds or wills in not having their intentions defeated by the Rule.

The act is to be effective as to grants or devises, thus effectively covering both transactions inter vivos and wills. But by the use of the words "g ants and devises" the question as to the effect of the act on transfers of personal property is raised. Both words in their legal significance mean transfers of interests in real property and are not properly applicable to personal property transfers. Hence the act by its language limits the Rule only in transfers of interests in real property. Acts derogating from the common law are strictly construed.[4] But if the Rule in Shelly's case does not apply to creation of interests in personal property or if a like result is not reached by analogy or some other

---

[2]34 Pa. Bar Assoc. Reports 41.

[3]Act of May 17, 1929, P.L. 1808.

[4]Carter v. Reserve Co., 100 S.E. 738 (W. Va. 1919).

rule of law, the failure of the act to include creation of life estates and remainders in personal property is immaterial.

Judge Penrose, peculiarly able in the intricacies of the law of future interests, has said,[5] "The Rule in Shelly's Case does not, of course, apply to limitations of personal estates." *Bacon's Appeal*[6] holds that the Rule in Shelly's Case has nothing to do with the question in bequests of personalty. But, in *Appeal of Cockins and Harper, Ex'rs,* [7] the court held that under the Rule in Shelly's Case each residuary legatee took one-third of the personal estate absolutely. *Little's Appeal*[8] also held that the Rule applied in the case of personalty. The question, however, closely approaches to being an academic one only, since even in those cases holding that the Rule does not apply, the same result is reached normally, by analogy, under the rule that words which create either an estate tail or an estate in fee simple in realty will create absolute interests in personalty.[9]

In Mississippi where the act abolishing the rule was phrased in terms applicable to realty only the court held the Rule itself to be applicable after the act to transfers of personalty.[10] Massachusetts applied the rule to personalty that words creating a fee tail or fee simple in realty would create an absolute interest in personalty. The statute abolishing the Rule in Shelly's Case applied by its terms to realty only. The court there held that they were not bound to apply the Rule regardless of intent in personalty cases and found in the case an intent not to create an absolute interest in the personalty.[11]

The better reasoned cases in Pennsylvania hold that the Rule does not apply to personal property transfers. They do apply the Rule by analogy under the guise of the rule that words creating a fee simple or fee tail in realty will create an absolute interest in personalty. Henceforth words creating a life estate in realty and remainder to the heirs of the life tenant will no longer create a fee simple in the life tenant. Therefore no longer will words creating a life estate in personalty and remainder to the heirs of the life tenant create absolute interests in personalty. With the Rule *limited,* the analogy must be *limited,* likewise. It would seem absurd to *limit* the Rule in realty transfers, to

---

[5]Keys's Estate, 4 Pa. Dist. Rep. 134 (1895).
[6]57 Pa. 504 (1868).
[7]111 Pa. 26 (1886).
[8]117 Pa. 14 (1887).
[9]Bacon's Appeal, 57 Pa. 504 (1868); Potts' Appeal, 30 Pa. 168 (1858); Keys's Estate, 4 Pa. Dist. Rep. 134 (1895).
[10]Powell v. Brandon, 24 Miss. 343 (1852).
[11]Sands v. Old Colony Trust Co., 81 N.E. 300 (Mass. 1907).

which the Rule properly applies, and yet permit the Rule to stand, directly or by analogy, to a situation to which the Rule never did apply logically. Hence we believe the Rule is now equally *limited* in personalty cases.

The situation controlled by the act is where the grant or devise expresses an intent to create an estate for life with remainder to the heirs of the life tenant. Acts with language limiting the act to cases where a life estate is expressed have been criticized because they do not say "freehold" as in the original wording of the Rule. But since fee tails have been abolished in Pennsylvania, the only type of freehold that can support a remainder are life estates of some sort and this criticism is not valid here. Will the act apply if the estate created in the first taker is a life estate *pur autre vie?* A dictum in a West Virginia case[12] suggests that an act similar to the Pennsylvania act would not apply to such a case. While this result may be proper under that statute, we submit that such conclusion would be incorrect under our act. All the act requires is that there be an estate for life and it does not specify that it must be for the life of the person to whom given. An estate *pur autre vie* is "an estate for life" and only a court desirous of defeating the application of the act wherever it could, could hold such a situation uncovered by the act. Will the act apply if the estates are joint life estates in the first takers followed by remainders to their heirs? This same West Virginia case holds that their act does not cover this situation. The only thing that would prevent our act from covering this situation would be the fact that it uses the singular rather than both singular and plural in speaking of life tenants. It is familiar statutory interpretation that the use of the singular is meant to include the plural. Only blind, unreasoning interpretation of our act would leave this situation unaffected.

Does the act in stating "with remainder to the heirs of the life tenant" require that the entire interest after the life tenant's interest be given to the heirs? Suppose the devise is to A for life, remainder to B for life, remainder to the heirs of A. There can be no question that the Rule applies whether the remainder to the heirs is limited immediately or mediately after the life tenancy to the ancestor. The act does not say with "the" remainder to the heirs of the life tenant. If it did, strict construction might say that the act would not apply where the remainder was "a" remainder only and not "the" only remainder. Hence the quoted wording of the act would seem to be equally applicable

---

[12] Carter v. Reserve Co., 100 S.E. 738 (W. Va. 1919).

whether or not there was an interposed life estate to another, in either case there being a remainder to the heirs of the life tenant. But the words used in the act to describe what shall *not* happen when the situation controlled by the act is present renders this conclusion at least debatable. The act says, "shall not operate to give such life tenant an estate in fee." The act is therefore to apply only when the legal result in the absence of the act would be to give the life tenant a fee simple. Where there is an interposed life estate to another the Rule in Shelly's Case operates to give the remainder to the life tenant but the rules of merger prevent the two estates from coalescing into an estate in fee simple.[13] Hence a reasonable interpretation of the act would leave this situation unaffected thereby. A like conclusion seems inevitable where the remainder to the heirs on being treated as a remainder to the life tenant is a contingent one, for there will be no merger into a fee simple.[14] Possibly these are the situations meant to continue outside the act to allow the good influence of Shelly's Case to continue. No good reason can be suggested why the intention of the creator of the interests should be frustrated in these instances and the intention allowed to control in the others. The inter-position of a life estate or the annexing of a condition to the remainder do not disclose an intent to give the life tenant anything more than a life estate. We believe that these situations were meant to be covered by the act and the doubt is raised only by the unfortunate wording of the effect of the act, speaking as it does only negatively. It is regrettable that the framers of the act were not more careful to distinguish between the operation of the Rule in Shelly's Case and the utterly independent working of the rules of merger. [15]

Does the act in saying "remainder to the heirs of the life tenant" mean that the act shall apply only when the specific word "heirs" is used? There is nothing in the act to indicate that the word "heirs" is there used with such restricted force. The act clearly means that it is to apply wherever the remainder is given to persons to take as heirs of the life tenant—to take by descent from him—to create the unknown estate of a life estate descendible to heirs.[16] Hence it would seem that the act is meant to be applied if the word "children" is used in the

---

[13]Fearne, Contingent Remainders, p. 29.

[14]Fearne, Contingent Remainders, p. 34.

[15]See also Lyman v. Lyman, 293 Pa. 490 (1928).

[16]See Hileman v. Bouslaugh, 13 Pa. 344 (1850).

sense of "heirs"[17] or if the word "issue" is so used[18] or other words are so used. It is unthinkable that the life tenant should take a life estate only where the word "heirs" has been used and shall take the remainder in fee also where the words "children" or "issue" have been used.

In situations to which the act is effective, what interests will be created by the grant or devise? What will now be the effect of a devise to A for life, remainder to his heirs? The language of the act is not all that might be desired in this connection. It says, "shall not operate to give such life tenant an estate in fee." As has been pointed out above, strictly speaking the Rule never did operate to give the life tenant an estate in fee. Most of the statutes passed in the United States on this subject have been couched in affirmative language in speaking of the effect of the act on dispositions to which it applies. The New York act, the model for most of the statutes of the other states, provides that the persons who, on the termination of the life estate, are the heirs of such tenant for life, shall take as purchasers, by virtue of the remainder limited to them.[19] The Massachusetts act provides that a remainder in fee simple shall vest in the heirs of the life tenant.[20] The Connecticut act said that "only" an estate for life should vest in the grantee or devisee.[21] The startling result reached by their court[22] was that the remainder limited after the life estate was void. We trust that such will not be the result under our act. To say, as our act does, that the life tenant is not to take a fee simple is merely another way of saying that the word "heirs" or its equivalent shall no longer be considered to be a word of limitation indicating the quantum of the estate taken by the ancestor but shall be considered a word of purchase indicating the persons who are to take the remainder in their own right from the grantor or testator. Hence our act is in practical effect the counterpart of the New York act.

What heirs will take this remainder? Is the remainder during the life estate vested or contingent? Is it vested but subject to a condition subsequent divesting it on the death of an heir presumptive before the death of the life tenant? Under the common law rules applied by the Pennsylvania courts, an estate to A for life, remainder to A's heirs, using the word "heirs" as a word of purchase, creates a contingent remainder in A's heirs which vests, if at all, on the death of A. Those who are

---

[17]Shapley v. Diehl, 203 Pa. 566 (1902); Lauer v. Hoffman, 241 Pa. 315 (1913). Cf. Manchester v. Durfee, 5 R. I. 549 (1858).

[18]Stout v. Good, 245 Pa. 383 (1914).

[19]N.Y. Real Property Law (1917), section 54.

[20]Mass. General Laws (1921), Chapter 184, section 5.

[21]Conn. General Laws (1930), section 5002.

[22]Lewis v. Lewis, 51 Atl. 854 (Conn. 1902).

A's heirs at his death will take the remainder in fee, further words of limitation not being necessary to create a fee either by will or by deed in Pennsylvania. The remainder to A's heirs, A being a living life tenant, must create a contingent remainder under the test of the contingency of remainders consistently applied in this state. It must be contingent, for until the death of the life tenant, there is no one who answers the description of the life tenant's heirs. If before the life tenant's death, the life estate should be terminated by forfeiture, merger or surrender, the remainder would not stand ready, by its terms, to come into possession.[23] Until A dies he has no heirs and until his death it cannot be determined who those heirs will be and hence the remainder is contingent because the remaindermen are unascertained. This remainder to the heirs will not be transmissable inter vivos nor by will or descent.[24] Chairman Simpson, on being questioned before the Bar Association in 1898 as to the effect of abolition of the rule stated that there was no doubt that the remainder would go to those persons who at the time the devise or grant took effect were his heirs for the time being.[25] It is submitted that there is no justification for this conclusion in the Pennsylvania decisions and that only those who survive the life tenant and then occupy the position of his heirs will take the remainder. The result should be the same as where there is a life estate to A, remainder to the heirs of the testator, which now means only those who are heirs at the death of the life tenant.[26]

Will the surviving husband or wife of the life tenant take an interest in the remainder to the heirs? At the time that the abolition of the Rule was first suggested neither spouse took as an heir of the other but took special interests by way of curtesy or dower. It is equally certain that in 1935 either spouse takes property from the other on death intestate as an heir of that other. This means that either is the heir of the other as that term is used in wills.[27] Hence the surviving spouse will be entitled to share in the remainder to heirs. It would be a taking by purchase from the grantor or testator, however, and the spouse will take equally with the other heirs, whether they be children or collaterals and regardless of the number of such other heirs. If there were a widow and three children of the life tenant surviving him, each would take one-fourth and the widow would not take one-third as in intestacy. The In-

---

[23]See, for example, Womrath v. McCormick, 51 Pa. 504 (1866).

[24]Moss' Estate, 80 Pa. Super. 323 (1923).

[25]4 Pa. Bar Assoc. Reports 289.

[26]Act of June 29, 1923, P.L. 914.

[27]See Troxell's Estate, 90 Pa. Super. 533 (1927).

testate Act would be resorted to to determine who are heirs of the life tenant but they take by purchase as tenants in common from the original grantor or testator. Suppose the gift is to A for life, remainder to descend at A's death to his children. Our Supreme Court has held that the Rule applies in such a case, since the testator intended a passing by descent from the life tenant to his children.[28] Hence the present act should apply and A would not take a fee simple. Will A's surviving spouse share in this remainder? A logical construction would allow her to share since the word "children" was held by the court to have been used to mean "heirs". Under the act of 1935 to give the surviving spouse an interest in the remainder seems as much contrary to the intention of the testator as to give the estate in remainder to the life tenant under the Rule. This would also be true where the word used is "issue" and the court finds an intention to use it as meaning a taking by descent from the life tenant. It may be that in this type of case the courts will follow the intention expressed and give the remainder only to children or lineal descendants of the life tenant since the act does not in words dictate a contrary conclusion.

Collateral heirs of the life tenant would seem to be entitled in proper cases to take the remainder to heirs in the absence of direct heirs. Our act manifests no intention to *limit* the Rule merely for the benefit of direct descendants and not for the benefit of collateral heirs. This result has been reached in New Jersey[29] but this is due to the peculiar language of the New Jersey statute and furnishes no basis for a like conclusion under our statute. But collateral heirs might well be excluded on the basis of intention of the grantor or testator where the words used to make the Rule applicable are "children" or "issue", as in the case of the surviving spouse. Like conclusions seem inevitable in the case of parents or grandparents.

It should be remembered that if the remainder to the heirs is contingent, as it must be, that the grantor or heirs of the testator will retain a vested reversion in the property unless an alternative gift is made disposing of the interest if the remainder does not vest in possession. This suggests the possibility of the life tenant acquiring the reversion with the resulting legal possibility under the law of Pennsylvania that the contingent remainders will be destroyed thereby.[30] The passage of the present act makes it even more essential that an act shall be passed to prevent the destruction of contingent remainders

---

[28]Lauer v. Hoffman, 241 Pa. 315 (1913).
[29]Lippincott v. Davis, 28 Atl. 587 (N.J. 1894).
[30]Dunwoodie v. Reed, 3 S. & R. 435 (1817); Stewart v. Neely, 139 Pa. 309 (1891).

in Pennsylvania or to at least make clear that indestructibility is the present law of this state, if such it be.

The above discussion will indicate, at least, that the present act is not such a model of clarity that it can safely be made the pattern for subsequent statutes. The act has made a sweeping change in the law of future interests in Pennsylvania. We must await with patience for those judicial explorations that will result, possibly, in the discovery of that unknown country wherein the Rule in Shelly's Case remains unlimited in its operation and still, therefore, creates a remainder in fee in the life tenant, or, as the act phrases it, creates an estate in fee in the life tenant.

Carlisle Pa. Harold S. Irwin