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NORTH CAROLINA LAW REVIEW

Volume 67 | Number 3

Article 4

3-1-1989

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Recommended Citation

John V. Orth, *Requiem for the Rule in Shelley's Case*, 67 N.C. L. REV. 681 (1989).

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OBSERVATION

REQUIEM FOR THE RULE IN SHELLEY'S CASE

JOHN V. ORTH†

Men are we, and must grieve when
even the shade
Of that which once was great is
passed away.

Wordsworth

In its 1987 session the North Carolina General Assembly abolished the Rule in Shelley's Case.¹ Only a few years earlier, in a case involving the claimed application of the famous Rule, Judge Charles Becton of the North Carolina Court of Appeals had noted that 1981 marked the 400th anniversary of Shelley's Case, although the Rule enshrined therein was at least a century and a half older. He observed the occasion by refusing to apply it because of a technicality.² Such unsympathetic treatment has increasingly been the fate of the long-lived Rule, even in those jurisdictions still giving it lip service. Most judges and lawyers (not to mention law professors) think it "more honoured in the breach than the observance." At last count, only three or four American states were still nominally committed to the Rule;³ England, its country of origin, had done away with it in 1925.⁴ In North Carolina, which had been more loyal than most, extending the Rule to personalty as recently as 1965,⁵ its demise went unmourned. It is always sad when those gathered at the graveside have nothing good to say about the deceased; it is even worse when they come only to scoff and mock. While not putting myself forward as chief mourner for the defunct Rule, I can at least offer some not-wholly-unfriendly reflections at the obsequies.

In its origins and stripped of its inessential trappings, the Rule in Shelley's

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1. Law of July 31, 1987, ch. 706, 1987 N.C. Sess. Laws 1294 (codified at N.C. GEN. STAT. § 41-6.3 (1987 Cum. Supp.)) ("The rule of property known as the rule in Shelley's case is abolished.") (applicable to transfers on or after October 1, 1987)).

2. *Jones v. Stone*, 52 N.C. App. 502, 510-11, 279 S.E.2d 13, 18 (in devise in the form of "O to A for life, then to be divided among A's heirs," words of inheritance not used in technical sense), *disc. rev. denied*, 304 N.C. 195, 285 S.E.2d 99 (1981).

3. See 1 AMERICAN LAW OF PROPERTY § 4.51 (A. Casner ed. 1952 & Supp. 1977) (listing as of 1977 Arkansas, Delaware, Indiana, North Carolina, "and probably a few other states").

4. Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 131; see Farrer, *Law of Property Act, s. 131—Shelley's Case—Limitation to "A and His Heirs,"* 53 L.Q. REV. 371 (1937); Hargreaves, *Shelley's Ghost*, 54 L.Q. REV. 70 (1938).

5. *Riegel v. Lyerly*, 265 N.C. 204, 209, 143 S.E.2d 65, 69 (1965) (first application to personal property since cases involving title to slaves), *noted in Abstract*, 68 W. VA. L. REV. 104 (1965); see also Aycock, *Survey of North Carolina Case Law—Real Property*, 44 N.C.L. REV. 1027, 1036-39 (1966) (discussing *Riegel*).

Case made perfect sense. Expressed in terms a modern generation can understand, it closed a tax loophole. Under feudalism heirs were obliged to pay "relief," a sort of inheritance tax to their lords. Feudal lawyers, not unlike their modern successors, were ever astute for means to save their client money. Since those who took possession by means other than inheritance were not liable for relief and since devises were not yet possible, some shrewd medieval scrivener must have perceived that if one who would have been an heir could take under the terms of a conveyance, relief could be avoided. The judges promptly saw through the maneuver and, since modern concepts of separation of powers did not then exist, immediately plugged the loophole by judicial means.⁶ The precedent found its classic expression in Shelley's Case. Sir Edward Coke, one of defendant's counsel, published a lengthy report of the case. Coke, who later became a judge, happened to be one of the common law's most eminent and erudite commentators, and his industry and renown helped to guarantee wide publicity for the Rule.

As formulated in Shelley's Case, the venerable Rule held that:

when 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; that always in such cases, "the heirs" are words of limitation of the estate, and not words of purchase.⁷

Although at common law there were two freehold estates that could support remainders, the life estate and the fee tail, in North Carolina only the life estate can perform that role. By virtue of a statute adopted in 1784 and continued to the present, "every person seized of an estate in tail shall be deemed to be seized of the same in fee simple . . ."⁸ In consequence, the Rule in Shelley's Case as applied in North Carolina operated only on a life estate followed "either mediately or immediately" by a remainder to the heirs of the life tenant in fee simple

6. On the background to the Rule in Shelley's Case, see 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 107-11 (5th ed. 1942); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 564-66 (5th ed. 1956); A. SIMPSON, A HISTORY OF THE LAND LAW 96-102 (2d ed. 1986).

After legal devises were permitted by the Statute of Wills, 1540, 32 Hen. 8, ch. 1, the Doctrine of Worthier Title (Wills Branch) was formulated to prevent the avoidance of relief by devise. North Carolina abolished the Doctrine of Worthier Title in the 1970s. Law of Feb. 26, 1979, ch. 88, 1979 Sess. Laws 51; Law of April 12, 1974, ch. 1329, 1973 Sess. Laws (2d Sess.) 629; see N.C. GEN. STAT. § 28A-1.2 (1974) (repealed and replaced in 1979); N.C. GEN. STAT. § 41-6.2 (1984).

7. *Wolfe v. Shelley*, 1 Co. Rep. 93b, 104a, 76 Eng. Rep. 206, 234 (C.P. 1581) (statement of defendant's counsel, probably Sir Edward Coke); see also E. COKE, A COMMENTARY UPON LITTLETON 319b, 376b (1628). More elaborate statements of the Rule may be found in 1 R. PRESTON, AN ELEMENTARY TREATISE ON ESTATES 263-64 (1820) and 4 J. KENT, COMMENTARIES ON AMERICAN LAW 215 (5th ed. 1844) (following the PRESTON statement of the rule). North Carolina courts have generally relied on KENT or PRESTON. See, e.g., *Jones v. Whichard*, 163 N.C. 241, 243, 79 S.E. 503, 504-05 (1913); *Smith v. Proctor*, 139 N.C. 314, 321, 51 S.E. 889, 891 (1905); *Jones v. Stone*, 52 N.C. App. 502, 506, 279 S.E.2d 13, 16, *disc. rev. denied*, 304 N.C. 195, 285 S.E.2d 99 (1981); *White v. Lackey*, 40 N.C. App. 353, 355, 253 S.E.2d 13, 15, *disc. rev. denied*, 297 N.C. 457, 256 S.E.2d 810 (1979).

8. Act of 1784, ch. 204, § 5 (1 Potter's Revisal 1819) (present version codified at N.C. GEN. STAT. § 41-1 (1984)). On the history of this legislation, see Orth, *Does the Fee Tail Exist in North Carolina?*, 23 WAKE FOREST L. REV. 767 (1988).

or in fee tail.⁹ Schematically the conveyance in question reduces to the form "O to A for life, then to A's heirs [or to the heirs of A's body]." The remainder is contingent since heirs can be ascertained only at the death of the ancestor (for, in the words of Lord Coke, *non est haeres viventis*).¹⁰ In effect the Rule vests the remainder in the life tenant (A), in whom (if there is no intervening estate) it merges with the life estate. If the remainder in the heirs had been in fee simple, the life estate becomes a fee simple. If the remainder had been in fee tail, it becomes a fee tail. In the latter case, of course, the fee tail in possession is converted by statute into a fee simple. In either case, if the heirs receive the land, they must receive it by inheritance; that is, if the owner has not transferred it *inter vivos* or devised it away from them.

Although originating as a means of countering tax avoidance, the Rule in Shelley's Case was to develop a curious life of its own. The tax that heirs were trying to avoid disappeared when feudal tenures were abolished by statute in 1660.¹¹ Thereafter the Rule itself, an adjunct of feudalism, seemed destined for the dustbin of history. Fate was slow to overtake the Rule, however, for knowledgeable scribes avoided the form of words that called for its application. Then as now, conscientious lawyers did not expect their clients to risk litigation and possible defeat in the interests of law reform. As a result the Rule continued to exist in the shadows.

On the eve of American independence the Rule in Shelley's Case fell foul of one of the most dynamic, independent-minded, and brilliant judges in history. William Murray, Lord Mansfield, was Chief Justice of the Court of King's Bench from 1756 to 1788. Under his leadership the court gave England a thoroughly modern commercial law; his decisions underlie much of today's Uniform Commercial Code.¹² An innovative jurist, he felt only impatience with the feudal intricacies of England's land law. In 1770 in *Perrin v. Blake*,¹³ a case involving the construction of a will, Lord Mansfield led his court to read the Rule in Shelley's Case out of English law, exclaiming that it would be "a strange law" that crossed the intention of the testator even if that intention was perfectly clear.¹⁴ His lordship admitted that there were "lawyers of a different bent of genius, and different course of education, who have chosen to adhere to the strict letter of the law; and they will say that *Shelley's* case is uncontrollable authority."¹⁵ Indeed, one of the puisne judges, Mr. Justice Yates, dissenting in *Perrin*, said just that: "After you have fixed the [testator's] intention, it then becomes a question, [w]hether such intention can be executed consistently with the estab-

9. See Comment, *Shelley's Case and Limitations Over After Estates Tail in North Carolina*, 1 N.C.L. REV. 110, 110 n.1 (1922) (signed "L.P. McG.," i.e., Dean Lucius Polk McGehee).

10. E. COKE, *supra* note 7, at 22b (no one is the heir of a living person).

11. Statute of Tenures, 12 Car. 2, ch. 24 (1660).

12. See Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351, 358-62 (1983).

13. 1 F. HARGRAVE, COLLECTANEA JURIDICA 283 (K.B. 1770). For briefer accounts of the case, see 4 BURR. 2579, 98 Eng. Rep. 355; 1 W. BL. 672, 96 Eng. Rep. 392.

14. See 1 F. HARGRAVE, *supra* note 13, at 318.

15. See 1 F. HARGRAVE, *supra* note 13, at 321.

lished rules of law?"¹⁶ By the late eighteenth century separation of powers had become a check on the judiciary's ability to make (or, in this case, to unmake) law. Yates pointed out that although the original reason for the Rule was obsolete, it could be changed only by the legislature, and that to follow the testator's intention "in contradistinction to the legal sense of his words" would render titles uncertain, so that "no counsel could venture to give his opinion upon a will."¹⁷

Lord Mansfield's restless mind was not satisfied by appeals to defer to parliament for law reform—in this regard he looked rather backwards than forwards. A few years later he scoffed openly at a similar appeal in another area of the law: "What!" he exclaimed, "[P]ass a judgment to do mischief, and then bring in a bill to cure it!"¹⁸ Of course, his lordship (unlike American judges) was simultaneously a member of the legislative branch: as a peer of the realm, one of the so-called law lords, he was entitled to a seat in the upper chamber. Whether to reform the law in one place or another seemed to him a matter of indifference.

As a product of the Enlightenment, Mansfield placed far more emphasis on giving legal effect to expressions of intention than did his more conservative contemporaries—in this he looked ahead to the twentieth century. "Lawyers of a different bent of genius" deferred to tradition; they determined to build with the old blocks and admire what they could not understand. Sir William Blackstone tried in his famous *Commentaries* to give the reasons for the rules of law, but he candidly conceded: "Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory of reason . . ."¹⁹

Although Mansfield had succeeded in eradicating the Rule in Shelley's Case, the quietus was to prove only temporary. *Perrin* was carried from King's Bench to the Court of Exchequer Chamber and in 1772 Mansfield suffered one of his rare reversals: the Exchequer Chamber reinstated the Rule in Shelley's Case.²⁰ Mr. Justice Blackstone, whose *Commentaries* had earned him a seat on the Court of Common Pleas, penned a particularly elaborate defense of the old dispensation.²¹ Like most revolutions that fail, this one produced a more than equal and opposite reaction. For the first time a court definitely held that the Rule was a rule of law, not of construction; that is, it was explicitly recognized to be applicable regardless of intention. Quoting W.S. Gilbert, Dean Samuel

16. See 1 F. HARGRAVE, *supra* note 13, at 310 (Yates, J., dissenting).

17. See 1 F. HARGRAVE, *supra* note 13, at 317.

18. Bishop of London v. Ffytche (H.L. 1783), reported in T. CUNNINGHAM, *THE LAW OF SIMONY* 174 (1784). Mansfield's query was later quoted by Chief Justice Best in *Fletcher v. Lord Sondes*, 3 Bing. 501, 580, 130 Eng. Rep. 606, 637 (H.L. 1826).

19. 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *70.

20. Not to be confused with the ancient common-law Court of Exchequer, the Court of Exchequer Chamber heard appeals from any of the three common-law courts: King's Bench, Common Pleas, and Exchequer. Its judges were those of the two courts not involved in the case; its name derived from the early practice of meeting in a chamber (or room) at the Exchequer (or Treasury).

21. 1 F. HARGRAVE, *A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND* 487 (1787) (printing Blackstone's opinion).

Mordecai of Trinity College (now Duke University) Law School later quipped: testators' intentions, "like 'The flowers that bloom in the spring! Tra-la! Have nothing to do with the case.'"²² Mansfield's liberalism also provoked a learned conveyancer, Charles Fearne, to write his influential *Essay on the Learning of Contingent Remainders and Executory Devises*,²³ which did more than anything else to preserve the Rule as black-letter law.

North Carolina's opportunity to exclude the Rule in Shelley's Case came in 1893 in *Starnes v. Hill*,²⁴ a case involving the construction of a deed. Although the form of the grant fell within the terms of the Rule ("O to A for life, then to A's heirs"),²⁵ plaintiff argued that an earlier statute had in effect abolished the Rule. The Revised Code of 1854 had introduced a provision that "any limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will."²⁶ If the statute truly substituted "children" for "heirs," then there would be nothing upon which the Rule could operate, because it applied only when "heirs" was used in its technical sense as "a class of persons succeeding by inheritance from one generation to another."²⁷ Chief Justice James Shepherd and the North Carolina Supreme Court declined the invitation to remove this "ancient landmark of the law."²⁸ The statute, if literally applied, would have threatened almost every title in the state: although no longer strictly necessary, conveyancers continued to use the age-old form "to A and his heirs" to create the estate of fee simple.²⁹ If the statute required such a grant or devise to be read as "to A and his children," it would implicate the obscure Rule in Wild's Case, which required different results depending on whether A had children living at the relevant moment or not.³⁰ By the First Resolution in Wild's Case, if A had no children living, the grant resulted in a fee tail, which would in North Carolina be converted by statute into a fee simple.³¹ By the Second Resolution in Wild's Case, if A had children living, then A and the children would take a fee simple in joint tenancy, which would be converted by another North

22. S. MORDECAI, LAW LECTURES 594 (1907) (quoting W. GILBERT, THE MIKADO, act II (1885)).

23. C. FEARNE, ESSAY ON THE LEARNING OF CONTINGENT REMAINDERS AND EXECUTORY DEVICES (1772).

24. 112 N.C. 1, 16 S.E. 1011 (1893) (opinion in Southeastern Reports incomplete).

25. In fact the grant was in the form "O to X for life, 'and in the event that [A] shall outlive [X],' to A for life, then to A's heirs," but because the dispute concerned A's interest, the prior life estate can be ignored for purposes of this discussion. For the significance of the language introducing A's life estate, see *infra* text accompanying notes 58-59.

26. Revised Code, ch. 43, § 5 (1854) (presently codified at N.C. GEN. STAT. § 41-6 (1984)).

27. *Allen v. Pass*, 20 N.C. (3 & 4 Dev. & Bat.) 207, 211-12 (1838) (Gaston, J.).

28. *Starnes*, 112 N.C. at 19, 16 S.E. at 1016.

29. The presumption against finding fees simple in wills in the absence of words of inheritance was reversed in 1784, Act of 1784, ch. 204, § 12 (1 Potter's Revisal 1819); the requirement of words of inheritance to create fees simple in deeds was dropped in 1879, Act of March 7, 1879, ch. 148, 1879 N.C. Pub. Laws 279. For current versions, see N.C. GEN. STAT. § 31-38 (1984) (wills); *id.* § 39-1 (1984) (deeds).

30. *Wild's Case*, 6 Co. Rep. 16b, 77 Eng. Rep. 277 (K.B. 1599); see Link, *The Rule in Wild's Case in North Carolina*, 55 N.C.L. REV. 751 (1977).

31. N.C. GEN. STAT. § 41-1 (1984).

Carolina statute into a tenancy in common.³² The court was convinced that the 1854 statute had been meant to apply only to conveyances in the form "O to A's heirs," which would otherwise have resulted in a contingent interest (if it resulted in any interest at all) since A's heirs were unascertainable until his death. They also entertained a well-founded notion that the 1854 statute had not been intended to abolish the Rule in Shelley's Case.³³ The Chief Justice was acutely aware of the speed and conviction with which Lord Mansfield had been reversed a century earlier:

This "ancient landmark of the law" was, we believe, on a celebrated occasion, shown but slight respect by so great a judge as *Lord Mansfield*, but the controversy which immediately sprang up between his Lordship and Mr. Fearne did not, it is said, result to the advantage of the former, and the rule was more firmly settled than ever in the jurisprudence of England.³⁴

The Rule in Shelley's Case had become part of the prized arcana of the law, one of the secrets shared by lawyers and judges which the public would never guess. Its mastery was a test of legal attainment: "What, sir, is the Rule in Shelley's Case?" was asked of innumerable candidates at the bar.³⁵ Its very outmodedness endeared the Rule to some in the profession: it was a standing reminder of just how old the common law really was. In picturesque phrase, one judge described it as "a gothic column found among the remains of feudality."³⁶ Of course, as Oliver Wendell Holmes had lately reminded the learned members of the profession, no common-law rule of any moment served only one purpose.³⁷ Although the Rule in Shelley's Case had originally policed conveyances that attempted to evade the payment of relief, it did so by favoring the fee simple estate. Nineteenth century individualists also favored that estate, but for other reasons. The fee simple gave the present owner maximum power over the land, to use or abuse as he saw fit. He could alienate all or part of it; he could mortgage it for all it was worth. He could devise it to whomever he wished, or if he saw fit, he could let it pass at his death by intestacy. Entails, restrictive covenants, restraints on alienation, and all sorts of future interests inhibited the power of the present possessor. In its small way, the Rule in Shelley's Case helped to keep property flowing in the channel of fee simple. Like Chaucer's

32. *Id.* § 41-2.

33. See note appended to *Starnes v. Hill*, 112 N.C. 1, 16 S.E. 1016 (1893):

Note.—It may not be improper to say that since the preparation of this opinion the writer has been assured by ex-Justice Rodman, the distinguished survivor of those connected with the supervision and publication of the Revised Code, that it was not the purpose of the Commission to abolish the rule in Shelley's case.

Starnes, 112 N.C. at 26, 16 S.E. at 1019.

34. *Id.* at 19, 16 S.E. at 1016 (citing J. CAMPBELL, *LIFE OF MANSFIELD*).

35. [D]id the student answer with a correct guess, when, on being asked the meaning of the rule, he said: "The rule in *Shelley's case* is very simple if you understand it. It means that the same law which was applied in that case applies equally to every other case just like it."

Welch v. Gibson, 193 N.C. 684, 690, 138 S.E. 25, 28 (1927) (Stacy, C.J.).

36. *Polk v. Faris*, 17 Tenn. (9 Yer.) 209, 233 (1836) (Reese, J.).

37. O. HOLMES, *THE COMMON LAW* 36 (1881).

medieval Man of Law, but with far more truth, it could be said of the nineteenth century lawyer: "Al was fee symple to hym in effect."³⁸

Respect for the Rule in Shelley's Case was symptomatic of a broader outlook on law and society. Lawyers, judges, and legal academics were proud of the common law—all of it—and convinced that upholding it contributed to political stability and economic development. Early in the twentieth century Dean Mordecai mixed questionable demography with fulsome praise for the purity of North Carolina's common law:

No North Carolinian need be in haste to exchange his laws for those of others. Our population is but little mixed with other than that of the mother country [if, that is, one ignores North Carolinians of African extraction], and in our laws we preserve in its integrity more than does any other state and, in some particulars, more than does England herself, the best principles of the common law.³⁹

Dean Mordecai was able to organize his lectures on North Carolina property law along the lines laid down by Blackstone in the eighteenth century. By contrast, modern law teachers are more likely to dismiss or ridicule the past. Property law in particular is apt to be portrayed as a chamber of horrors, stocked with grotesque or nonsensical holdovers. A relic like the Rule in Shelley's Case is no longer a precious reminder of a remote past but is instead, as Professor Webster remarked twenty years ago, something "North Carolina can do without."⁴⁰ Rather than creatively adapting and re-adapting rules inherited from the past, the new approach is to discard them all in favor of the ill-examined notion of effectuating intention. It is much easier to make fun of the past than of the present, but much less important.

Ever since the days of Lord Mansfield, the public policy set against the Rule in Shelley's Case has been the need to give effect to the intention of grantor or devisor. The law has always recognized the importance of intention. The Statute of Wills in 1540 conceded the principle of freedom of testation.⁴¹ Yet even then not every expression of intention was given effect, only those that complied with the necessary formalities. This general rule remains true to this day. Perhaps the most famous direction to judges to respect intention was the medieval statute *De Donis Conditionalibus* which originated the fee tail.⁴² Judges had been construing grants in the form "O to A and the heirs of his body" to give A a fee simple conditional—an estate that could be alienated in fee simple after the birth of issue. The barons complained, and together with the

38. G. CHAUCER, *THE CANTERBURY TALES I* (A) 319 (J. M. Dent & Sons Ltd. rev. ed. 1985) (n.d. circa 1387).

39. S. MORDECAI, *supra* note 22, vi-vii.

40. Webster, *A Relic North Carolina Can Do Without—The Rule in Shelley's Case*, 45 N.C.L. REV. 3, 33 (1966). Compare Professor Webster's remark with Professor McCall's description of the doctrine of the destructibility of contingent remainders as an "unjust relic of feudalism." McCall, *The Destructibility of Contingent Remainders in North Carolina*, 16 N.C.L. REV. 87, 118 (1937).

41. 32 Hen. 8, ch. 1-2 (1540) (granting the holder complete power of devise over land held in socage or of the nature of socage tenure and permitting the holder to devise two-thirds of land held by knight-service).

42. 13 Edw. 1, ch. 1 (1285).

king they directed the judges to read conditional grants according to their tenor. Of course, the unbarrable entail was a perpetuity, and the common recovery was later invented to convert it back into a fee simple.⁴³ Oddly enough in the long history of the law, statutes were passed in American states after the Revolution requiring the judges to construe conveyances in fee tail as in fee simple, regardless of intention! North Carolina's statute was adopted in 1784.⁴⁴

Beginning with the *Duke of Norfolk's Case*⁴⁵ in 1682, the modern Rule Against Perpetuities has operated to defeat the intention to tie up property for a period deemed too long—about a century. While legal professionals might debate the mechanics of the Rule Against Perpetuities and advocate greater liberality in enforcing intention within the perpetuities period, there remains broad consensus that some period, however delimited, is too long, regardless of intention.⁴⁶ And, I think, the public would agree—if the issue could ever be intelligibly put to them in all its ramifications—although they would probably never guess that the historic measuring rod was “a life in being plus twenty-one years” (not to mention a period of gestation) and they would certainly not understand what “vesting” means. The point of rehearsing all this, of course, is to show that giving effect to intention has always been relative: public policy sets the limits within which intention may operate.

Let us investigate intention in the area once covered by the Rule in Shelley's Case. Imagine a person consulting his attorney concerning the drafting of a will. The attorney questions him about his intentions; if necessary, he instructs him about rules of law concerning restraints on alienation or against perpetuities; finally he guides him into paths of righteousness. Professional advice is often necessary; within the limits set by public policy, the common law offers many choices, perhaps too many. All reasonable (and a few unreasonable) intentions can be accommodated. But what if the testator intended to leave Blackacre “to *A* for life, then to *A*'s heirs”? Prior to 1987 in North Carolina it could not be done, although Professor Webster demonstrated in detail just how close a skilled draftsman could get.⁴⁷ Had the very words been used, the Rule in Shelley's Case would have given *A* the fee simple. The testator would have to have chosen one of the lawful alternatives. After the year of grace, 1987, the client's will can at last be done. That is to say, a devise in such a form will now result in *A* receiving a life estate, while his heirs receive a contingent remainder, one that will vest (if it ever does) at *A*'s death.

As we have just seen, the problem of the Rule in Shelley's Case would not have arisen had the testator consulted an attorney. Thirty years ago when a bill to abolish the Rule came before the North Carolina General Assembly, it was

43. See *Taltarum's Case*, Y.B. 12 Edw. 4, 19, pl. 25 (1472).

44. Act of 1784, ch. 204, § 5 (1 Potter's Revisal 1819) (present version codified at N.C. GEN. STAT. § 41-1 (1984)).

45. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682); see Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 20 (1977).

46. See Haskell, *A Proposal for a Simple and Socially Effective Rule Against Perpetuities*, 66 N.C.L. REV. 545, 548 (1988).

47. Webster, *supra* note 40, at 10-17.

rejected. Many of the legislators were attorneys and said they understood the Rule, as did all the other attorneys in North Carolina.⁴⁸ The cynic might say that the existence of intent-defeating rules like the one in Shelley's Case had the effect of discouraging would-be testators from drafting do-it-yourself wills, and consequently helped to preserve a staple of law office business; but the motives of the lawyer-legislators were not necessarily selfish (perhaps one should better say: were not necessarily *only* selfish). Professionally drafted wills *are* better than the homemade variety.

Imagine now a person unlearned in the law sitting down to draw his own will. How will he express his intention? Anyone leafing through the *North Carolina Reports*, or any state reports for that matter, will quickly discover that laymen can concoct the most remarkable devises. Some are internally inconsistent, giving in one place what they take away in another. Others clearly express unenforceable intentions. Still others mix up legal and nonlegal terms into a veritable farrago expressing no discernible intention.

To keep matters simple, let us take a devise that is in—or that can be reasonably wrestled into—the form “*O* to *A*, at his death to *A*'s heirs.” *O* is dead and gone. How did he intend to devise Blackacre? Let us begin with what he said, legally speaking. An estate is limited to *A*. At common law there was a strong presumption in wills (and an irrebuttable one in deeds) that no more than a life estate was intended unless accompanied by words of inheritance (“and his heirs” or “and the heirs of his body”). By statutes in North Carolina these presumptions were reversed, as we have seen—as to wills in 1784 and as to deeds in 1879.⁴⁹ They were reversed, that is, unless the instrument showed that the maker “plainly intended” to create “an estate of less dignity.” In this case, there being a limitation over in fee,⁵⁰ the statutory presumption would seem to be rebutted. *A* then receives a life estate, and the first aspect of the devise may be rewritten “*O* to *A* for life . . .”

And what about *A*'s heirs? What interest do they receive? To begin with, words of inheritance are not necessary in the limitation over—or, to be exact, they are already there. North Carolina explicitly adheres to the old common-law rule that technical words are used in their technical sense unless something appears to the contrary.⁵¹ The technical meaning of “heirs,” as earlier pointed out, is “a class of persons succeeding by inheritance from one generation to another.”⁵² As Lord Coke put it long ago: “by the title of heirs, come the heirs of heirs to infinity.”⁵³ It is not necessary, in other words, to say “to *A*'s heirs and their heirs”; “to *A*'s heirs” says it all. The limitation over, then, would seem to be in fee simple.

48. *Id.* at 28 n.75.

49. See *supra* note 29. Current versions of these statutes are at N.C. GEN. STAT. § 31-38 (1984) (wills), and *id.* § 39-1 (1984) (deeds).

50. See *infra* text accompanying note 53.

51. *Whitley v. Arenson*, 219 N.C. 121, 127, 12 S.E.2d 906, 910 (1941).

52. *Allen v. Pass*, 20 N.C. (3 & 4 Dev. & Bat.) 207, 211-12 (1838).

53. E. COKE, *supra* note 7, at 9a (*haeredum appellatione veniunt haeredes haeredum in infinitum*).

When would this fee simple vest in possession? The devise says "at his [A's] death." Life estates normally end with the death of the life tenant, but, as lawyers know, they *may* end sooner. At common law an attempt by *A* to convey in fee simple (known as a "tortious feoffment") caused a forfeiture of the life estate.⁵⁴ While forfeitures for tortious feoffment are now ancient history, premature termination of life estates by merger is not. If *A* gathered into his hands a reversion or remainder in fee simple, in addition to his life estate (and if there was no intervening vested remainder), then *A*'s life estate would merge—one is tempted to say it would *submerge*—into the fee simple, and *A* would no longer have a life estate plus a future interest but would have instead a fee simple absolute. At common law, intervening remainders that were not vested, that is to say, contingent remainders, were destroyed, unless they had been created simultaneously with the life estate and the next vested estate in the same person.⁵⁵ (This effect is caused by the doctrine of the destructibility of contingent remainders, addressed later.⁵⁶) Yet another means of the premature termination of life estates, one explicitly recognized by current statute in North Carolina, is forfeiture for waste:

In all cases of waste, when judgment is against the defendant, the court may give judgment for treble the amount of the damages assessed by the jury, *and also that the plaintiff recover the place wasted*, if the damages are not paid on or before a day to be named in the judgment.⁵⁷

The point of this discussion is to determine if the remaindermen, here "*A*'s heirs," are qualified to take possession when *A*'s life estate ends, *whenever and however it ends*—whether, in other words, they would be entitled to take possession if *A*'s life estate terminated prematurely, or if they must await *A*'s death. In many states, there is authority that words such as "at his [the life tenant's] death" are to be construed to mean at the termination of the particular estate.⁵⁸ In such states, "at his death" means "then," and the limitation over in the devise could be rewritten "*then to A's heirs*." In North Carolina, however, the leading case of *Starnes v. Hill*, which we have already encountered, held that similar language in a deed was to be construed literally; that is, the remainder would vest only "at his [A's] death."⁵⁹ Should the particular estate terminate earlier,

54. 1 AMERICAN LAW OF PROPERTY, *supra* note 3, § 2.17.

55. See C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 137 (2d ed. 1988).

56. See *infra* text accompanying notes 64-66.

57. N.C. GEN. STAT. § 1-538 (1983) (emphasis added). For a critical analysis of an earlier version of this statute, see McCall, *supra* note 40, at 98-102.

58. See 1 AMERICAN LAW OF PROPERTY, *supra* note 3, § 4.33.

59. 112 N.C. 1, 19, 16 S.E. 1011, 1016 (construing a grant in the form "O to X for life, 'and in the event that [A] shall outlive [X]'; to A for life, then to A's heirs"); accord *Brown v. Guthery*, 190 N.C. 822, 130 S.E. 836 (1925) ("to A for life, 'and upon [A's] death to [B], if he be alive, or to his heirs if he be dead'"; held: B took a contingent remainder); *Richardson v. Richardson*, 152 N.C. 673, 68 S.E. 217 (1910) ("to A for life, 'and at [A's] death' to B for life"; held: B took a contingent remainder); *Beddard v. Harrington*, 124 N.C. 62, 32 S.E. 377 (1899) ("to A for life or widowhood, then to B 'after the death of [A]'; held: B cannot take as purchaser until death of A); see *supra* text accompanying notes 24-28.

These results have been criticized. See Block, *The Rule in Shelley's Case in North Carolina*, 20 N.C.L. REV. 49, 61 (1941) (the finding of a contingent remainder in *Starnes* is "clearly wrong"); McCall, *supra* note 40, at 102.

the land would revert to *O*—to *O*'s estate in our hypothetical case—and the remainder would await *A*'s death, if it was not destroyed.

Having considered when, legally speaking, the remainder becomes possessory, we must now address the problem of the identity of the remaindermen, "*A*'s heirs." At common law heirs were those who took in succession "from one generation to another";⁶⁰ they can be ascertained only at the death of the ancestor. In North Carolina the Intestate Succession Act of 1959 fixes the meaning of heirs in each generation.⁶¹ Since the remainder in our case is to a person or persons who cannot presently be ascertained, it is contingent. Or is it? As we have seen, a North Carolina statute provides that "any limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will."⁶² *Starnes v. Hill* held that the statute did not apply when a precedent estate is conveyed to the living ancestor—as here.⁶³ Of course, if the statute *did* apply, it would convert the limitation over in the devise into one "to *A*'s children." Such a remainder would be vested if *A* had any children. Until *Starnes v. Hill* is overturned, however, we must assume that the limitation over is, as it says, "to *A*'s heirs" and is therefore a contingent remainder.

Before leaving the legal analysis of *O*'s devise, we should linger over the significance of finding a *contingent* remainder in *A*'s heirs. Because the remainder is contingent, there would seem to be a reversion in *O* (or, rather, in *O*'s estate). Recognizing a reversion is merely another way of describing what would happen to Blackacre if no one ever qualified as *A*'s heir: it would revert to *O* (or, as we have said, to *O*'s estate). The full state of the title, as we have at last deciphered it, would therefore seem to be: life estate in *A*, contingent remainder in fee simple in *A*'s heirs, and reversion in *O* (or *O*'s estate).

At common law contingent remainders were destructible: if when the particular estate terminated the contingency had not yet been resolved, the remainder was destroyed; the fact that the contingency was later resolved did not revive the interest. North Carolina continues to pay lip service to this rule,⁶⁴ which conjures up a possibility too cruel to be taken seriously. Imagine that *O*'s reversion passed to *A*, either under the residuary clause of *O*'s will or by *O*'s partial intestacy. *A* would then have *both* the life estate *and* the reversion. Because of the exception to the destructibility rule alluded to earlier,⁶⁵ the contingent remainder would survive, but *A* would have it in his power, by transferring his two

60. *Allen v. Pass*, 20 N.C. (3 & 4 Dev. & Bat.) 207, 211-12 (1838) (Gaston, J.).

61. Codified at N.C. GEN. STAT. §§ 29-1 to 29-30 (1984).

62. *Id.* § 41-6.

63. See *supra* text accompanying notes 24-28.

64. See *Blanchard v. Ward*, 244 N.C. 142, 148-49, 92 S.E.2d 776, 781 (1956) (dictum). See generally *McCall*, *supra* note 40, at 118 (concluding destructibility rule is a useless anachronism). There is, in fact, as Professor Link has pointed out, "a kind of statutory destructibility in North Carolina." Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C.L. REV. 727, 728 n.7 (1979). Under N.C. GEN. STAT. §§ 39-6 and 39-6.1 (1984), the grantor of a deed or settlor of a trust creating a contingent remainder in some person not in being or not yet ascertained may revoke the grant at any time prior to the happening of the event vesting the remainder.

65. See *supra* text accompanying note 55.

estates to a third person, to effect a merger that would wipe out the contingent remainder to his heirs⁶⁶—the exact result under the quondam Rule in Shelley's Case. The sensitive must avert their eyes!

Everything that has been said so far about *O*'s devise "to *A*, at his death to *A*'s heirs" has concerned the *legal* meaning of *O*'s words, the intention they would have signified had they been used by a skilled legal draftsman. To believe that one has now actually ascertained *O*'s intention is to commit the logical fallacy known as *petitio principii*, assuming in the premise the conclusion that is to be proved: that *O* knew what he was talking about and meant what he said.⁶⁷ What exactly did the unlearned *O* intend? If we could summon his shade back from the grave, what would he say about our legal handiwork? Note that under our analysis *A* has an interest that is not devisable. While theoretically alienable, it would not, as a practical matter, bring very much: the market for estates *pur autre vie* is permanently depressed. While theoretically mortgageable, it again would not be worth very much: perhaps with a life insurance policy and an imaginative banker *A* could secure a loan, after paying a high premium for getting a hidebound mortgagee to do anything so unconventional. There is a procedure available by statute in North Carolina allowing the sale (or mortgage) in fee simple of property subject to a contingent remainder, but part of the proceeds must still be held for the remaindermen.⁶⁸

What shall *we* say if *O*, before returning to interrupted bliss (or whatever), says that he never intended to create a life estate followed by a contingent remainder? What if he thought "to *A*, at his death to *A*'s heirs" described an estate in fee simple?—which it does, when you come to think of it. In this case at least, the much maligned Rule in Shelley's Case, with all its baggage of worn-out feudalism and its strange career over the last three centuries, would actually have served *O* better! One must fervently pray, now that the Rule is gone, that the judges recall that their primary duty is to effectuate intention (within the bounds of public policy) and not simply to do the opposite of what they would have done under the Rule in Shelley's Case.

"Intention" has become to property law what "reasonableness" is to tort, "good faith" to contract, and "balancing" to constitutional law: a phrase of indefinite meaning that nonetheless passes for sovereign wisdom. By focusing on an anachronism like the Rule in Shelley's Case, property law do-gooders can lose sight of just how artificial the whole system of American property law—and any other, for that matter—actually is. Before a person can formulate a significant intention, he must at least have some idea of the range of possible choices and the means of expressing himself. Intention's scope is limited not only by

66. See C. MOYNIHAN, *supra* note 55, at 137.

67. Professor Webster, in my opinion, fell into this lamentable error when he wrote:

[I]t is inconceivable that any deviser or grantor would ever indicate in his will or deed that the first taker is to have only a life estate and the first taker's heirs a remainder if the deviser or grantor intended for the first taker to have a fee simple estate.

Webster, *supra* note 40, at 8 n.14. Perhaps it is enough to reply for the unlearned in the words of St. Paul: "the evil which I would not, that I do." *Romans* 7:19.

68. N.C. GEN. STAT. §§ 41-11, -11.1, -12 (1984).

substantive public policy but also by the institutional needs of the system. Judge and jury cannot pore over every deed and devise, and title searchers (that necessary but neglected breed) need better guidance than "Thy will be done." To think that we will necessarily respect intention now that the Rule in Shelley's Case is gone is a mistake: legal problems are not solved so easily. If one really wanted to make progress, one would have to forget about the technicalities for awhile and consider some truly radical reforms.

First, one could consider reducing rather than enlarging the range of possible estates and future interests. Permissible choices would be stereotyped, and every grant or devise would be conclusively presumed to fit within one or a few of the recognized types. No longer would the menu be complicated by exotic and unexpected dishes from the past. In the same spirit, one might even consider reducing the freedom of testation and forcing more estates, especially small ones, through intestacy, which presently provides very sensible results—all in fee simple, I might add.

Second, one could consider requiring as a condition of legal validity that wills be drafted by legal scribes. An investigation of intention would necessarily be part of the process. If worse came to worse, one could even concoct a bureaucratic form such as is required by the Truth in Lending Act—not to compare it to the *Miranda* warning! In this connection the inexpensive standardized wills and deeds used by so-called "storefront law offices" or "legal clinics" are a positive contribution; as is legal advertising, including direct mail solicitation.

Finally, one could consider actually instructing the public at large in legal matters. Even in these last days, high school graduates (not to mention college graduates) know far more about American literature and American history than they do about American law—except, of course, what they have picked up about the enforcement end of the Motor Vehicle Code and the statutes regulating alcoholic beverages and controlled substances. The dissemination of legal learning might seem at first glance to conflict with the prior suggestion that legal advice be required for all wills. The inspiration here is not, however, the millennial one of making "every man his own lawyer," but the practical one of making people informed consumers of legal services. Anything would be better than the old system that only lawyers can work but that anyone can take a try at.

