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THE RULE IN SHELLEY'S CASE IN WEST VIRGINIA

By JAMES W. SIMONTON*

IN 1849 the Legislature of Virginia passed the following act which is today a part of the Code of West Virginia:

"Where any estate, real or personal is given by deed or will to any person for his life, and after his death to his heirs, or to the heirs of his body, the conveyance shall be construed to vest an estate for life only in such person, and a remainder in fee simple in his heirs or the heirs of his body."

The probable intent in passing this statute was to abolish that legal antique known as the rule in Shelley's Case, but, since such laudable purpose was only partially accomplished, a much more comprehensive statute was passed in Virginia in 1887 and now this aged and useless rule is effectually abrogated in that jurisdiction. Similar action ought to be taken in West Virginia so as to rid the State forever of this ancient feudal doctrine, which a judge in a sister state has termed,—"the Don Quixote of the law, which like the last knight errant of chivalry, has long survived every cause which gave it birth, and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous."

The following statement of the rule in Shelley's Case will serve to give an idea as to how far the above statute actually abolishes the doctrine:

"If, after a limitation to a person of an estate of freehold, there be limited, by the same instrument, an estate in the form of a remainder to his heirs, or the heirs of his body, he will, at common law, take an estate in remainder in fee or in tail, according to the class of heirs specified, and the freehold estate previously limited to him will merge therein, unless there be another estate interposed which will prevent merger."

Probably few defenders of the rule in Shelley's Case can now be found among the members of the bench and bar. Professor

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1W. VA. CODE, c. 71, §11.
2VA. CODE, 1904, §2423.
4This is taken from TIFFANY ON REAL PROPERTY, 308.
Minor, who favored the rule in Shelley's Case, gave four reasons for it, three of which have long been obsolete. The fourth is that the rule in Shelley's Case prevents the non-alienability of the inheritance during the ancestor's life time; that is, if the rule applies, the ancestor would have a fee, while if it were abolished, he would have only a life estate followed, either mediately or immediately, by a contingent remainder in his heirs or the heirs of his body, which remainder, of course, would be inalienable prior to the termination of the life estate. The rule accomplishes this by arbitrarily defeating the intention of the grantor or testator, his intention being to create two estates, both of which are perfectly proper, lawful and not contrary to public policy, and both of which he could create by using different phraseology. This fourth reason, therefore, seems to have little or no force at the present time and it is difficult to see any other reason for retaining the rule in Shelley's Case unless because there is a sporting chance that some grantors or testators will so express themselves as to give rise to a law suit which will inure to the benefit of a worthy profession.

It is evident that the present West Virginia statute only partially abolishes the rule in Shelley's Case, for it does not apply unless an estate is given to the ancestor for his own life, thus excluding any case where such freehold is of any other character, as, for example, an estate pur autre vie. In a recent case, the Supreme Court of Appeals has still further limited the application of this statute by holding that, not only must the freehold estate in the ancestor be for his own life, but that the estate given to his heirs or to the heirs of his body, must be so limited as to take effect immediately on the termination of the life estate. The statute as thus construed would read, "When any estate, real or personal is given by deed or will to any person for his life, and [immediately] after his death to his heirs, or to the heirs of his body, . . ." It would have been possible to have construed the statute to mean that if the estate were given to his heirs or to the heirs of his body, to take effect at any time after the termination of the life estate in the ancestor, this would be within the meaning of the statute. Since the rule in Shelley's Case is one which almost invariably defeats the lawful intention of the grantor or testator one is inclined to regret

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52 MINOR'S INSTITUTES, pp. 402-4.
6The rule is a rule of law and not of construction and will operate no matter how clearly the grantor or testator expresses his intention that the ancestor is to have merely a life estate. See TIFFANY, REAL PROPERTY, 313-16.
7Carter v. Reserve Gas Co., 100 S. E. 735 (W. Va. 1919).
that a more liberal view did not prevail. However, the statute is so imperfect that it ought to be repealed and an effective one substituted.

It is submitted that the court in the principal case construed the statute more strictly than it did in *Irvin v. Stover,* and that that decision is inconsistent with the decision in the principal case. The facts of the principal case in so far as they concern the rule in Shelley's Case are briefly these. A father by deed conveyed certain land to his two sons, "To have and to hold the lands so long as they, the said parties of the second part, shall live, with a remainder to their heirs forever, and, in case of the death of either of the said parties of the second part, said land shall be vested in the other of said parties during his life, with remainder as aforesaid." One son left the state without paying any part of the consideration for the conveyance and the father by suit in equity had this son's interest sold and the father himself became the purchaser, receiving a deed for the same on March 18, 1871. On March 24, 1871 the other son conveyed all his right, title and interest to the father. The question was whether by these two deeds the father got merely a life estate for the joint lives of the sons, or whether he got a fee simple in the land. The court held that, by the operation of the rule in Shelley's Case, the sons took estates in fee simple and therefore the father by the above conveyances got title in fee simple. After pointing out the fact that, under the statutes and decisions of this State, the two sons took joint estates for life with right of survivorship and did not take as tenants in common, the court9 said:

"The life tenants were seized *per mie et per tout.* Each of them had a concurrent interest in the whole of the land, not a life estate in a moiety of it, and it could not be divested by the death of his companion. Bl. Com. bk. 2, p. 184. In consequence of this, the heirs of one might or might not have taken immediately after him. It was certain that one set would so take and that the other would not, but altogether uncertain which set of heirs would be in either situation. The statute contemplates a taking by a person for his life and after his death by his heirs. Here one set of heirs were bound to take after a person of whom they were not heirs. Hence the case does not fall within the terms of the statute, even though it may be within its spirit."

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967 W. Va. 356, 67 S. E. 1119 (1910)
The idea expressed here seems to be that the estate in the heirs or the heirs of the body, as the case may be, must be so limited that it will be certain to take effect immediately on the death of the ancestor, and if there is any possible contingency which might prevent this, the case does not fall within the statute. In *Irvin v. Stover*, there was a conveyance to a husband and wife, "to be held by them as a homestead for themselves, and after them to their heirs." The court held this gave to husband and wife an estate by entirety for their lives, and that, under the statute above quoted, the respective heirs of the husband and of the wife would take contingent remainders in fee simple. It is clear that the heirs of the husband and the heirs of the wife might be the same persons or might be different sets of persons, just as in the principal case the heirs of the two brothers might be the same persons or different persons. Therefore, one set of heirs might take after one of whom they are not heirs, and the remainder to the heirs will therefore not necessarily take effect immediately on the death of the ancestor. So far the cases are similar. The court distinguished them on a very technical ground, namely, that the husband and wife held *per tout et non per mie* (by the whole and not by the moiety) while the two sons in the principal case held *per mie et per tout* (by the moiety or by the whole). *Per mie et per tout* means the mode in which joint tenants hold the joint estate. For purposes of tenure and survivorship each is holder of the whole, but for purposes of alienation each has only his own share, which is presumed by law to be equal. *Per tout et non per mie* refers to the holding by entirety by a husband and his wife. They hold by entirety, that is, each is holder of the whole in all respects. The only apparent difference between the manner in which joint tenants hold, and the manner in which tenants by entirety hold, is in respect to the power of alienation. The joint tenant could alienate his share while the tenant by entirety could not (husband and wife being in law one person) but, so long as the joint tenant had not alienated, he held the whole estate just as in the case of the tenant by entirety. Hence in so far as the application of the statute in question is concerned, it would seem that there can be no

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10See Black's Law Dictionary; Bouvier's Law Dictionary; 2 Bl. Com. 182; Tiffany, Real Property, 379-81.
clear distinction between the principal case and *Irvin v. Stover* and that the latter case is in effect overruled by the former.

The important thing is not so much how the present inadequate statute shall be construed but whether the Legislature can be prevailed upon to pass a statute which will effectively abolish this ancient relic of feudal times. The writer suggests that the statute now in force in Virginia\(^2\) might be taken as it stands except that it would be well to add to the end of it the following clause: ""It being the intent of this provision to abrogate the rule of law commonly known as the rule in Shelley’s Case."" If this clause were added there would be no room for doubt as to the legislative intent. In the opinion in the principal case the Court said in respect to the present statute, ""If it had been the legislative purpose wholly to abrogate the common-law rule, it could have been abolished by name, for it was well known, or by the use of terms broad enough to include every case falling within it."" The safe way is to abolish it both by name and by the use of terms broad enough to include every case falling within it. Another excellent draft of an act which would certainly be effective is the following one which was prepared some years ago by Professor Ernst Freund of the University of Chicago Law School:

Where any grant or devise hereafter taking effect of any property shall limit an estate for life or of freehold to any person and an estate in remainder [either mediately or immediately] to the heirs (or heirs of any particular description) of such person, such person shall not be deemed to take an estate of inheritance, and the persons who, upon the taking effect of such remainder in possession, shall be the heirs (or the heirs of the class described as the same may be) of such person, shall take by virtue of the remainder so limited to them: it being the intent of this provision to abrogate the rule of law commonly known as the rule in Shelley’s Case.

Since the decision in the principal case has called attention to the fact that the rule in Shelley’s Case still lives, it is to be hoped that action will shortly be taken completely to abrogate it. The passage of either of the forms proposed would, it is believed, prove effective.

\(^2\)The words in brackets in the above draft were added by the writer in order to prevent the possibility of a construction such as was put upon the existing statute in the principal case.