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THE RULE IN SHELLEY'S CASE IN NORTH CAROLINA

NORMAN BLOCK*

This article deals with the application of the Rule in *Shelley's Case*, in North Carolina.¹ The statement of the Rule as a proposition of law is simple enough in itself. But because of the antiquity of the Rule and the confusion that its application has wrought among the courts, I have deemed it necessary to treat briefly but thoroughly the origin of the Rule, its character, and the theories concerning its application.

PART I. THE RULE

Sec. 1. *Statement of the Rule:* The rule of law known throughout the common law countries as the Rule in *Shelley's Case* was a part of the common law of England long before the famous case of Judge Shelley was decided.² The Rule briefly stated is this: that where an estate of freehold, either legal or equitable, is given to *A*, and by the same instrument, either mediately or immediately, a respective legal or equitable remainder is given to the heirs or the heirs of the body of *A*, the words "heirs" or "heirs of the body of *A*" are words of limitation and not words of purchase.³ It is important to draw, and constantly

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¹ *Scope Note:* Statutory changes in the law of real property that touch upon the subject material of the Rule have been inserted under the head of North Carolina Statutes. Cases dealing with slaves have been collected and are grouped in a footnote on the application of the Rule to personal property, *infra* note 48. The remainder of the treatment deals with the application of the Rule. A separate section has been devoted to the intent of the testator, (Part II, Sec. 5). Part IV treats of the estate of the ancestor; Part V, the remainder; Part VI, executory trusts; Part VII, powers to appoint; and Part VIII, heirs or heirs of the body made words of purchase. In North Carolina certain types of executory limitations over on default of heirs or heirs of the body of the holder of the particular estate take the limitation out of the Rule. The cases dealing with these limitations have been collected and classified in Part IX. Cross references to the various sections have been inserted in the footnotes where it has been deemed necessary.

This article does not deal with statutes abolishing the Rule.

The subject matter is so broad that any conclusion would merely be a summary of the various sections. In the place of a conclusion, I have attempted to treat the problems under each section in a concise manner, and there offer certain suggestions pertinent to the problem treated in that section.

Because of the doctrine in North Carolina that certain types of executory devises take the limitation out of the Rule, the modern cases in which the Rule is applicable are limited. Since most modern devises involve some types of executory limitation over, it would perhaps be a wise policy on part of the legislature to abolish the Rule by statute.

² KALES, *CASES ON FUTURE INTEREST* (2d ed. 1936) 118.

³ *Wolfe v. Shelley*, 1 Co. 93b, 76 Eng. Rep. 206 (C. B. 1581); 1 FEARNE, *CONT. REM.* (4th Am. ed. 1906) *28; 1 PRESTON, *ESTATES* (1828) *263.

keep in mind, the difference between words of purchase and words of limitation. Words of purchase are words in an instrument which taken absolutely by themselves, without any reference to any other words in the instrument, first attach an estate to a person or group of people. Words of limitation are words which by referring to some other words in the instrument describe the extent or size of an estate that has already attached to some person.⁴ And so when the Rule says that the words "heirs" or the "heirs of the body" of *A* are words of limitation and not words of purchase, it simply means that "heirs" or the "heirs of the body" refer to and are read in connection with the estate given to *A* extending or modifying that estate, and are not taken as describing a group to whom an estate will first attach.

Sec. 2. *History of Shelley's Case*: A short sketch of *Shelley's* case will clarify the nature of the Rule. Edward and John Shelley were tenants in tail of a vast estate. Edward had two sons, Henry, the first-born, and Richard. Edward Shelley made plans to suffer a common recovery, in which he covenanted that the lands should be to the use of *A* (himself) for life, then to the use of certain persons for twenty-four years, then to the use of the heirs male of the body of *A* and of the heirs male of the body of such heirs male. In the meantime, Henry Shelley, the oldest son, died, leaving his wife enceinte. Subsequent to Henry's death, the recovery was suffered, judgment given on it, and a writ of seisin was issued. However, on October 9, several hours before the above proceedings were completed, Edward Shelley, the father, died. On October 19, the writ of seisin was executed. Richard Shelley, the younger son, entered the lands and took possession of them. On December 4, a posthumous child was born to the wife of the late Henry Shelley. He was christened Henry. Richard Shelley leased the lands to Wolfe. Later, Henry, the son of Henry the first and grandson of John Shelley, ousted Wolfe, and a suit was brought to recover the lands in an action of ejectment.

There were several issues in the case: (1) was a recovery executed after the death of the recoveree valid? (2) did the writ of seisin make the recovery ineffective? and (3) was the entry of Richard lawful? Now, there was a rule of law then existing that if one was in possession of land by purchase he could not be ousted by an after-born heir, but if he were in by descent the after-born heir was entitled to the land.⁵

Admitting for the sake of argument that the recovery was well executed, the plaintiff argued that Richard must take by purchase. Counsel for the plaintiff strongly contended that the words "heirs male of body of Edward Shelley," found in the remainder, were words of

⁴ 1 FEARNE, *op. cit. supra* note 2, at *77.

⁵ See *Wolfe v. Shelley*, 1 Co. 93b, at 98b, 76 Eng. Rep. 206, 222 (C. B. 1581).

purchase, for if they were words of limitation then the words next following, to-wit, "heirs male of body of such heirs male" would be meaningless, because words of limitation cannot be added to words of limitation.⁶ When Coke, the counsel for defendant, was pressed on the point, he answered that "it is a rule in law 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 the 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.*" (Emphasis ours.) If they had been words of purchase, Coke argued, "violence would be offered . . . to the meaning of the parties; for if the heir male of body of Edward Shelley should take as purchasers, then all other issue male of the body of Edward Shelley would be excluded to take anything by the limitation; and it would be against the expressed limitation of the party."⁷

The Court decided that the entry by Richard was unlawful and plaintiff should take nothing by his bill, adopting as one of its reasons the rule advanced by Coke. This case firmly established an already existing rule of law, and specifically held that the further addition of words of limitation to "heirs" or "heirs of the body" in the remainder did not prevent the Rule from operating, provided the future limitation was to the heirs of the same quality.⁸

Sec. 3. *Theories of Origin of the Rule:* No one knows exactly how long the principle announced in the Rule had existed prior to *Shelley's* case. Lord Coke in his edition of Littleton mentions the principle of the Rule in speaking of fee tail. He discusses it under the caption "Reversion of Fee Simple in the Donor." He writes: "If a man makes a feoffment in fee and limits the use to his daughter for life, after her decease to his son in tail, and after to the use of right heirs of feoffer, though he parted with the whole fee yet he has the reversion . . . for wheresoever the ancestor takes an estate for life and after him a limitation to his right heirs, they shall not take as purchasers."⁹ Coke speaks of a man carrying all his heirs in his own body and adds "this appeareth in the common case that if land be given to a man and his heirs, all his heirs are so totally in him as he may give the land to whom he will." He further said that there were many cases in the books to illustrate the rule.¹⁰ The earliest case found in the books is *Abel's* case.¹¹

⁶ *Id.* at 95b, 76 Eng. Rep. 206, 212.

⁷ *Id.* at 104a, 76 Eng. Rep. 206, 235.

⁸ *Ibid.*; CHALLIS, REAL PROPERTY (3rd ed. 1911) 164.

⁹ CO. LITT. *22b.

¹⁰ *Id.* at *376b.

¹¹ Y. B. 18 E. 2 (1001), 7 Man. & G. 938, at 941 n. (c), 135 Eng. Rep. 381, 383 (1844) (translation).

At least seven theories have been advanced to explain the origin of the Rule:

(1) *That It Is to Prevent Fraud on Feudal Tenures.*

The Rule is supposed to have originated at the time when the feudal system was the economic and political basis of society. Under the feudal rules governing real property, certain dues had to be paid by those who took by descent. It had become a practice on the part of landowners to attempt to escape these dues.¹² The large landowners attempted to escape feudal dues by making their heirs purchasers by way of remainder following a life estate retained by themselves. But because of the then existing strong policy favoring feudal dues, the courts stepped in and declared that where the ancestor retained the freehold, such a remainder would be a fraud on the overlord, for the heirs would enjoy all the advantages of descent and none of its burdens; therefore, such heirs could not take as purchasers by way of remainder.¹³ From this point of view the Rule in *Shelley's Case* is in keeping with the rule that a man cannot make his heirs purchasers (by that name) of the estate they should take by descent.

(2) *To Prevent the Inheritance from Being in Abeyance.*

It appears that this theory is really the same as the one discussed above. However, it is generally classified by itself. It was a cardinal point of feudal property law that the seisin should never be in abeyance. As Mr. Preston points out,¹⁴ the common law courts reasoned that if the heirs took by purchase after the termination of the prior estates of freehold, the fee and the right would have been in nobody. Justice Blackstone, in *Perrin v. Blake*,¹⁵ gives support to this theory.

(3) *The Rule Finds Its Origin in the Relation of "Heirs" and Ancestor.*

Those who support this theory start from the well-settled proposition that a limitation to "*A* and his heirs" gives *A* the fee, and they reason that there is no fundamental difference between a limitation to "*A* and his heirs" and a limitation to *A* for life, remainder to *B* for life, remainder to heirs of *A* (or heirs of his body). Mr. Preston quotes Chief Baron Gilbert on this point: "As one gives the same in expressed words and more, and the interposition of another estate between them only breaks the order of the limitation and not the operation of the

¹² This practice later caused the passage of a statute annulling feoffments made fraudulently to those who would be heirs of the feoffer; 52 Hen. III, c. 6 (1267); 2 PRESTON, *op. cit. supra* note 3, at *295.

¹³ CO. LITT. *376b, n. II; 1 FEARNE, *op. cit. supra* note 3, at *84, *et seq.*; 1 PRESTON, *op. cit. supra* note 3, at *263; CHALLIS, *op. cit. supra* note 8, at 166; KALES, CASES ON FUTURE INTEREST (1917) 253, n. 3.

¹⁴ 1 PRESTON, *op. cit. supra* note 3, at *307 *et seq.*

¹⁵ 1 W. BL. 672 (1769); HARGRAVES, 1 LAW TRACTS (1787) 498.

words, which being the same in both cases ought to have the same operation and construction."¹⁶

(4) *Contingent Remainders Were Not Valid at the Time the Rule Began.*

Mr. Kales, in his book on Future Interests, points out that a remainder to "heirs of A" would be a contingent remainder, for a living person can have no heirs; and that at the time the Rule grew up, contingent remainders were not recognized by the law.¹⁷ Thus, if the "heirs" were to take at all, they had to take by descent.

(5) *Descent Was the Only Way Heirs Could Take Because of Meaning of Word "Heirs".*

Descent was the only way the heirs could take. "Heirs" means an indefinite succession of persons, each of whom will succeed to land of which his ancestor dies seised. There was no way known to the common law in which such persons could take by purchase. The only estates that could be held by more than one as purchasers were (1) joint tenancy and (2) tenancy in common. The "heirs" could not take as joint tenants because their estates would not arise at the same time; they could not take as tenants in common because they could not be tenants at the same time;¹⁸ it follows that the only way the "heirs" could take would be by descent.¹⁹ Thus, if the "heirs" were to take, it was necessary to have a rule that would allow them to take by descent. This theory would not explain the operation of the Rule where the remainder is to the heir of A without a further assumption in respect to the meaning of heir in the singular.

(6) *The Policy of the Law to Keep the Distinction between Descent and Purchase.*

This theory assumes that the same policy is behind the Rule in *Shelley's Case* as is behind the rule that a man cannot make his heirs take by purchase when they would have taken by descent. By the Rule in *Shelley's Case*, the law places the same barrier before acts of third persons that it does before acts of the ancestor of the heir.²⁰

(7) *To Throw Land in Commerce a Generation Sooner.*

Mr. Justice Blackstone advanced this theory in the famous case of *Perrin v. Blake*. He contended that the Rule was originated to throw land into commerce a generation sooner, and thereby subject it to debts of the first taker. He rests his theory upon a case which he found in

¹⁶ 1 PRESTON, *op. cit. supra* note 3, at *299; WILLIAMS, REAL PROPERTY (24th ed. 1926) 415.

¹⁷ KALES, ESTATES FUTURE INTERESTS (2d ed. 1920) §35.

¹⁸ In England at the time the Rule originated there could be but one heir at a time though limitation is to the heirs of A.

¹⁹ GOODEVE, REAL PROPERTY (5th ed. 1906) 222-225.

²⁰ HARGRAVE, *op. cit. supra* note 15, at 552-578.

the books, and which is curiously enough the earliest case on record involving the principle of the Rule.²¹ In that case, *A* purchased Blackacre, to hold to *A* and his wife and his eldest son, and if his son died without heirs of the body, then to the right heirs of *A*. The son died without issue in his father's lifetime. *A* became heavily indebted. His creditors reduced their claims to judgment and levied on *A*'s land. The sheriff returned his writ unsatisfied, stating that all the land of *A* had been delivered up, except Blackacre, in which he only had a life estate. In an action to decide the interest *A* had in Blackacre, the court held that *A* had a fee.²²

Sec. 4. *Requisites of the Rule*: From the practical standpoint, however, there are certain requisites that must exist before the Rule operates. If they are present in a limitation, the Rule comes into play. There must be (1) a prior estate of freehold in the ancestor;²³ (2) there must be a

²¹ *Abel's Case*, *supra* note 10. (Ferne points out Blackstone's and Hargrave's reasons for Rule to apply only where the remainder is to heirs general of the life tenant as estate tails were neither alienable nor subject to debts at that time. 1 FERNE, *op. cit. supra* note 3, at 84 *et seq.*) (*A* died before the suit was brought. It appears that the Court was of the opinion that *A* had a fee, but the execution was not granted because the creditor had released *A*. However, when the attorneys for the creditor asked that this execution cease forever, Berrington, J., replied, "We shall not award that this execution cease." Most of the argument dealt with warranty.)

²² Whatever might have been the one reason for the adoption of the principle embodied in the Rule, it seems that the main policy behind the Rule was to keep clearly defined the distinction which the common law had always drawn between descent and purchase. One of the most effective ways the courts could accomplish this was to prevent by judicial decision the creation of new types of estates which would allow the grantees to take as purchasers without any of the obligations of descent. Correspondingly, there was a strong policy to preserve the nature of the estates which the law recognized at that time under the feudal system. With the development of the concept of fee simple, life estate, remainder and reversion, there grew up a rule of law that if a man gave away the entire fee he could not restrict its alienation. The very nature of the fee was the right to alienate it, and in order to preserve these rules of law intact, the judges, by judicial decision, firmly established the rule that one could not transfer the entire fee and restrict its alienation. Such a rule must have met the disfavor of certain classes in the feudal days and they attempted to create means to dodge or evade the rule. A critical examination of a limitation to *A* for life remainder to heirs of *A* irresistibly leads to the conclusion that it is an attempt to give *A* the fee and restrict its alienation—for what other reason would a grantor have in giving *A* the fee and restricting the alienation than to be assured that the fee would pass to the heirs of *A* after *A*'s death? The limitation in *Shelley's Case* is a concrete example of an attempt of the owner of the fee to give out the entire fee and at the same time to restrict its alienation. It is submitted that the problem involved in the Rule in *Shelley's Case* is: Was the remainder given to those who would take from *A* by the canons of descent in the same manner as they would have taken by descent if conveyance had not been made to them by way of remainder? If the remainder was given to the heirs of *A* in the technical sense, it amounted to an evasion of the policy that one cannot convey the fee and at the same time restrict its alienation, a repugnancy which the law did not allow at the time that the Rule in *Shelley's Case* grew up. In addition, the common law judges must have reasoned, such a limitation would be a fraud on the feudal lords, a thing contrary to public policy of that time. Besides, such a remainder would be a contingent remainder and void.

²³ The estate of freehold in the ancestor may be by resulting use.

remainder to the heirs general or special of the first taker; (3) the estate to the ancestor and the remainder to his heirs must be limited under the same instrument; and (4) both estates must be either legal or equitable.²⁴

PART II. CHARACTER OF THE RULE AND THE INTENT OF THE TESTATOR

Sec. 5. *Character of the Rule*: The Rule operates on the remainder. Once it has been determined that the ancestor has a freehold estate, attention should then be directed to the remainder. The precise problem is—has a remainder been limited to the heirs or heirs of the body of the first taker? Heirs in the technical sense means a group of people who are to take in inheritable succession from the ancestor, generation after generation.²⁵ At this point, the problem is one of construction of the remainder. If the words in the remainder are used in their technical sense, the Rule applies, irrespective of the intent of the testator or grantor to give the ancestor only a life estate.

Our Court has apparently often forgotten this important point. Time and again, it has done verbal homage to the well-settled proposition that the Rule is a rule of law and operates irrespective of the testator's intention²⁶ only to turn upon itself and toy about unduly with the testator's intention. It is well settled that technical words or words of known technical import must have their technical effect even though the testator uses inconsistent words, unless the words in conflict make it perfectly clear that the testator did not mean to use the technical words in their proper sense.

Sec. 6. *The Intent of the Testator*: The Rule in *Shelley's Case* is a rule of law that operates irrespective of the intent of the testator.²⁷ Accordingly, once it has been determined that there is a remainder to the heirs or heirs of the body (in the technical sense) of the taker of the freehold estate, the Rule applies although the testator expressly stated that it should not or that the first taker was to have only a life estate.²⁸ However, the application of this simple principle, to limitations in wills particularly, has led to much confusion, due chiefly to the so-called doctrine of general intent, that is, the intent of the testator

²⁴ CHALLIS, *op. cit. supra* note 8, at 153.

²⁵ Allen v. Pass, 20 N. C. 207 (1838).

²⁶ Edgerton v. Aycock, 123 N. C. 134, 31 S. E. 382 (1898); Martin v. Knowles, 195 N. C. 427, 142 S. E. 313 (1928).

²⁷ For a full discussion of the intent of the testator, see 1 FEARNE, *op. cit. supra* note 3, at *154-*178; 1 PRESTON, *op. cit. supra* note 3, at *272-*279; 1 HAYES, INTRODUCTION TO CONVEYANCING (4th ed. 1839) 418-427; Nichols v. Gladden, 117 N. C. 497, 23 S. E. 459 (1895); Edgerton v. Aycock, 123 N. C. 134, 31 S. E. 382 (1898); Martin v. Knowles, 195 N. C. 425, 142 S. E. 313 (1928).

²⁸ Roe v. Grew, 2 Wils. K. B. 322, 95 Eng. Rep. 835 (C. B. 1766); Note (1910) 10 Col. L. Rev. 62.

as gathered from the instrument as a whole prevails over any particular expressed intent.

This doctrine seems to have its origin in *Roe v. Grew*,²⁹ a rather simple case for the application of the Rule. In *Roe v. Grew*, there was a devise to *A* (nephew of testator) for life, and after his death to the issue of his body, and the heirs of the body of such issue. It was held that *A* had an estate tail. In reaching this decision, however, Lord Chief Justice Wilmut said, "The intention of the testator clearly was, to give *A* an estate for life only, but his intention also clearly was that the sons of *A* should take in succession. Both these intentions cannot take place, for if the devisee *A* took only an estate for life, his son could never have taken—The Court must put themselves in the place of testator, and determine as he would have done if he had been told that both of his intentions in the will, by the rules of law, could not take place, and had been asked which of them he desired should take effect and stand. He certainly would have answered that 'so long as *A* had any issue male the premises should not go to the lessor of the plaintiff', and if we balance the two intentions, *A* must be adjudged to have been tenant in tail."³⁰ But it doesn't seem that such language was necessary for the decision of the case. Yet the doctrine was approved in 1820 by Lord Eldon, in *Jesson v. Wright*,³¹ and appeared to be alive in England as late as 1844.

The doctrine of general intent met its death in England thirteen years later in the leading case of *Van Grutten v. Foxwell*.³² As to the doctrine, Lord Herschell said, "I think the introduction of the notion of a 'general intent' and a 'particular intent' on the part of the testator, the latter intent yielding to the former, tended to put matters on the wrong track, and suggest that the estate the devisee took depended after all on the intention of the testator, and not on the effect which the law gave to a devise in particular terms."³³ In North Carolina, the doctrine of general intent has had a checkered career. As early as 1833, the Court announced the doctrine of general and particular intent.³⁴ But in *Nichols v. Gladden*,³⁵ Montgomery, J., ably and firmly stated that the Rule was a rule of law and was not to be construed according to the general intent of the testator. However, in 1833, the

²⁹ 2 Wils. K. B. 322, 95 Eng. Rep. 835 (C. B. 1766).

³⁰ The famous case of *Perrin v. Blake*, which involved squarely the effect of the intent of the testator on the Rule, was never carried to a final decision. However, it caused much discussion at the bar and among text writers. For a full discussion of the case, see 1 FEARNE, *op. cit. supra* note 3, at *155-*156; 1 PRESTON, *op. cit. supra* note 3, at *271.

³¹ 2 Bligh. 1 (1820). But in the same case the doctrine was attacked strongly by Lord Redsdale.

³² *Van Grutten v. Foxwell*, [1897] A. C. 658, 663 (Eng.).

³³ *Ross v. Toms*, 15 N. C. 376 (1833).

³⁴ 117 N. C. 497, 23 S. E. 459 (1895).

Court had announced the doctrine of general and particular intent.³⁶ Consequently, many years later, in *Hampton v. Griggs*,³⁷ the Court apparently attempted to reconcile the doctrine of general intent with the *Gladden* case. After stating that the Rule in *Shelley's Case* was a rule of law, Stacy, J., said, "The meaning or sense in which the words 'heirs' or 'heirs of the body' are employed, whether technical or other, is denominated the general or paramount intent, and this is to be the controlling factor. As against this dominant purpose the lesser or particular intent must give way; for having once determined that the second devise was intended to be given to the heirs of the first taker *qua* heirs, or in the strict and technical sense of heirs, the rule is inexorable."³⁸ It is submitted that such language only confused matters. It would be better to disregard entirely the talk of general and particular intent. In the late case of *Martin v. Knowles*,³⁹ the Court quoted Mr. Hayes at length. It is hoped that this will be the death blow to the doctrine of general and particular intent in North Carolina.⁴⁰

PART III. NORTH CAROLINA STATUTES

Sec. 7. *There are several statutes which may affect the application of the Rule.*

1. *Fee Tail Converted into Fee Simple:*

"Every person seised of an estate in tail shall be deemed to be seised of the same in fee simple; and all sales and conveyances, made bona fide and for valuable consideration since the first day of January 1777 by any tenant in tail in actual possession of any real estate where such estate has been conveyed in fee simple, shall be good and effectual in law to bar any tenant in tail and in remainder of and from all claim, action, and right of entry whatsoever, of, in, and to such entailed estate, against any purchaser, his heirs, or assigns, now in actual possession of such estate, in the same manner as if such tenant in tail had possessed the same in fee simple."⁴¹

This statute does not prevent the Rule from operating.⁴²

2. *Heirs Construed as Children:*

"A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be the children of such person, unless a contrary intention appear by the deed or will."⁴³

³⁶ *Blackledge v. Simmons*, 180 N. C. 535, 105 S. E. 202 (1920); *Crisp v. Briggs*, 176 N. C. 1, 96 S. E. 662 (1918). But see *Crawford v. Wearn*, 115 N. C. 540, 541, 20 S. E. 724, 725 (1894); and *Ward v. Jones*, 40 N. C. 400 (1848).

³⁷ 184 N. C. 13, 113 S. E. 501 (1922). See Sec. 22(a) *infra*.

³⁸ *Hampton v. Griggs*, 184 N. C. 13, 17, 113 S. E. 501, 502 (1922).

³⁹ 195 N. C. 427, 142 S. E. 313 (1928).

⁴⁰ 1 HAYES, *op. cit. supra* note 27, at 418.

⁴¹ N. C. CODE ANN. (Michie, 1939) §1734.

⁴² *Nichols v. Gladden*, 117 N. C. 497, 23 S. E. 459 (1895). See Note (1922) 1 N. C. L. REV. 110 (criticism). ⁴³ N. C. CODE ANN. (Michie, 1939) §1739.

This statute does not prevent the Rule from operating. It applies only when there is no preceding estate conveyed to a living person.⁴⁴

3. *Limitations and Failure of Issue:*

"Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, descendants, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative, (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitations be otherwise, and expressly and plainly declared in the face of the deed or will creating it: Provided, that the rule of construction contained in this section shall not extend to any deed or will made and executed before the 15 of January, 1828."⁴⁵

This statute does not prevent the Rule from operating. Again the purpose of the statute was to make a contingent limitation good. It fixes a definite time when the estate to the first taker shall become absolute.⁴⁶

4. *Fee Presumed though Heirs Omitted:*

"When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word 'heir' is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by conveyance or some part thereof, that the grantor meant to convey an estate of less dignity."⁴⁷

This statute does not prevent the Rule from operating.

Sec. 8. *Slave Cases:* See footnote—Personal Property.⁴⁸

PART IV. OF THE ESTATE IN THE ANCESTOR

Sec. 9. *Freehold in the Ancestor:* There must be a freehold estate in the ancestor. It may be expressed, or implied by way of resulting use.⁴⁹ Without a freehold in the ancestor the rule does not apply; it is a

⁴⁴ *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011 (1893); *Hartman v. Flynn*, 189 N. C. 452, 127 S. E. 515 (1925).

⁴⁵ N. C. CODE ANN. (Michie, 1939) §1737.

⁴⁶ *King v. Utley*, 85 N. C. 59 (1881); *Sanderlin v. Deford*, 47 N. C. 75 (1854).

⁴⁷ N. C. CODE ANN. (Michie, 1939) §991.

⁴⁸ *Note of Rule in Shelley's Case and Personal Property.* The rule does not apply to personal property. *Crawford v. Wearn*, 115 N. C. 540, 20 S. E. 724 (1894). Note (1909) 27 HARV. L. REV. 53. However, prior to the abolition of slavery, the Rule applied to deeds and devises of slaves. *Chambers v. Payne*, 59 N. C. 276 (1862); *Williams v. Houston*, 57 N. C. 277 (1858); *Boyd v. Small*, 56 N. C. 39 (1856); *Hodges v. Little*, 52 N. C. 145 (1859); *Sanderlin v. Deford*, 47 N. C. 75 (1854); *Coon v. Rice*, 29 N. C. 217 (1847); *Ham v. Ham*, 21 N. C. 598 (1837); *Allen v. Pass*, 20 N. C. 207 (1838); *Nichols v. Cartwright*, 6 N. C. 137 (1812); *Cutlar v. Cutlar*, 3 N. C. 154 (1801).

⁴⁹ *Brown v. Guthrie*, 190 N. C. 822, 130 S. E. 836 (1925).

necessary requisite.⁵⁰ It does not matter that the limitation is to *A* for life "only".⁵¹

Sec. 9 (a). *Where the Freehold Is in the Ancestor as Tenant in Common*: The life tenants may be tenants in common⁵² with a remainder to their respective heirs. If the remainder is to the heirs of only one of the life tenants, the Rule will operate as to his moiety. Our court has so held.⁵³ If a freehold is left to life tenants as tenants in common, with remainders to the heirs of the body of the life tenants, it is not necessary that the life tenants be capable of having children or are able to marry each other. The rule will operate to give each an estate tail as to an undivided half which will be changed into fee simple by statute.⁵⁴

Sec. 9 (b). *Where a Freehold Is in the Ancestors Jointly*: If a freehold is limited to two or more people jointly, with remainder to their "heirs", the Rule operates where (1) "heirs" means heirs of one of the tenants, or (2) if the joint life tenants are capable of having a common heir, or (3) where "heirs" means heirs of two between them begotten.⁵⁵ And so if land is devised to *A*, *B*, and *C*, jointly, and then to their *respective* heirs, executors and administrators, the English Courts have held that the Rule does not operate; that *A*, *B*, and *C* were joint tenants for their lives and the lives of the survivor with several remainders in tenancy in common in fee.⁵⁶ The English Court said the word "respective" before the word "heir" prevented the Rule from operating.⁵⁷ However, where there is a devise to several children of the testator as joint tenants for life, with remainder to the heirs at law of the joint tenants, it was held by our court, in *Walker v. Taylor*,⁵⁸ that the Rule operates to give the joint tenants for life the fee jointly. Our court pointed out that *A*, *B*, and *C*, the joint life tenants, were capable of having a common heir.

Walker v. Taylor was followed in *Bagwell v. Hines*,⁵⁹ where there was a deed to *A* and *B* for their joint lives, with remainder in fee

⁵⁰ See Sec. 3 *supra*: *Reasons for the Rule*. *Wolfe v. Shelley*, 1 Co. 93b, 104a; Co. Litt. *319; CHALLIS, *op. cit. supra* note 8, at 153; 1 FEARNE, *op. cit. supra* note 3, at *28; 1 PRESTON, *op. cit. supra* note 3, at *266.

⁵¹ *Merchants National Bank v. Dortch*, 186 N. C. 510, 120 S. E. 60 (1923).

⁵² 1 PRESTON, *op. cit. supra* note 3, at *313.

⁵³ *McSwain v. Washburn*, 170 N. C. 363, 87 S. E. 97 (1915).

⁵⁴ *Cahoon v. Upton*, 174 N. C. 88, 93 S. E. 446 (1917).

⁵⁵ 1 FEARNE, *op. cit. supra* note 3, at *36.

⁵⁶ *Wilson v. Atkinson* (1892) 3 Ch. I (Eng.); Note (1893) 6 HARV. L. REV. 321.

⁵⁷ Cf. *Ex parte Tanner*, 20 Beav. 374, 52 Eng. Rep. 647 (Ch. 1855) (where limitation was to *A* and *B* and the heirs of their bodies respectively, the Rule operated).

⁵⁸ 144 N. C. 175, 56 S. E. 877 (1907).

⁵⁹ 187 N. C. 690, 122 S. E. 659 (1924). But if the limitation of the freehold is not joint, but successive, the Rule should not operate. 1 FEARNE, *op. cit. supra* note 3, at *35; 1 PRESTON, *op. cit. supra* note 3, at *314.

to heirs of *A* and *B*. (*A* and *B* were evidently brothers and sisters.) Fearne contends that if the joint life tenants are incapable of marriage, they should take several estates of inheritance though the freehold is in them jointly.⁶⁰

The Rule applies where there is an estate by the entirety for life in the first takers, remainder to the heirs or the heirs of the body of the life tenants.⁶¹

The possibility of part of the joint freehold terminating during the life of one of the ancestors does not prevent the Rule from operating.⁶² In *Cotton v. Mosely*,⁶³ the limitation was to *A* and his wife, *B*, for their lives, and "afterwards to *B*'s heirs forever". If *A* predeceased *B* his estate would terminate before the remainder could possibly have vested in possession, but the Rule would apply just the same.⁶⁴ Suppose the limitation is to *A* and *B* jointly, remainder to right heirs of him that dieth first. It seems the Rule would apply, theoretically. The court in *Cotton v. Mosely*, said that the fact that the remainder will or cannot possibly vest in the lifetime of the ancestor will not exclude the Rule. However, in the suggested case, as Mr. Preston points out,⁶⁵ the inheritance will not vest, for the ancestor must die, terminating his freehold estate, before it is certain that he in particular is the person to whose heirs the limitation is made. Such gifts over are governed by the rules respecting contingent remainders and these rules prevent the vesting of the inheritance in the hypothetical case.

If the limitation is to *A* and his wife *B* (or to anyone capable of issue by the laws of marriage), with remainders to the heirs of their bodies, the Rule operates to give an estate tail in the ancestors jointly,⁶⁶ which is converted into a fee simple by our Statute.

Sec. 9 (c). *Where the Freehold in Ancestor Is by Way of Remainder*: If the ancestor's freehold is limited by way of vested remainder, the Rule should operate at once to give him a fee or fee tail in remainder. Our Court has so held in *Wool v. Fleetwood*.⁶⁷ There would seem to be no doubt on this point; however, the New York court⁶⁸ seemed to indicate, in *Spader v. Powers*,⁶⁹ that a vested

⁶⁰ 1 FEARNE, *op. cit. supra* note 3, at *36.

⁶¹ *Davis v. Bass*, 188 N. C. 200, 124 S. E. 566 (1924); *Robertson v. Griffin*, 185 N. C. 38, 115 S. E. 824 (1923).

⁶² 1 FEARNE, *op. cit. supra* note 3, at *30.

⁶³ 159 N. C. 1, 74 S. E. 454 (1912).

⁶⁴ Cf. 1 FEARNE, *op. cit. supra* note 3, at *36; 1 PRESTON, *op. cit. supra* note 3, at *338.

⁶⁵ 1 PRESTON, *op. cit. supra* note 3, at *315-319; 1 FEARNE, *op. cit. supra* note 3, at *32.

⁶⁶ *Cohoon v. Upton*, 174 N. C. 88, 93 S. E. 446 (1917); 1 FEARNE, *op. cit. supra* note 3, at *35.

⁶⁷ 136 N. C. 460, 48 S. E. 785 (1904).

⁶⁸ The Rule is now abolished in New York.

⁶⁹ 50 Hun 153 (N. Y. 1889).

remainder in the ancestor had to be vested in possession or the Rule would not apply. In that case there was a devise to *A* for life, at *A*'s death to *B*, and should *B* predecease *A*, then to *B*'s heirs. *B* did predecease *A*. The New York court held *B*'s heirs took by purchase under the will and not by descent.⁷⁰ In *Wool v. Fleetwood*, there was a devise to *A* for life, and after his death to *B* for life, and after his death "to vest in *B*'s lawful heirs." The Supreme Court of North Carolina held that *B* took a vested remainder in fee. It is submitted that the rule in the *Fleetwood* case is the sounder of the two.

The fact that the ancestor's estate is limited by way of contingent remainder does not prevent the Rule from operating when the remainder in the ancestor vests. As long as the remainder in the ancestor is contingent, however, the Rule does not operate,⁷¹ for the ancestor does not then have an estate of freehold. In the leading case of *Starnes v. Hill*,⁷² there was a deed of Blackacre in special trust to *A* for life, and in event *B* (husband of *A*) outlived *A*, then to *B* for life, and then to the heirs of the said *B*, them and their heirs forever. *A* and *B* and the trustees conveyed Blackacre to one *Y*, who sold it to plaintiff. The plaintiff contracted to sell to defendant. *A* and *B* were living at the time of suit. The court held: (1) that *B* had a contingent remainder, and if he does not outlive *A*, his heirs take by purchase; (2) if *B* outlives *A*, his remainder vests and the Rule applies to give him the fee. The court seems clearly wrong in holding that *B* had a contingent remainder. It is a well-settled rule that the mere addition of words of contingency, which do not add anything to the very nature of the remainder, do not make a remainder contingent. In the limitation in question, to *A* for life, and in event *B* outlived *A*, then to *B* for life, there is in substance a limitation to *A* for life, remainder to *B* for life, for the only way *B* could ever take a life estate in possession where there is a preceding life tenant would be to outlive the preceding life tenant. The words "in event *B* outlived *A*" add no contingency to the nature of the remainder that is not always implied in such limitation by its very nature. That a limitation to *A* for life, then to *B* for life (a living person) gives *B* a vested remainder is a self-evident proposition. Such in substance was the limitation in *Starnes v. Hill*. Perhaps the court's interest in the Rule in *Shelley's Case* caused it to overlook this point, which was all important to the proper solution of the case.

Sec. 9 (d). *The Ancestor's Estate May Terminate in Lifetime of Ancestor*: The fact that the ancestor's freehold may terminate in the

⁷⁰ Note (1910) 24 HARV. L. REV. 160.

⁷¹ 1 PRESTON, *op. cit. supra* note 3, at *316.

⁷² 112 N. C. 1, 16 S. E. 1011 (1893).

lifetime of the ancestor does not prevent the Rule from operating. If there is an estate in *A* for the life of *B*, or to *A* during her widowhood, with remainder to the heirs or the heirs of the body of *A*, the Rule operates,⁷³ for all the Rule requires is that the ancestor take a freehold and that by the same conveyance a remainder is limited to his heirs. There is no North Carolina case directly in point, but it is submitted that our court should follow the rule stated above.⁷⁴

Sec. 9 (e). *Where Ancestor Has a Life Estate as Trustee, Taking No Beneficial Interest Therein*: If an estate is limited to *A* for life as trustee, with remainder to the heirs or the heirs of the body of *A*, there is some doubt that the Rule applies. Mr. Fearn⁷⁵ thinks the Rule has no application. Mr. Preston,⁷⁶ however, thinks that the Rule should apply, contending that a declaration of trust annexed to the freehold of the ancestor does not make any difference. There is no North Carolina case in point.⁷⁷

Sec. 9 (f). *Where There Are Intervening Life Estates*: It is well settled that intervening life estates, vested or contingent, do not prevent the operation of the Rule.⁷⁸ Our court so held in *Hartman v. Flynn*.⁷⁹ The Rule operates on the remainder independent of the doctrine of merger. Some contend that the freehold and the remainder unite in the ancestor subject to opening and letting in intervening life estates as they vest in possession,⁸⁰ while others advance the theory that where life estates are interposed, the remainder and the freehold do not unite until the intermediate life estates have expired or lost possibility of vesting in possession. The result is the same in both cases.

PART V. OF THE REMAINDER

Sec. 10. *In General*: There must be a remainder by the same instrument that creates a freehold in the ancestor. It may be limited either to the heirs general or special of the first taker.⁸¹

Sec. 11. *Where the Remainder Is to Heirs of the Ancestor*: A typical case for the application of the Rule is a limitation to *A* for life

⁷³ 1 PRESTON, *op. cit. supra* note 3, at *313.

⁷⁴ See *Cotton v. Mosely*, 159 N. C. 1, 74 S. E. 454 (1912). See Sec. 9(b) *supra*.

⁷⁵ 1 FEARNE, *op. cit. supra* note 3, at *39.

⁷⁶ 1 PRESTON, *op. cit. supra* note 3, at *311.

⁷⁷ See discussion *Sec. 18 infra: Executory Trusts*.

⁷⁸ CHALLIS, *op. cit. supra* note 8, at 163; 1 FEARNE, *op. cit. supra* note 3, at *37; 1 PRESTON, *op. cit. supra* note 3, at *266.

⁷⁹ 189 N. C. 452, 127 S. E. 517 (1925).

⁸⁰ 1 FEARNE, *op. cit. supra* note 3, at *34.

⁸¹ *Barns v. Best*, 196 N. C. 668, 146 S. E. 710 (1929); *Daniel v. Bass*, 193 N. C. 294, 136 S. E. 733 (1927); *Wills v. Mutual Loan & Trust Co.*, 183 N. C. 267, 111 S. E. 163 (1922); *Weatherly v. Armfield*, 30 N. C. 25 (1847); *Hollowell v. Karnegay*, 29 N. C. 261 (1847); CHALLIS, *op. cit. supra* note 8, at 163; 1 FEARNE, *op. cit. supra* note 3, at *28; 1 PRESTON, *op. cit. supra* note 2, at *263.

remainder to heirs of *A*.⁸² If the word "heirs" is used other than in its technical sense, *i.e.*, as an indefinite group of people to succeed by descent from generation to generation, the Rule does not apply.⁸³ However, the word "forever" added to heirs in the remainder does not prevent the Rule from operating.⁸⁴ And so, if the remainder is to the heirs of *A*, "their only use and behoof," the Rule operates.⁸⁵ The addition of such words as "lawful"⁸⁶ or "surviving"⁸⁷ or "nearest"⁸⁸ to heirs of *A* in the remainder will not prevent the Rule from operating. However, if the remainder is to the heirs of *A* and one or some of the possible heirs are expressly eliminated, the Rule will not apply. In *Watkins v. Flora*,⁸⁹ the remainder was limited to *A*'s heirs by consanguinity, with exception of one sister, *B*. The court properly held that the Rule did not apply, for since the course of descent cannot thus be altered by admitting some and excluding others, the heirs take by purchase in the remainder.

Sec. 12. *Implied Remainders in the Heir*: Where a life estate is given to *A* and a limitation to *B* on failure of heirs or heirs of the body of *A*, the question of whether or not a remainder will be implied to heirs of *A* presents itself. In England it seems that a remainder will be implied to the heirs of the life tenant and the Rule in *Shelley's Case* will operate.⁹⁰ Georgia follows the English courts.⁹¹

This point has never been directly presented to our courts. However, in *Pugh v. Allen*,⁹² there was a deed of Blackacre to *A*, his heirs and assigns on certain conditions, and in further consideration that in case *A* should die without heir, the gift shall go to *B*, his heirs and assigns. The case holds that in such a situation to die without heir means to die without issue. From this case, it might be argued that in North

⁸² *Curry v. Curry*, 183 N. C. 83, 110 S. E. 579 (1922); see *Wills v. Mutual Loan & Trust Co.*, 183 N. C. 267, 111 S. E. 163 (1922); *Allen v. Hewitt*, 212 N. C. 367, 193 S. E. 275 (1937). Where there is a remainder to the heirs of the first taker, the addition of such words as "to such collateral relations as may be entitled to the same upon the failure of issue" are treated by our court as surplusage. *Rowland v. Home Bldg. & Loan Ass'n*, 211 N. C. 456, 190 S. E. 719 (1937).

⁸³ *Wilkinson v. Boyd*, 136 N. C. 46, 48 S. E. 516 (1904); *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756 (1902).

⁸⁴ *Waddell v. Aycock*, 195 N. C. 268, 142 S. E. 10 (1928); *King v. Utley*, 85 N. C. 59 (1881).

⁸⁵ *Starling v. Newsom*, 180 N. C. 440, 105 S. E. 3 (1920).

⁸⁶ *Wool v. Fleetwood*, 136 N. C. 460, 48 S. E. 785 (1904).

⁸⁷ *Price v. Griffin*, 150 N. C. 523, 64 S. E. 372 (1909).

⁸⁸ *Crisp v. Briggs*, 176 N. C. 1, 96 S. E. 662 (1918).

⁸⁹ 30 N. C. 374 (1848).

⁹⁰ *Lethieulier v. Tracy*, 1 Keny. 56, 96 Eng. Rep. 914 (Ch. 1754).

⁹¹ *Burton v. Black*, 30 Ga. 638 (1860). Closely associated with this doctrine of a remainder implied in the heirs of the first taker is the principle of increasing a life estate by implication. It seems that the weight of authority is that an express life estate may be increased by implication. See note: (1911) 29 L. R. A. (N. S.) 1011.

⁹² 179 N. C. 307, 102 S. E. 394 (1920).

Carolina there would be no remainder implied in the heirs of the first taker, in a limitation to *A* for life, then to *B* on failure of the heirs or the heirs of the body of *A*, and therefore the Rule would not apply in such a limitation.

It is interesting to note that in *Pugh v. Allen*, the life estate was to a son of the grantor, and the gift over if he should die without an heir was to another son of the grantor in fee. In the *Allen* case, our court applied the rule of *Rollins v. Keel*,⁹³ that is, where the ultimate taker is presumptively or potentially one of the heirs general of the first taker, the term dying without heir or heirs on part of the primary grantee will be construed to mean his issue in the sense of children and grandchildren living at his death and not heirs general. From the reasoning of that case, a general rule to the effect that there will be no implication of remainders in heirs of the first taker might be stating the proposition too broadly. For example, if the gift over was to a stranger of the blood of the first taker, or if it was to take effect on failure of heirs of the body of *A*, the reason given in *Pugh v. Allen* for not implying a remainder to heirs of life tenant, namely, that if it was so implied the limitation over to *B* would be in vain, ceases to exist.

Sec. 13. *Remainder to Heirs of Body of Life Tenant*: The Rule applies where the remainder, under the proper circumstances, is limited to the heirs of the body of the taker of the particular estate.⁹⁴ The Rule operates in this situation to carry the remainder to the ancestor, and if there are no intervening estates, to give him an immediate estate in tail general, tail special, male or female, depending upon the limitation. Estate tail has been abolished in North Carolina by statute,⁹⁵ but that does not prevent the Rule from operating.⁹⁶ The Statute converts what would have been an estate tail into an estate in fee in the first taker.

The words "bodily heirs" in the remainder have the same meaning as heirs of the body.⁹⁷ The Rule applies though the limitation in the remainder is to the heirs of the body "only"⁹⁸ or to their "only use and behoof,"⁹⁹ or to the heirs of the body of *A* and to *B* for life,¹⁰⁰ no other limitation or gift over following. Likewise, a remainder to the heirs or heiresses of the body of the life tenant does not prevent the Rule from operating. *Leathers v. Gray*, deciding this last proposition,

⁹³ 115 N. C. 68, 20 S. E. 209 (1894).

⁹⁴ *Bradley v. Church*, 195 N. C. 662, 143 S. E. 211 (1928); *Perry v. Hackney*, 142 N. C. 368, 55 S. E. 289 (1906).

⁹⁵ N. C. CODE ANN. (Michie, 1939) c. 34, §1734. See §7 *supra*.

⁹⁶ See sec. 7 *supra*.

⁹⁷ *Chamblee v. Broughton*, 120 N. C. 170, 27 S. E. 111 (1897).

⁹⁸ *Foley v. Ivey*, 193 N. C. 453, 137 S. E. 418 (1927).

⁹⁹ *Starling v. Newsom*, 180 N. C. 440, 105 S. E. 3 (1920).

¹⁰⁰ *Daniel v. Harrison*, 175 N. C. 120, 95 S. E. 37 (1918).

first came up in 1887.¹⁰¹ And the court held that the Rule did not apply on the ground that the addition of word "heiresses" showed that "heirs" was not used in its technical sense. On the rehearing¹⁰² the court reversed itself. The court there said, "super-added words, to have such an effect, must have appropriate pertinency in meaning and bearing . . . the course of descent is not changed in any degree from what it would have been if the word 'heiresses' did not appear, nor does the word suggest or imply children of the testator any more than does the word 'heirs'."¹⁰³

Sec. 14. *Remainder to Others than Heirs or the Heirs of the Body:*

Sec. 14 (a). *Remainder to the Issue of the First Taker:* If the remainder is limited to the issue of the life tenant, the Rule does not apply unless it manifestly appears that "issue" is used as heirs general.¹⁰⁴ Since the word "heirs" is no longer needed to pass the fee in North Carolina,¹⁰⁵ this rule seems sound in spite of the common law rule that in devises "issue" is generally treated to embrace descendants of all degrees.¹⁰⁶ The reason common law judges construed "issue" to include heirs general was to carry the inheritance to the issue by descent, for if the issue took by purchase they would take only a life estate. Even in the absence of a statute abolishing the necessity of the word "heirs" to pass the fee, if words of limitation were added to "issue", then "issue" would be construed as a word of purchase.¹⁰⁷

In North Carolina, if the remainder is to the bodily issue of the life tenant, the Rule does not apply.¹⁰⁸ In coming to this conclusion the court was justified by former holdings and on general principles, but the decision seems to place entirely too much emphasis on the estate the testator intended to give the first taker; the approach should be by way of the remainder. If the remainder is limited to the heirs or the heirs of the body of the life tenant *qua* heirs, though those exact words are not used, the Rule should apply.

Sec. 14 (b). *Where the Remainder Is to "Children", Etc.:* If the remainder is limited to any other than the heirs or the heirs of the body of the life tenant, the limitation is out of the Rule. And so, where the remainder is limited to the children of the life tenant, the Rule

¹⁰¹ *Leathers v. Gray*, 96 N. C. 548, 2 S. E. 455 (1887).

¹⁰² *Leathers v. Gray*, 101 N. C. 162, 7 S. E. 657 (1888).

¹⁰³ *Id.* at 166, 7 S. E. at 659 (1888).

¹⁰⁴ *Faison v. Odam*, 144 N. C. 107, 56 S. E. 793 (1907).

¹⁰⁵ See sec. 7 *supra*.

¹⁰⁶ *In re Cust* [1919] Vict. L. R. 693 (Australia); notes (1920) 33 HARV. L. REV. 988; (1916)¹ 30 HARV. L. REV. 195.

¹⁰⁷ In the common law of England, the word "issue" presumptively has the meaning of "heirs". In a remainder limited to the issue of the life tenant for the purpose of the Rule, "issue" has the effect of "heirs" unless it appears to be used to designate particular individuals. CHALLIS, *op. cit. supra* note 8, at 164; SMITH, EXECUTORY INTERESTS (1845) 248.

¹⁰⁸ *Ford v. McBrayer*, 171 N. C. 420, 88 S. E. 736 (1916).

does not apply,¹⁰⁹ unless it clearly appears that the word "children" was used in the sense of "heirs".¹¹⁰

In *Hathaway v. Harris*,¹¹¹ the testator devised land to *A* (his son) for life, and if he should die with lawful child, then to him and his heirs forever; but if he should die without lawful child, gift over to his widow for life, then to *B* and his heirs. It was held that the Rule applied. The court pointed out that in its opinion the words "then to him and his heirs" refer to *A*; that in every other part of the entire clause (except the concluding words), where the pronouns "he" and "his" were used, the reference is plainly to his son, *A*, and must be so understood. The court held that the limitation should be treated as if it read as follows: If he (*A*) should die with a lawful child, then to him (*A*) and his (*A*'s) heirs forever, but if he should die without a lawful child, then to his (*A*'s) widow. This, our court holds, plainly indicates that the testator's mind was focussed on his son.

If *Hathaway v. Harris* were before the court today for the first time and the limitation should be construed in the same manner, it is arguable that the Rule would not apply because the ultimate gift over was not to the heirs general of *A*. It is not clear from the case whether *B* was one of the potential heirs of *A* or whether he was a stranger to the blood of *A*. If *B* was one of the potential heirs of *A*, then the Rule would not apply under the doctrine of *Puckett v. Morgan*.¹¹² However, if *B* happened to be a stranger to the blood of *A*, it seems that in spite of *Puckett v. Morgan* the Rule would operate. *Williams v. R. R.*¹¹³ seems to be authority for this statement, but the point is not strongly established in the *Williams* case, for it may be explained away on another point.¹¹⁴ However, it was not suggested at the time of *Hathaway v. Harris* (1881) that any type of gift over took the limitation out of the Rule in *Shelley's Case*.

If the remainder is limited to the "nearest blood relatives" of the holder of the particular estate, the Rule does not apply.¹¹⁵ But if the remainder is to the "legal representatives" of the first taker, the Rule applies.¹¹⁶ In *Nobles v. Nobles*, Blackacre was devised to *A* for life, remainder to his legal representatives. The court properly focussed its attention on the nature of the remainder and concluded that in such a limitation legal representatives conveyed an estate to the heirs of the

¹⁰⁹ *Hutton & Bourbonnais Co. v. Horton*, 178 N. C. 548, 101 S. E. 279 (1919); *Smith v. Moore*, 178 N. C. 370, 100 S. E. 702 (1919).

¹¹⁰ See *Jones v. Whichard*, 163 N. C. 241, 79 S. E. 503 (1913); notes (1920) 33 HARV. L. REV. 988; (1896) 10 HARV. L. REV. 66.

¹¹¹ 84 N. C. 96 (1881).

¹¹² 158 N. C. 344, 74 S. E. 15 (1912).

¹¹³ 200 N. C. 771, 158 S. E. 473 (1931).

¹¹⁴ See §23(g) *infra*.

¹¹⁵ *Miller v. Harding*, 167 N. C. 53, 83 S. E. 25 (1914).

¹¹⁶ *Nobles v. Nobles*, 177 N. C. 243, 98 S. E. 715 (1919).

first taker as a class to take in succession from generation to generation.¹¹⁷ There is no case in North Carolina where the remainder was limited to the descendants of the first taker, but in light of the decided cases, it is submitted that descendants would be construed as heirs.¹¹⁸

Sec. 14 (c). *Remainder to the Heirs by Springing Use*: If the remainder is limited to the heirs by way of springing use, the Rule does not apply. This follows from the nature of the Rule and the requisites necessary to bring it into operation.¹¹⁹ There is no North Carolina case in point.

Sec. 15. *Remainder to Heirs or the Heirs of the Body by the Present Husband or Wife*: In the case of *Morehead v. Montague*, it was decided that if the remainder is to the heirs or the heirs of the body of the life tenant by her husband, the Rule applies.¹²⁰ This case expressly overrules *Dawson v. Quinnerly*,¹²¹ and *Thompson v. Crump*,¹²² which held that the Rule did not apply in similar situations. Mr. Fearn said that the Rule applies where the remainder is to heirs of *A* begotten by *B*, her husband.¹²³ Some of the early English cases distinguished between limitations to the heirs of *A* begotten "by her husband" and the heirs of *A* begotten "on" the body of *B*, holding that the Rule applied in the former and not in the latter.¹²⁴ But since *Morehead v. Montague*, it does not seem that this distinction would be drawn in North Carolina, for the limitation in *Dawson v. Quinnerly* was to *A* for life, then to the heirs of *A* begotten on the body of *A* by her present husband. As stated above, this case has been expressly overruled. However, if *A* and *B* are both of the same sex or cannot marry, the limitation is read to be to their heirs respectively.

Sec. 16. *Remainder in the Heirs on Contingent Event*: If the remainder to the heirs or the heirs of the body of the first taker is contingent upon the happening of some event, the Rule operates to give the ancestor a contingent remainder. When the event happens, the remainder becomes a vested remainder in the ancestor, and if there are

¹¹⁷ For an early definition of "heir", see *Ward v. Stowe*, 17 N. C. 509 at 512 (1834).

¹¹⁸ It has been so construed in Pennsylvania, *Burkley v. Burkley*, 266 Pa. 338, 109 Atl. 687 (1920).

¹¹⁹ 1 PRESTON, *op. cit. supra* note 3, at *324. See §4 *supra*.

¹²⁰ *Morehead v. Montague*, 200 N. C. 497, 157 S. E. 793 (1931). *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687 (1897), cited by the court as authority for its position, is not necessarily authority for a case dealing with the Rule in *Shelley's Case*. In the *Sessoms* case, the limitation was to *A* and lawful heirs of his body forever, if he should die without such lawful heirs, gift over to *B*. Cf. *Thompson v. Crump*, 138 N. C. 32, 50 S. E. 457 (1905); *Bird v. Gilliam*, 121 N. C. 326, 28 S. E. 489 (1897).

¹²¹ 118 N. C. 188, 24 S. E. 483 (1896).

¹²² 138 N. C. 32, 50 S. E. 457 (1905).

¹²³ 1 FEARNE, *op. cit. supra* note 3, at *31.

¹²⁴ 1 FEARNE, *op. cit. supra* note 3, at *31.

no intervening life estates, the then vested remainder in the ancestor unites with the life estate to give him the fee. If the event does not happen in the lifetime of the ancestor, the contingent remainder in him passes to his heirs by descent.¹²⁵

Sec. 17. *The Effect on the Remainder of the First Taker Predeceasing the Devisor*: Where the devisee of the particular estate predeceases the testator, the problem of whether or not the heirs in the remainder can take as purchasers arises.¹²⁶ For example, a devise to *A* for life, remainder to *B* for life, remainder to heirs of *A*. *A* predeceases the testator. Since a will is ambulatory, why may not the heirs of *A* take as purchasers? The problem has not been presented to our courts. Mr. Preston, in his essay on the Rule, raised this problem.¹²⁷ Under the heading, he cited *Brett v. Rigden*,¹²⁸ which does not involve the Rule but raises an analogous problem. There the devise was to *A* and his heirs. *A* predeceases the testator; the heir of *A* claimed under the will. In both *Brett v. Rigden* and the case suggested, if *A* had outlived the testator he would have had a fee. The court, in *Brett v. Rigden*, held that the heir of *A* took nothing under the will. But that case does not seem to decide the problem suggested under this section. It is submitted that if the holder of the particular estate should predecease the testator in the supposititious case, the heirs of *A* should take as purchasers.

PART VI. EXECUTORY TRUSTS

Sec. 18. *Executory Trust and the Rule*: The Rule does not apply to executory trusts.¹²⁹ Executory trusts in the sense that the Rule does not apply should be distinguished from trusts that are executory in that the Statute of Uses does not operate upon them.¹³⁰ If the testator has defined precisely and in clear words the settlement to be made, the trust is not executory in the meaning of the Rule, even though it requires a conveyance by the trustee.¹³¹ A trust is executory so that the Rule does not apply "only where the settlement to be made is to be executed, or a conveyance made, by the trustee, and where there is an *informal* or *imperfect* indication as to what the settlement is to be, or where language used to describe the settlement is not intended by the settlor or testator to be taken in its strict or legal sense."¹³² In the early

¹²⁵ 1 FEARNE, *op. cit. supra* note 3, at *34.

¹²⁶ *Ibid.*

¹²⁷ 1 PRESTON, *op. cit. supra* note 3, at *293.

¹²⁸ 1 Pl. Com. 340, 344a, 75 Eng. Rep. 516, 522 (C. B. 1568).

¹²⁹ *Hooker v. Montague*, 123 N. C. 154, 31 S. E. 705 (1898); 1 FEARNE, *op. cit. supra* note 3, at *113-147.

¹³⁰ Note (1910) 23 HARV. L. REV. 488.

¹³¹ 1 FEARNE, *op. cit. supra* note 3, at *137.

¹³² KALES, *op. cit. supra* note 17, at §432.

English case of *Bagshaw v. Spencer*,¹³³ Lord Hardwick entertained the idea that all trusts were executory and therefore whenever there was a trust the Rule did not apply. This has been repudiated in England and a distinction is now drawn between an executory and an executed trust for the purpose of applying the Rule.¹³⁴

In the North Carolina case of *Hooker v. Montague*,¹³⁵ a four to three decision announces the proposition that executory trusts do not come within the Rule. The dissenting judges split from the majority on the point of whether or not there was a conveyance of the legal title to the trustee. In that case the limitation was as follows: "that all my property, real, mixed and personal, be converted into money [directions to the executors] and be divided equally among my children, share and share alike . . . ; that the shares falling to my daughters under the will be placed in the hands of my son *B* as trustee for each of them . . . and he shall hold the same for life of each respectively, pay each the yearly interest during the life of each, and to their individual heirs at law after death of each of the said daughters respectively." Judge Furches, writing the dissent, said that the relation of *B* with regard to the fund was in the nature of guardian or manager of the estate;¹³⁶ and that the daughters received an equal absolute portion of proceeds therefrom. The case is not too strong on its facts, for aside from the question of trust it seems, upon close examination, that the limitation attached to personal property, the money obtained by the executors through converting the testator's estate into cash, and, of course, the Rule does not apply to personal property. This point seems not to have been raised. However, it is submitted that the proposition of law that the case announces would be followed as a well-defined exception to the Rule.

Mr. Kales points out that there are certain aids to construction in determining whether or not a trust is executory. A direction to the trustees to make a conveyance containing certain limitations, raises only an inference that the gift is imperfect. Where the direction to convey was to *A* for life, remainder to *A*'s heir or heirs of his body, it has been regarded as executory.¹³⁷ However, where the direction was to convey to *A* and the heirs of his body, the trust was said to be executed, on the ground that direction was short and simple. If the settlement is fully described, or to be made by the trustee by reference to another instrument of complete limitation, the settlor is said to be his own conveyancer and the trust is executed.¹³⁸

¹³³ 1 Ves. sen. 142, 27 Eng. Rep. 944 (1748).

¹³⁴ For a full discussion, see 1 FEARNE, *op. cit. supra* note 3, at *120.

¹³⁵ 123 N. C. 154, 31 S. E. 705 (1898).

¹³⁶ See *id.* at 161, 31 S. E. at 707 (dissenting opinion).

¹³⁷ *Papillon v. Voice*, 2 P. Wms. 471, 24 Eng. Rep. 819 (1728).

¹³⁸ KALES, *op. cit. supra* note 17, at §432.

PART VII. POWER TO APPOINT

Sec. 19. *Powers in General*: Where the life tenant is donee of a power to appoint, two types of problems arise: (1) if the limitation is to *A* for life, with the power to appoint, and he subsequently appoints, there is a question whether the requisites of the Rule have been satisfied; (2) if there is a gift over to heirs or the heirs of the body of *A* on default of appointment, the issue is whether or not the presence of power to appoint prevents the Rule from operating.

Sec. 19 (a). *Where Limitation Is to A for Life with Power to Appoint*: The donee of a general power could appoint to himself if he wished. If he appointed to his heirs *inter vivos* and the Rule were held to apply, it might seem that the heirs could not be heard to object. However, if the appointment was to the heirs of the body of *A* and *A* died intestate, it is, since the abolition of estate tail in North Carolina, an important issue whether or not the Rule applies. The statute abolishing estate tails¹³⁹ does not say that heirs of the body shall not be words *designatio personarum*; it merely converts the estate tail into fee simple. Those answering the description of "heirs of the body" might well be a different class from those answering the description of "heirs" and if the Rule operated, all those who qualified as heirs of the intestate donee would share in the property that was subject to the appointment. If, on the other hand, the Rule did not operate, only the "heirs of the body" of *A* would take the entire property as purchasers under the appointment.

If the life tenant is donee of a special power to appoint among his heirs or the heirs of his body, the problem becomes more acute because of the nature of the power. If *A* appoints to his heirs or the heirs of his body and the Rule operates to give *A* the fee, it defeats the intention of the donor. It is true that the Rule in *Shelley's Case* operates irrespective of the intent of the grantor, but in all other cases the grantor uses the technical words "heirs" or "heirs of the body" in the instrument which he himself executed. Then, too, a special power is not considered to be property in the donee as is a general power. If the donee of a special power to appoint by deed among his heirs, appointed to heirs of his body, it would raise the same problem referred to in the case of an *inter vivos* exercise of a general power to the heirs of his body.

There is not any case in point in North Carolina. The chief objection to the Rule applying to *inter vivos* exercise of powers in favor of the heirs of the donee is that the life estate to the ancestor and remainder to the heirs are not limited by the same instrument; a life estate without any reference to an inheritance by remainder in the instrument that

¹³⁹ See sec. 7 *supra*.

determines his estate is changed subsequently, by the act of some other than the grantor, to an estate of inheritance.¹⁴⁰ Mr. Challis, in his treatment of the Rule, thought that it should apply; that an estate limited under a subsequent exercise of power contained in the instrument creating the life estate was an estate arising under the same instrument.¹⁴¹

Mr. Preston, in his treatment of the Rule, questions its application to such a situation, contending that some of the English cases cited to support the application of the Rule really go off on another point.¹⁴²

If the power given to the life tenant is solely testamentary or is in fact exercised by will, an additional objection to the application of the Rule arises. In such a case, it would seem that the termination of the life estate by the death of the life tenant would prevent the Rule from applying. If the testamentary appointment is to heirs of *A*, it does not make any difference whether or not the Rule operates, for, as pointed out in the early English case of *Venables v. Morris*,¹⁴³ the same people would take the same interest whether they took by descent or purchase. But in that case, Lord Kenyon said that the case ought to be decided on the ground that an appointment when executed is to be considered in the same light as if it had been contained in the instrument that created it. This might form the basis for an argument that the Rule should apply even though the power was exercised by will.

Sec. 19 (b). *Where the Limitation Is to A for Life, with Power to Appoint, in Default of Appointment Gift Over*: In such a limitation, it has been held that the Rule does not apply. In the leading case of *Patrick v. Morehead*,¹⁴⁴ there was a devise of Blackacre to *A* for life, and if "he has any lawful heirs, to them or any of them he may think proper; if *A* died without issue . . . the land is to be equally divided among my grandchildren." *A* died intestate. It was held that *A* had a life estate only. Speaking for the court, Ashe, J., said that the super-added words "or any of them he may think proper" prevented the application of the Rule, "and we do not conceive," he continued, "that it can make any difference that the power has not in fact been exercised. It is the *existence* [italics ours] of the power that affected the quality of the estate. It could not be foreseen whether it would be exercised or not, but it is enough to prevent the application of the Rule that the limitation to the heirs of the devisee was coupled with a power the exercise

¹⁴⁰ In some cases this may be by the act of someone other than the life tenant, for example, where there is a limitation to *A* for life, power in gross in *B*, and *B* appoints to the heirs or heirs of the body of *A* either (1) by deed, or (2) by will.

¹⁴¹ CHALLIS, *op. cit. supra* note 8, at 163.

¹⁴² 1 PRESTON, *op. cit. supra* note 3, at *310-*312.

¹⁴³ 7 T. R. 438, 101 Eng. Rep. 1064 (1797).

¹⁴⁴ 85 N. C. 62 (1881).

of which would prevent them from taking the same estate they would have taken if the land had come to them by descent from him."¹⁴⁵

However, if a life estate with general power to appoint is given to X and in default of appointment to A for life, remainder to heirs of her body, and there is no appointment, the Rule operates.¹⁴⁶

PART VIII. HEIRS OR HEIRS OF THE BODY AS WORDS OF PURCHASE

Sec. 20. *Superadded Words of Limitation*: If the words "heirs" or "heirs of the body," in the remainder are not used in their technical sense, that is, to designate a class of persons to take in succession from generation to generation, the Rule does not apply; the words in the remainder then take effect as words of purchase. Just what will change them into words of purchase varies from jurisdiction to jurisdiction. Since the decision in *Shelley's Case* itself, it has been held in England that the addition of words of limitation in a remainder to the heirs or the heirs of the body of the life tenant does not prevent the Rule from operating.¹⁴⁷ The Federal Courts and at least one state jurisdiction in this country have reached the opposite result on the ground that since *primogeniture* and estate tail have been abolished, the addition of words of limitation might show that "heirs" was not used in its technical sense to designate a class to take in succession from generation to generation, but was used to designate particular persons to take as purchasers.¹⁴⁸ Our court follows the English rule.¹⁴⁹ The earliest case on the point is *Williams v. Holly*, which held that the Rule applied. However, in *Jarvis v. Wyatt*¹⁵⁰ the court in a strong dictum held that the Rule should not apply where there were superadded words of limitation. Because the point might be reopened, it is interesting to note the basis for the dictum. Taylor, C. J., spoke of the testator's intention; Henderson,

¹⁴⁵ *Patrick v. Morehead*, 85 N. C. 62, 69 (1881); see *Graves v. Trueblood*, 96 N. C. 495, 1 S. E. 918 (1887).

¹⁴⁶ *Helms v. Collins*, 200 N. C. 89, 156 S. E. 152 (1930).

¹⁴⁷ *Helms v. Collins*, 200 N. C. 89, 156 S. E. 152 (1930); *Jesson v. Wright*, 2 Bligh. 1 (1820); *CHALLIS, op. cit. supra* note 8, at 164; 1 *FEARNE, op. cit. supra* note 3, at *185-*208; 3 *JARMON, op. cit. supra* note 124, at 1815 *et seq.* It is true that the limitation in *Shelley's Case* was to the heirs male of the body of A, heirs male of such heirs male, and that superadded words of limitation expressly added nothing; the "heirs male of A" included by implication the subsequent words "heirs male of their bodies," for every heir male of the body of the heir male of A is in the construction of the law an heir male of the body of A.

¹⁴⁸ *Blythe v. Goode*, 269 Fed. 544 (C. C. A. 4th, 1920); *Aetna Life Ins. Co. v. Hoppin*, 214 Fed. 928 (C. C. A. 7th, 1914); *Aetna Life Ins. Co. v. Hoppin*, 249 Ill. 406, 94 N. E. 669 (1911) (limitation to A and B for life, at the death of survivor to the heirs of the body of A, their heirs and assigns forever); *KALES, op. cit. supra* note 17, at *418.

¹⁴⁹ *Robeson v. Moore*, 168 N. C. 388, 84 S. E. 351 (1915); *Ex parte McBee*, 63 N. C. 332 (1869); *Moore v. Parker*, 34 N. C. 123 (1851); *Folk v. Whitley*, 30 N. C. 133 (1847); *Williams v. Holly*, 4 N. C. 266 (1815).

¹⁵⁰ 11 N. C. 227 (1825).

J., based it on the abolition of estate tail, while Hall, J., said, "equally to be divided among them, to them and their heirs forever" made the heirs take as purchasers.

Sec. 20 (a). "*Heirs*" in the Singular Used in the Remainder: If the remainder is to the heirs of the life tenant, it does not matter whether the plural or the singular of "heirs" is used; the Rule applies in both instances, and so whether or not the words of limitation are superadded.¹⁵¹ However, if the singular is used in a remainder to the *heir* of the body of the life tenant and words of limitation are superadded to the remainder, the Rule does not apply. This is known as the Rule in *Archer's* case and is a well-defined exception to the Rule in *Shelley's Case*. In *Archer's* case, the limitation was to *A* for life, remainder to next heir male of *A*, and to the heirs male of the body of such next heir male. In order for the Rule in *Archer's* case to apply, the word "heir" must be used clearly inconsistent with the collective sense.¹⁵² For example, in a conveyance to *A* for life, remainder to next heir male of *A*, the rule in *Archer's* case does not apply. And to *A* for life, remainder to heirs male of the body of *A* and his heirs forever, but if *A* dies without such heir male, then over to *B*, the rule in *Archer's* case does not apply. The Rule in *Shelley's Case* applies to both of the above examples. No case involving *Archer's* case has come up in North Carolina.

Sec. 21. *The Addition of "Share and Share Alike"*: If the words "share and share alike" or the words "equally to be divided" are added to a remainder to the heirs or heirs of the body of the life tenant, the Rule does not apply.¹⁵³

In *Mills v. Thorne*,¹⁵⁴ our court said such words prevent the Rule from applying because they show that the issue or heirs are to take per capita, that is, as tenants in common and not as heirs in line of succession. "To be divided" or "equally" or "between" or "amongst" or "share and share alike", or similar words, make a tenancy in common.¹⁵⁵ However, where the limitation is to *A* and *B* for life, and after the death of *A* the land is to be divided equally between *B* and the heirs of *A's* body, the Rule applies.

Sec. 22. *Other Qualifying Words*: If the superadded words are explanatory and show that the testator did not intend to use "heirs" in

¹⁵¹ Sec. 19 *supra*.

¹⁵² Note (1914) 27 HARV. L. REV. 673.

¹⁵³ *Cheshire v. Drewry*, 213 N. C. 450, 197 S. E. 1 (1938); *Hore v. Schloss*, 168 N. C. 97, 83 S. E. 306 (1914); *Gilmore v. Sellars*, 145 N. C. 283, 59 S. E. 73 (1907); *Mills v. Thorne*, 95 N. C. 362 (1886); *Ross v. Toms*, 15 N. C. 376 (1833).

¹⁵⁴ *Jones v. Oliver*, 38 N. C. 369 (1844) (remainder was to the heirs of body *equally* but the case went off on another point); *Jenkins v. Jenkins*, 96 N. C. 254, 2 S. E. 522 (1887) (equally among heirs of body of *A*).

the remainder in its technical sense, they will take the limitation out of the Rule. In *Welch v. Gibson*, in a poorly drafted will, the testator devised Blackacre to *A* (his daughter) for life, at the death of *A* to her bodily heirs, and "to go as entailed property for succeeding generations; *all living children at the death of A to have an equal share in this property during the terms of their lives*, [emphasis ours] and shall go to the heirs of these said legatees from generation to generation." The court held that the Rule did not apply, the underlined words above being equivalent to "share and share alike."¹⁵⁶

By statute¹⁵⁷ the word "heirs" means children under certain conditions, but this does not prevent the Rule from operating¹⁵⁸ provided the other requisites are contained in the limitation. *Lide v. Wells* is an example of a case where "heirs" will be construed to mean children. In the *Wells* case, the testator devised property in trust, the income to be paid to *A* and *B*, and Blackacre was given to *A* so long as it remains unsold by the trustee, provided *A* keeps up a hotel. The trust was to last for twenty years, "at which time my said estate shall be divided between the heirs of *A* and *B* per stirpes." It was held that the Rule did not apply.¹⁵⁹

Deeds and wills are often poorly drafted, with confusing superadded words. A line cannot be drawn exactly describing just what groups of words are sufficient to take the limitation out of the Rule. The decided cases, however, will serve as guide posts. In *Williams v. Beasley*,¹⁶⁰ the deed was to *A* . . . "(1) provided *A* should have heirs or heirs of her body to live and survive, then to said heirs, to them and their heirs forever . . . (2) but if *A* should die and leave an heir or heirs of her body, in that case the said heirs being her children or child, is to hold, occupy and possess all the property herein given to them and their heirs forever." It was held the Rule did not apply. The court said the clause marked (2) made "heirs" a word of purchase. In *Hodges v. Fleetwood*,¹⁶¹ in the premises of the deed the conveyance was unto *A*, wife of *B*, during her natural life, then to descend to her heirs, the children of said *B* . . . [habendum] to them party of the second part, and their heirs forever. It was held the Rule did not operate. The court said the deed should read as if it were written to *A* for life, and after her death to her children, the issue of *B*, and their heirs forever. In *Marsh v. Griffin*, the habendum was to "*A*, the party of the second part, her heirs and assigns during her natural life, and at her death then to belong

¹⁵⁶ *Welch v. Gibson*, 193 N. C. 684, 138 S. E. 25 (1927).

¹⁵⁷ N. C. CODE ANN. (Michie, 1939) c. 34, §1739.

¹⁵⁸ See Sec. 7 *supra*.

¹⁵⁹ *Lide v. Wells*, 190 N. C. 37, 128 S. E. 477 (1925).

¹⁶⁰ 60 N. C. 102 (1863).

¹⁶¹ *Hodges v. Fleetwood*, 102 N. C. 122, 9 S. E. 640 (1889).

to her bodily heirs to have and to hold in fee simple."¹⁶² The court was inclined to think that the deed gave *A* a fee simple outright, but said that the deed was in effect to *A* for life, remainder to heirs of her body, and the Rule applied. In *Smith v. Proctor*, realty was conveyed in trust for benefit of *A* "during his natural life, and in event said *A* died not leaving lawful issue" over to *B*, "but in case lawful issue of *A*," the trustee to make title "to the heir of *A*." It was held that the Rule did not apply.¹⁶³ *Fillyaw v. Lear* is a clear case of superadded words taking the deed out of the Rule. In that case the habendum read to "*A* for life, remainder to lawful heirs of her body who may be living at her death and to the issue of such child or children who may die before *A* and to their heirs and assigns forever."¹⁶⁴

PART IX. EXECUTORY LIMITATIONS OVER

Sec. 23. *Effect in General*: Limitations over, on the failure of heirs or heirs of the body of the first taker, may raise the problem whether or not a remainder is to be implied to such heirs or heirs of the body, or issue. No case has presented this point to our court.¹⁶⁵ Limitations over after a remainder to heir of *A* may be on the failure of heirs living at the death of first taker, or on failure of issue or children; here it is a question whether or not the limitation over has the effect of superadded words which modify the remainder so as to take the limitation out of the Rule.¹⁶⁶

Sec. 23 (a). *Where There Is a Gift Over in Default of Heirs or the Heirs of the Body of the First Taker*: If a life estate is given to *A*, remainder to the heirs or the heirs of the body of *A*, with a gift over on default to the heirs of *A* or to any stranger of the blood of *A*, the Rule operates. However, if the gift over is to some but not all of the heirs of *A*, it has been held since the case of *Bird v. Gilliam*¹⁶⁷ that the Rule does not operate. The rule that a gift over to some but not all of the heirs will take limitation out of the Rule became crystallized in *Puckett v. Morgan*,¹⁶⁸ which has since been considered the leading case on the point. The decided cases involving limitations over on default of heirs or the heirs of the body of the first taker may be classified as follows.

Sec. 23 (b). *Remainder to the Heirs of the Body of A, in Default, Gift Over to Heirs of A*: The Rule applies.¹⁶⁹ In the leading case of

¹⁶² *Marsh v. Griffin*, 136 N. C. 333, 48 S. E. 735 (1904).

¹⁶³ *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889 (1905).

¹⁶⁴ *Fillyaw v. Lear*, 188 N. C. 772, 125 S. E. 544 (1924).

¹⁶⁵ *Notes* (1911) 29 L. R. A. (N. S.) 1110.

¹⁶⁶ *Id.*, at 1115 *et seq.*

¹⁶⁷ 121 N. C. 326, 28 S. E. 489 (1897).

¹⁶⁸ 158 N. C. 344, 74 S. E. 15 (1912).

¹⁶⁹ *Tyson v. Sinclair*, 138 N. C. 23, 50 S. E. 450 (1905).

Tyson v. Sinclair, there was a devise of Blackacre to *A* for life, then to lawful heirs of his body in fee simple; on failing such lawful heirs of his body, then to his right heirs in fee. In holding that the Rule applied, the court said, "Any words added to the limitation which carry the estate to any other person, in any other manner or quality, than the canons of descent provide, will take the case out of the operation of the Rule and limit the first taker to a life estate."¹⁷⁰

Sec. 23 (b) (1). *Remainder to the Heirs or Heirs of the Body of A, in Default, Gift Over to the Children of A*: The Rule does not apply. Chief Justice Stacy, in *Edwards v. Faulkner*,¹⁷¹ collects and distinguishes the cases applicable to this type of limitation.

Sec. 23 (c). *Remainder to the Heirs or the Heirs of the Body of A, Gift Over in Default of Heirs or the Heirs of the Body to the Brothers and Sisters of A*: The Rule does not apply.¹⁷² The gift over is to some but not all of the heirs of *A*.¹⁷³ *Bird v. Gilliam* is the first case in the books announcing this principle. In the *Gilliam* case, the devise was as follows: to *A* (daughter of testator) for life, remainder to the heirs of her body, but if *A* has no heirs of her body, then to *B* (brother of *A*) and the heirs of his body. It was held the Rule did not apply. In a short opinion, Montgomery, J., speaking for the court, said, "but there were explanatory words where the testator said 'but if my daughter *A* should not have lawful heirs of her body gift over.' Such words have been construed by this court to mean issue."¹⁷⁴ The court then cites *Rollins v. Keel*.¹⁷⁵ In the *Keel* case, the testator devised real property as follows: "to my wife, *W*, until my son, *J*, is eighteen, then to *J* in fee; if *J* dies without lawful heir, then to *W* during her widowhood, afterwards to *A* (brother of testator) in fee." *J* died without leaving issue or brother or sister. The court held that in construing the will "to die without heir" would be taken to mean "to die without issue" for upon *J*'s death without issue or brother or sister or issue of such, his mother would take as his heir, to defeat the intent of the testator. There was no positive rule of law like the Rule in *Shelley's Case* involved in *Rollins v. Keel*. It might well be argued that the *Keel* case should not be controlling where the Rule is involved. However, the principle of *Bird v. Gilliam* has repeatedly met the approval of our Supreme Court. It was adopted as the basis for the decision in *Puckett*

¹⁷⁰ *Id.*, at 25, 50 S. E. 450.

¹⁷¹ 215 N. C. 586, 2 S. E. (2d) 662 (1940).

¹⁷² *Gurganus v. Bullock*, 210 N. C. 670, 188 S. E. 85 (1936); *Doggett v. Vaughan*, 199 N. C. 424, 154 S. E. 660 (1930); *Bird v. Gilliam*, 121 N. C. 326, 28 S. E. 489 (1897).

¹⁷³ *Doggett v. Vaughan*, 199 N. C. 424, 154 S. E. 660 (1930); *Puckett v. Morgan*, 158 N. C. 344, 74 S. E. 100 (1912).

¹⁷⁴ A remainder to the issue of *A* is not within the Rule. See Sec. 12(a) *supra*.

¹⁷⁵ 115 N. C. 68, 20 S. E. 209 (1894).

v. Morgan,¹⁷⁶ the leading case on this type of limitation. If the doctrine of the *Keel* case is controlling, it is submitted that it should have the effect of superadded words modifying the remainder and thus take the limitation out of the Rule.¹⁷⁷ However, the court has put too much stress on the nature of the limitation over as evidence of testator's or grantor's paramount intention. See the development of the doctrine below.

Sec. 23 (d). *Remainder to the Heirs or the Heirs of the Body of A in Default Gift Over to the Half-Sister of A*: The Rule operates to give the first taker a fee. In the leading case of *Benton v. Baucom*,¹⁷⁸ the devise was to A (stepdaughter of testator) for life, remainder to her lawful heirs, if any; if not, then to "my [testator's own] three children." It was held the Rule operated. *Puckett v. Morgan* was not mentioned in the decision, but in *Welch v. Gibson*,¹⁷⁹ Stacy, J., distinguishes *Puckett v. Morgan*. He said, "When there is an ulterior limitation which provides that upon the happening of a given contingency the estate is to be taken out of the first line of descent and then put back into the same line in a restricted manner by giving it to some but not all of those who presumptively would have shared in the estate as being potentially among the heirs general of the first taker, these circumstances with others may be used as one of the guides in ascertaining the paramount intention¹⁸⁰ of the testator and with other indicia it has been held sufficient to show that the words 'heirs or the heirs of the body' were not used in their technical sense."¹⁸¹

Sec. 23 (e). *Remainder to Heirs or the Heirs of the Body of A, in Default Gift Over to Next of Kin of A*: The Rule does not apply.¹⁸² In the leading case of *May v. Lewis*, the court discussed the meaning of "next of kin" and held that it brought the limitation within the doctrine of *Puckett v. Morgan*.

Sec. 23 (f). *Remainder to Heirs or the Heirs of the Body of A, in Default Gift Over to A's Nearest Relatives*: The Rule does not apply.¹⁸³ In *Fields v. Rollins*, Hoke, J., said that "nearest relatives" means "next of kin," and "when there is a limitation over to a restricted class of heirs of the first taker on his death without heirs or heirs of his body, *this in itself* [italics mine] will show that the words in the first in-

¹⁷⁶ 158 N. C. 344, 74 S. E. 15 (1912) (Devise to A [grand-daughter of testator] for life, then to her bodily heirs if any, but if she have none, back to her brothers and sisters).

¹⁷⁷ Sec. 14 *supra*.

¹⁷⁸ 192 N. C. 630, 130 S. E. 629 (1926).

¹⁷⁹ 193 N. C. 684, 138 S. E. 25 (1927).

¹⁸⁰ See Sec. 6 *supra*, on *Intent of Testator*.

¹⁸¹ *Welch v. Gibson*, 193 N. C. 684, 138 S. E. 25 (1927).

¹⁸² *Williamson v. Cox*, 218 N. C. 177, 10 S. E. (2d) 662 (1940); *Wallace v. Wallace*, 181 N. C. 158, 106 S. E. 501 (1921); *Jones v. Whichard*, 163 N. C. 241, 79 S. E. 503 (1913); *May v. Lewis*, 132 N. C. 115, 43 S. E. 550 (1903).

¹⁸³ *Fields v. Rollins*, 186 N. C. 221, 119 S. E. 207 (1923).

stance were not used or intended as words of general inheritance under our canons of descent, but must be taken and construed to mean issue in the sense of children or grandchildren."¹⁸⁴

Sec. 23 (g). *Remainder to the Heirs or the Heirs of the Body of A, in Default Gift Over to Designated Persons, Strangers to the Blood of A*: The Rule applies.¹⁸⁵ In *Morrisett v. Stevens*,¹⁸⁶ the limitation was to *A* (brother of testator) for life, remainder to the heirs of *A* in fee, if *A* dies without heirs of the body, to Betty Stevens in fee. It was held the Rule applied. Montgomery, J., said, "The ulterior devise by way of remainder in event that the ancestor should die, without heirs of his body' need not be considered, for the first taker died leaving heirs, his children, who are plaintiffs in this action."¹⁸⁷ In *Jones v. Whichard*,¹⁸⁸ the court said that in *Morrisett v. Stevens* "the ulterior disposition was not, and was not intended as, a limitation on the estate conveyed to the first taker, but was a provision whereby one stock of inheritance, on certain contingencies, was substituted for another, the second to hold as purchasers direct from the grantor or original owners."¹⁸⁹

Though the *Stevens* case may be doubtful authority for this classification, the proposition stated above seems to be supported by *Williams v. R. R.*¹⁹⁰ In that case, there was a devise to *A* (grandson of the testator) for life, then to his bodily heirs in fee, but in event he dies without issue, gift over to *B* (Plummer Williams) and *C* (Wiley Williams). The case does not make it clear who *B* and *C* were. It was held that the Rule operated. However, this case may be explained away on the ground that the devisee over executed a quitclaim deed to *A*.

Sec. 23 (h). *Remainder to the Heirs of the Body of A in Default, Gift Over to the Heirs of the Testator*: The Rule does not apply where the life estate was to a child or children of the testator.¹⁹¹

Sec. 23 (i). *Remainder to the Heirs of A, in Default, Gift Over to Testator's Estate*: The Rule does not apply where the life estate is to a child or children. In *Reed v. Neal*¹⁹² the court said "to return to my

¹⁸⁴ *Id.* at 223, 119 S. E. at 208.

¹⁸⁵ *Williams v. Norfolk S. R. R.*, 200 N. C. 771, 158 S. E. 473 (1931); *Morrisett v. Stevens*, 136 N. C. 160, 48 S. E. 661 (1904).

¹⁸⁶ 136 N. C. 160, 48 S. E. 661 (1904).

¹⁸⁷ *Id.* at 161, 48 S. E. at 661.

¹⁸⁸ 163 N. C. 241, 79 S. E. 503 (1913).
¹⁸⁹ The court no doubt is here classifying *Morrisett v. Stevens* with cases like *Whitfield v. Garris*, 134 N. C. 24, 45 S. E. 904 (1903) (Testator devised to *A*, and in the event of death of *A* without children, then to the grandchildren of the testator. *Held*, fee simple in *A* defeasable on the happening of the contingency.) The difference in the two types of limitations is apparent on examination. In the latter there is no remainder to the heirs.

¹⁹⁰ 200 N. C. 771, 158 S. E. 473 (1931).

¹⁹¹ *Blackledge v. Simmons*, 180 N. C. 535, 105 S. E. 202 (1920). *Cf. Whitehurst v. Bowers*, 205 N. C. 541, 172 S. E. 180 (1934). In that case it is not clear whether or not *A* was a child of the grantor.

¹⁹² 182 N. C. 192, 108 S. E. 769 (1921).

estate" was the same as "to return to my heirs" and *Puckett v. Morgan* takes it out of the Rule.¹⁹³

Sec. 23 (j). *Remainder to the Heirs or the Heirs of the Body of A, in Default, Gift Over to Brothers of the Testator*: The Rule applies.¹⁹⁴ In *Walker v. Butner*,¹⁹⁵ the devisee over, brother of the testator, conveyed his interest to A, the life tenant. (A was an adopted child of the testator.) The court mentioned the fact that this conveyance cured any defect there was in the title, but further said that upon the plain language of the will, A took a fee simple, defeasible if she die leaving no issue, and cited *Morrisett v. Stevens* as authority.

Sec. 23 (k). *Where There Is a Life Estate to Children of Testator, Remainder to Heirs of the Body, in Default, Gift Over to Testator's Family*: In *Radford v. Rose*,¹⁹⁶ there was a devise to A, B, C and D (all of the testator's children, apparently) for life, then to their heirs provided they have any that have attained the age of twenty-one, but if they (A, B, C and D), my children, have no bodily heirs, gift over to Rose (testator's) family. Should they have an heir at their death not twenty-one years of age, that the said heir shall be in possession at the age of twenty-one of its share of the estate. The case offers some delicate problems in construction of the will. The court came to the conclusion that it should read: "I loan to them [A, B, C and D] [for] their lifetime, and then to their heirs, but should they have no bodily heirs the property shall go back to the Rose (testator's) family, provided heirs under the age of twenty-one shall not take possession until they reach that age." It was held that the life tenants obtained a defeasible fee. The court cited *Tyson v. Sinclair*,¹⁹⁷ saying that it was almost directly in point. In the *Rose* case,¹⁹⁸ Allen, J., said that the Rule operated, for, "the plaintiff being a Rose," if she died without having had children, her heirs and the heirs of her father, the testator, would be the Rose family, and this fact marks the distinction between this case and *Puckett v. Morgan*, and *Jones v. Whichard*.

In *Hampton v. Griggs*,¹⁹⁹ there was a devise of Blackacre to A (son of testator) for life, and then unto the lawful heirs of A, and if my son should die without a bodily heir, then gift over to Hampton

¹⁹³ That is, the heirs of the testator might be some, but would not be all of the heirs of the life tenant. The court said the devise should be read as if it were "to A for life, and at her death, I give it to her issue, if any; if none, to my heirs."

¹⁹⁴ *Walker v. Butner*, 187 N. C. 535, 122 S. E. 301 (1824) (Limitation to A for life, then to heirs of A; if she should not leave any heirs, over to B [brother of testator]).

¹⁹⁵ *Ibid.*

¹⁹⁶ 178 N. C. 288, 100 S. E. 249 (1919).

¹⁹⁷ 138 N. C. 23, 50 S. E. 450 (1905). See Sec. 23(b) *supra*.

¹⁹⁸ *Radford v. Rose*, 178 N. C. 288, 291, 100 S. E. 249 (1919). See Sec. 23(c) *supra*.

¹⁹⁹ 184 N. C. 13, 113 S. E. 501 (1922).

(testator's) family. It was held that the Rule does not operate. Stacy, C. J., writing for the court, said, "Members of the Hampton family, of course, are potentially among the heirs general of the first taker; but they are not all, and this ulterior limitation would exclude others among his heirs who were not of the blood of the original stock."²⁰⁰ The court classified this case with *Puckett v. Morgan*²⁰¹ and said that it was to be distinguished from *Tyson v. Sinclair*²⁰² and *Radford v. Rose*.

The *Griggs* case does not attempt to overrule the *Rose* case, but to the contrary approves it. It is difficult to see from the reports wherein the cases differ. Perhaps the record of the cases would untangle the matter. It might be that in the *Rose* case the testator left the property to all of his children, while in the *Griggs* case, it was left to only one of a number of children. But it is hard to see that this would change the situation. Perhaps the court in the *Rose* case was looking at the situation at the time of the suit. Such would indeed be a dangerous practice in applying the Rule. It is not necessary for the life tenant in fact to have an heir of the body in order for the Rule to operate on a limitation to A for life, remainder to heirs of his body. In the light of the decided cases, it is submitted that where there is a life estate to the children of the testator, remainder to the heirs of the body, gift over in default, to the testator's family, the Rule should not operate.

Sec. 23 (1). *Remainder to Heirs of Body, in Default Gift Over to Nearest Heirs of A*: This is an open question.²⁰³

CONCLUSION

The Rule in *Shelley's Case* originated in the fifteenth century, if not before, when real property was held under feudal tenure. It is a rule of law which, from its origin, operates irrespective of the intent of grantor or testator, as the case may be. For generation after generation it has been carried down to the present day as a part of our common law. Some modern American courts, like our Supreme Court, have put much stress on the intention of the testator or grantor, in an effort to restrict its application. This has tended only to make a complex rule all the more complicated in its application. Since the reasons for the origin of the Rule and the justification for its existence have long ago disappeared, it should be abolished by legislative enactment.

²⁰⁰ *Id.* at 19, 113 S. E. 501.

²⁰¹ See Sec. 23(c) *supra*.

²⁰² See Sec. 23(b) *supra*.

²⁰³ See *White v. Norman*, 185 N. C. 1, 115 S. E. 822 (1923).