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RATIONALE OF THE RULE IN SHELLEY'S CASE IN INDIANA

By ADDISON M. DOWLING*

I. INTRODUCTION

Purpose of Article

Perhaps no rule of law has tortured the mind of the legal profession more than the Rule in Shelley's Case, with the natural result that students fear it, lawyers view it with considerable misapprehension and the courts apply it with some reluctance. It is not uncommon for courts to question the advisability of applying the Rule nor for legislatures to

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1 "That it is not a rule of construction, but of property, which had its origin in feudal tenure, and was first adopted to secure the lords the profits, rights and perquisites incident to inheritances. It is at best a mere artificial technicality, the maintenance of which, is to displace the clear intention of the testator and produce injustice, when justice ought to prevail. It has met with denunciation and severe criticism from the ablest judicial minds in England and this country, till it has become the practice of courts whenever the question arises, to hold that the particular case then under consideration does not come within the rule in Shelley's Case." (Dissenting opinion) McCray v. Lipp (1871), 35 Ind. 116, 121; Waters v. Lyon (1894), 141 Ind. 170, 174-175, 40 N. E. 662.

Walsh in his treatise in Anglo-American Law (1932), p. 246, says: "It is difficult to understand how any court can be induced to tolerate as a rule of construction which so obviously defeats the real intent of the grantor or devisor."

"It may be remarked that whatever reasons may have once existed for it in England have, even there, long since ceased, and no good reason is perceived for its incorporation into the legal policy of this country. It was doubtless introduced into many of the other states as into this, as a part of the Common Law, without discussion or question as to its propriety, but it has been abrogated in many of them by statute (2 Wash. on R. P. 276 and note). Its propriety as a rule of law, in this state, is seriously doubted, and it may be regretted that the attention of the legislature has not been directed to the propriety of its repeal, as its only effect and more particularly in its application to devisees, is to defeat the real intention of testators." Siceloff v. Redman (1866), 26 Ind. 251, 259.
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abrogate the Rule or abolish it. The Rule, however, has been adopted and frequently applied by the Courts of Indiana and recognized as established law in this state. The legal profession might admit that the rule itself is not difficult to comprehend and perhaps be equally willing to admit that its application in many instances causes considerable mental discomfort. It is thought that despite the antiquity of the Rule and the several articles which have been written on the subject a rationale of the Rule within limited boundaries

2 The thirty-three states which have enacted statutes directed to the abrogation of the Rule are as follows:


45 Harvard Law Review, 573 (N).

3 The Rule in Shelley's Case is a rule of the Common Law, and as the Common Law has been adopted in this State by statute, the rule is binding upon the courts as a rule of real property in Indiana. Sorden v. Gatewood (1848), 1 Ind. 107; Doe v. Jackman (1854), 5 Ind. 283; Hull v. Beals (1864), 23 Ind. 25; Siceloff v. Redman (1866), 26 Ind. 251; McCray v. Lipp (1871), 35 Ind. 116; Andrews v. Spurlin (1871), 35 Ind. 262; Nelson v. Davis (1871), 35 Ind. 474; Gonzales v. Barton (1873), 45 Ind. 295; Maxwell v. Featherstone (1882), 83 Ind. 339; Shimer v. Mann (1884), 99 Ind. 190; Fountain County Coal Co. v. Beckleheimer (1885), 102 Ind. 76, 1 N.E. 202, Chamberlain v. Runkle (1901), 23 Ind. App. 599, 63 N.E. 486; Snyder v. Greendale Land Co. (1911), 48 Ind. App. 178, 91 N.E. 819.

4 "That the rule in Shelley's Case is recognized as law, and a rule of property in this State is too well settled to admit of controversy." Taney v. Fahnley (1890), 126 Ind. 88, 89, 25 N. E. 882.

5 See Note 29 L. R. A. (N. S.) p. 977.

6 Application of the Rule in Shelley's Case, 28 Law Quarterly Review 148 (1912); Application of the Rule in Shelley's Case Where the Limitations are
might be of interest and benefit to the reader. Since there appears to be slight unanimity in the application of the Rule among the various states where the Rule obtains, it is obviously necessary to limit the scope of this article principally to Indiana law. Extended consideration of the Rule in other states would only invite confusion.

Facts in Shelley’s Case

The following is a brief summary of the facts and events which were connected with the famous case of *Wolfe v. Shelley* (1581), 1 Coke 93 b, 76 Eng. Rep. 206, better known as “Shelley’s Case”:

Edward Shelley and Joan, his wife, were seized of a special tail estate. Said Edward and Joan had two sons, Henry and Richard. Joan died. Henry married and a daughter, Mary, was born unto him. Henry died then leaving his father, Edward, his brother, Richard, his daughter, Mary, and his wife, who was enceinte, surviving him. Edward Shelley, the father of Richard, suffered a common recovery (the purpose of


7 “Fee tail estates (now abolished by statute in Indiana, 56-138 Burns 1933) are estates of inheritance which, instead of descending to heirs generally, go to the heirs of the donee’s body, which means his lawful issue, his children, and through them to his grandchildren in a direct line, so long as his posterity endures in a regular order and course of descent, and upon the extinction of such issue the estate determines. Estates tail are either general or special, according to whether the limitation is to the heirs of the donee’s body generally or to certain specified heirs, coming within that description, to the exclusion of others.” 21 C. J. 931, 932, Sections 43, 45.

8 “A Common recovery was a judgment recovered in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in the suit, which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee simple in the recoveror.” Cyclopedic Law Dictionary.
which was to defeat the entail) which suit gave rise to the
following estate "to the use of himself (Edward) for life,
to the use of others for 24 years, and then to the use of the
heirs male of the body of said Edward, lawfully begotten,
and the heirs of the body of such heirs male lawfully begotten,
and for default of such issue over." (In substance this pro-
vision is equivalent to saying "to Edward for life, remainder
over to others for 24 years, remainder over to Edward's heirs
in fee.") Then Edward died. Henry Shelley, Jr. was born.
Richard Shelley took possession of the property held by his
father and leased it to one Wolfe. Later Henry Shelley, Jr.
entered said premises and attempted to oust Richard's lessee,
Wolfe. Wolfe, claiming through Richard, brought suit against
Henry, Jr. After a three day argument by counsel of each
side the Queen, says Coke, "ordered Sir Thomas Bromley,
Lord Chancellor of England, to assemble all the justices of
England before him and, upon conference had between them-
selves touching the said questions, to give their resolutions
and judgments thereof." After considerable study and delib-
eration it was decided that the plaintiff, Wolfe, should take
nothing by his bill and the judicial body determined that under
the facts the following well established rule should be applied.

Statements of the Rule

It is a rule in law when the ancestor, by any gift or convey-
ance, takes an estate of freehold, and in the same gift or
conveyance an estate is limited, either mediately or immedi-
ately, to his heirs in fee or in tail; that always in such cases
"the heirs" are words of limitation of the estate, and not
words of purchase.

Coke described the Rule in these terms:

"When the ancestor, by any gift or conveyance, takes an estate of
freehold, and in the same gift or conveyance, an estate is limited medi-
ately or immediately to the heirs in fee or tail, that always in such
cases 'the heirs' are words describing the extent or quality of the
estate conveyed and not words designating the persons who are to
take it."
Preston on Estates, p. 263, as cited in Baker v. Scott, 62 Ill. 86, offers the following elaborate definition of the Rule:

“When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and afterward in the same deed, will or writing, there is a limitation by way of remainder, with or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally or his heirs of his body by that name in deeds or writings of conveyance, and by that or some such name in wills, and as a class or denomination of persons to take in succession, from generation to generation, the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imparted by that limitation.”

Indiana courts in stating the Rule have used similar phraseology to that employed in the foregoing definitions.9

Reasons for the Rule

Contrary to popular conception, the Rule which was applied in Shelley’s case, existed long before Shelley’s time10 and had become a ruling precedent which is believed to have been applied as early as 1325, in a case cited in Perrin v. Blake (1770), 4 Burr. 2579, 10 Eng. Rul. Cas. 689. The Rule did not apparently attract general attention until 1590, but since that time has been the subject of great controversy. Due to the attacks made upon the Rule which challenge its right to exist it might be well at least to do lip service to various reasons for its origin.

The following theories which offer possible reasons for the Rule have been stated by Frank Goodwin in his Treatise on the Law of Real Property (1905), p. 186:

Theory No. 1: It was common in the reign of Henry III for fathers to make conveyances to the eldest son for the purpose of depriving the lord of certain of his fruits of tenure, i. e. feudal incidents. If, then, a tenant holding by knight service should convey to his eld-

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9 Doe v. Jackman (1854), 5 Ind. 283, 284; Andrews v. Spurlin (1871), 35 Ind. 262, 265; Waters v. Lyon (1894), 141 Ind. 170, 175, 40 N.E. 662; Teal v. Richardson (1902), 160 Ind. 119, 120, 66 N. E. 435.

10 See Note 29 L. R. A. (N. S.) p. 977.
est son a fee simple, thereby making the son take as a purchaser, the son, being under age, thereafter at the death of his father would not be liable to wardship, because he held by purchase and not by descent. (Wardship entitled the lord to take tribute.) The statute of Marlbridge (1267) was passed to defeat this practice, which was called collusion; and the first of these theories concerning the origin of the Rule in Shelley's Case is that it was the above practice which caused the statute of Marlbridge to declare that in the case of a limitation to A for life, remainder to his heirs, the heirs should not be allowed to take by purchase, but that they must take by descent.

Theory No. 2: There was a time when, by a limitation to “A and his heirs,” the heir was a purchaser, and of course his consent had to be obtained to the alienation of the fee, as A had but a life estate. The power of alienation against the heir was accomplished, without any legislation, during the reign of Henry III. The second theory is that before this authority was acquired the courts saw no difference between a gift to A for life, remainder to his heirs, and a gift to A and his heirs. Hence the Rule in Shelley's Case.

Theory No. 3: Relates to abeyance. It is shocking to the common law mind that the inheritance should ever be in abeyance. Now, in a gift to A for life, remainder to his heirs, the grantor has given away the inheritance, but since A has no heirs while he lives, the inheritance would have to be in abeyance, because although given away, there is no one to take it; and this must be so unless A himself can take it. Hence the Rule in Shelley's Case.

Theory No. 4: The Rule in Shelley's Case gets the property into the market one generation earlier, for if A takes a fee simple in possession the property is immediately marketable, which fact has caused the Rule in Shelley's Case to hold its own down through the ages.

Theory No. 5: The only way in which two or more persons can at the common law take one estate as purchasers is to take together as joint tenants or tenants in common. Significance must be given to the plurality of the word “heirs.” It is not intended that they shall take together as joint tenants, or tenants in common. Therefore they cannot take as purchasers. Hence the Rule in Shelley's Case.

II. EXPLANATION OF THE RULE

Formal Statement Analyzed

Before attempting an explanation of the Rule in a running statement it would seem advisable to treat each important part of the Rule separately. Therefore the following formal statement will be broken down into ten parts, each part
assigned a separate heading with a brief explanation accompanying it.

It is a rule of 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 his heirs in fee or tail, that always in such cases the word "heirs" is a word of limitation and not a word of purchase.

(1) "It is a rule of law"

The Rule in Shelley's Case must not be looked upon as a rule of construction but as a positive rule of real property law. Harsh applications of the Rule, which sometimes defeat the real intention of the grantor or testator, are more than persuasive to show that the Rule is not one of construction. It is true that the courts will construe the wording of a deed or will but such construction is primarily for the purpose of determining the real intention of the maker, and once the intention is established then the Rule is applied.

(2) "When the ancestor"

When the Rule speaks of the ancestor, reference is made to the first taker. It is the ancestor who profits by the application of the Rule as he receives an estate in fee, and in him the line of inheritance is established, his heirs to take the estate, provided, of course, he does not grant or devise the fee before his death. On the other hand if the Rule is not invoked, the ancestor takes only a life estate and a vested remainder is limited to those persons named as remaindermen.

(3) "By any gift or conveyance"

The Statute of Frauds requires the transfer of lands to be in writing and when the Rule speaks of "gift or conveyance" any legitimate written transfer is contemplated.

(4) "Takes an estate of freehold"

The Rule is only operative when the estate taken by the ancestor is such that the word "heirs" will have a sufficient

estate to operate upon. In other words the freehold estate in the ancestor is absolutely necessary in order that an inheritable estate can vest in the first taker. As a practical matter the freehold contemplated by the Rule is generally a life estate in possession, but it has been held that the freehold need not be one in possession. Also an estate in a trustee in trust for the use of others during their joint lives may come within the rule. Likewise a determinable life estate "to A so long as she remains my widow," (the possibility that such an estate may terminate in the lifetime of the widow and before there can be an heir, being immaterial) has been held a sufficient freehold estate to qualify under the Rule.\(^\text{12}\)

(5) "And in the same gift or conveyance"

This phase of the Rule merely provides that in order for the Rule to operate both the freehold estate in the ancestor and the remainder in fee or tail must be created in the same instrument. In other words the freehold estate cannot be granted in a deed and the remainder devised in a will, but both estates must be created in either the deed or will.\(^\text{13}\)

(6) "An estate is limited"

The estate referred to in this clause is the vested estate which the remaindermen would take in the event the Rule could not be invoked. Of course if the Rule is applied the estate limited merges with the freehold estate of the ancestor,


vesting the fee in him. The terms limited and limitations have a variety of meanings and are often confused, but the term limited as used in the Rule refers to an estate in the same property created or contemplated by the conveyance to be enjoyed after the first estate, granted or devised, expires.

(7) "Either mediately or immediately"

The terms "mediately or immediately" under the Rule have reference to the time when the remainderman is entitled to possession. In case the Rule is not applied, the remainderman is entitled to possession instantly (immediately) upon the death of the ancestor. If possession is to be taken at a future time, which is the situation where there is an intervention of an intermediate estate between the life estate and the remainder, the term "mediately" would be appropriate to show a future possession. It should be noted that in Shelley's Case there was an intermediate estate for 24 years which meant that the estate in remainder was limited "mediately" to the heirs.\(^\text{14}\)

(8) "To his heirs"

Where there exists a remainder over to "his heirs" the Rule contemplates that the word "heirs" when used in the technical or legal sense means the heirs of the ancestor. The result being that a line of inheritance is set up in the ancestor, and by virtue of such an inheritable estate being created in him, the Rule provides that the ancestor shall take a fee.

(9) "In fee or tail"

In order that the Rule may operate it must be possible for the life estate in the first taker to merge with the estate in

kind of an estate might be created by statute which could begin in A, and then descend not to his heirs, but to the heirs of an ancestor as if the estate had come to A by descent, but such a statute has never been passed." 29 L. R. A. (N. S.) 1007.

\(^{14}\) In the event an intermediate estate is interposed between the life estate in A and the remainder in the heirs of A, e. g. "To A for life, remainder to B for 24 years, remainder to A's heirs in fee," A takes a fee simple estate subject to B's estate for 24 years, not to be executed in possession until the determination of the intervening estate. Such intervening estate does not prevent the Rule from operating.
remainder which merger would give rise to a vested inheritable estate in the ancestor. The basis of such an estate of inheritance is the fee simple or fee tail estate in remainder.

(10) "That always in such cases the word 'heirs' is a word of limitation and not a word of purchase."

Since the operation of the Rule depends upon the construction of the words which create the remainder, it is important to know the difference between words of "limitation" and words of "purchase." It is axiomatic that the Rule is not a rule of construction, but in order for the Rule to operate the courts must first construe and interpret the wording of the instrument. That is, it is necessary for the court to decide whether the remaindermen take by descent from the ancestor or by way of purchase from the testator or grantor. If they take by descent the word "heirs" will be construed as a word of limitation and the Rule will be invoked, but if they are to take directly from the testator or grantor then the word "heirs" must be construed as a word of purchase and the Rule will not be applied. As Coke points out in his definition of the Rule the word "limitation" as used in the Rule must be understood as a word of "boundary", i.e. a word describing the extent or quality of the estate conveyed to the ancestor, while the word "purchase" must be understood as designating the persons who are to take the estate "descriptio personarum."

Restatement of the Rule

By bringing the foregoing fragments of the Rule together the Rule might be stated in the following simple manner:

It has become a positive rule of property law that when a grantor or devisor creates an estate for life in A and in the same deed or will also creates in A's heirs a remainder in fee or fee tail (which estate is to take effect in possession immediately or after an intervening estate), the word "heirs" (if used in the technical sense) is to be interpreted as a term denoting the extent of the ancestor's (A's) estate and not as a term designating those who are to take as remaindersmen.
Merger and Exceptions to the Rule

Under the Rule a grant to "A for life with a remainder to A's heirs in fee" vests a fee simple estate in A. It would be most pertinent to ask, "Why does A not take a life estate and the heirs of A take the fee simple?" To answer, legally, a living man cannot have heirs (nemo est heres viventis) but can have only apparent or presumptive heirs. Therefore, since the law favors an early vesting of the fee, A's life estate and the remainder in fee, to persons who are unable to take during A's life, (i.e. A's heirs) merge, vesting the fee in A. At Common Law in order to create a fee simple estate the word "heirs" or similar words denoting an estate of inheritance were indispensable, e.g. "to A and his heirs." Under the Statute De Donis (1285), to create a fee tail, (which estate has been abolished by statute in the State of Indiana), the term "heirs of the body" had to be employed, e.g. "to A and the heirs of his body" otherwise in each instance only a life estate was created.

15 If the Rule were abolished the probable effect would be to create a life estate in the ancestor with a contingent fee in the remainderman.

16 "It is said that no one can have an heir during his life, and, therefore, that the words 'his heirs' mean children. The premise is true, but the conclusion does not follow. A devise to a man and his heirs vests an estate of inheritance which will go to the legal heirs, whether they are children or other kinsmen. At Common Law the word 'heir' or 'heirs' was the strongest term that could be used to create a fee, and in many cases was indispensably necessary to create such an estate. It cannot, therefore, be logically possible that because the term 'heirs' is used the devise is limited to children and the estate of the first taker cut down to an estate for life. If this conclusion be just, then for many centuries courts and authors have given a radically erroneous meaning to the words 'his heirs.'" Shimer v. Mann (1884), 99 Ind. 190, 199; Fountain Co. Coal Co. v. Beckleheimer (1885), 102 Ind. 76, 77, 1 N. E. 202; Outland v. Bowen (1888), 115 Ind. 150, 158, 17 N. E. 281; Tinder v. Tinder (1891), 131 Ind. 381, 383, 30 N. E. 1077.

17 56-138 Burns 1933 (1 R. S. 1852, Ch. 23, Sec. 36, p. 232) provides: "Estates tail are abolished; and any estate which, according to the Common Law, would be adjudged a fee tail, shall hereafter be adjudged a fee simple; and if no valid remainder shall be limited thereon, shall be a fee simple absolute." Tipton v. LaRose (1867), 27 Ind. 484; Granger v. Granger (1896), 147 Ind. 95, 107, 44 N. E. 189, 46 N. E. 80; Teal v. Richardson (1902), 160 Ind. 119, 120, 66 N. E. 435; Gibson v. Brown (1916), 62 Ind. App. 460, 472, 110 N. E. 716, 112 N. E. 894.

18 At Common Law a grant which omitted the word "heirs" conveyed only
Now, when the Rule is applied, the merger of the two estates has the effect of creating an estate to "A and his heirs", which is readily recognized as a fee simple.

It is to be conceded that when the life estate of the ancestor is capable of merging with the fee in the heirs, the Rule may be applied, but it is equally true that where the two estates cannot coalesce, the Rule cannot be applied. The following situations constitute some of the exceptions to the Rule in Shelley's Case because merger is impossible:

(1) A merger of the estates can only arise when the particular estate, i.e. the ancestor's estate, is a freehold (life, life pur autre vie or fee tail) otherwise the estate in remainder would have no estate to operate upon.

(2) In order to effect a merger of the two estates both must be of the same quality, i.e. both legal or both equitable, otherwise they would not coalesce and each would retain its own characteristics and identity. Therefore an estate to X in trust for A for life with a remainder over to A's heirs would give rise to an equitable estate in A and a legal estate in A's heirs. Under the rules of property law the two estates could not merge and consequently the Rule would not apply.

(3) There may be no merger of estates where an estate is given to several persons for life in succession with a remainder to "their heirs." "Their heirs" means only the heirs of the surviving life tenant, and not their heirs generally.

a life estate. This rule prevailed until the following statute was passed, 1 R. S. 1852 Ch. 23, Sec. 14, p. 232, 56-105 Burns 1933 which provides: "It shall not be necessary to use the words 'heirs and assigns of the grantee' to create in the grantee an estate of inheritance, and if it be the intention of the grantor to convey any lesser estate, it shall be so expressed in the deed." Cases prior to 1852: Nelson v. Davis (1871), 35 Ind. 474, Nicholson v. Caress (1877), 59 Ind. 39; Fountain County Coal Co. v. Beckleheimer (1885), 102 Ind. 76, 1 N. E. 202; Lamb v. Medsker (1905), 35 Ind. App. 662, 74 N. E. 1012. Cases after passage of 1852 Act: Chamberlain v. Runkle (1901), 28 Ind. App. 599, 63 N. E. 486; Adams v. Merrill (1909), 45 Ind. App. 315, 85 N. E. 114, 87 N. E. 36; Mulvane v. Rude (1896), 146 Ind. 476, 45 N. E. 659; Fenstermaker v. Holman (1901), 158 Ind. 71, 62 N. E. 699. Rule as to Wills: See: 7-704, 705 Burns 1933 and cases cited.
(4) Nor can there be a merger when a contingency operates upon the remainder, viz., "To A for life, remainder to A's heirs, if A shall survive B." No merger here unless and until B dies, because inheritance cannot vest.

(5) No merger where the heirs take different estates than they would by descent, viz., "To A for life, remainder to heirs of his body, their heirs and assigns, so long as they (the heirs) remain residents of Indiana." Here the conveyance limits the estate to those heirs who remain in Indiana and defeats the estate of those who move out of the State.

(6) Where the word "heirs" is construed as meaning children or designating a person or a class of persons who may take as remaindemen.

III. APPLICATION OF RULE

Rules of Construction

As heretofore stated the Rule in Shelley's Case is not to be considered as a rule of construction but as a rule of property law, such principle sometimes having the effect of defeating the intention of the grantor or testator. Indiana courts have

19 The Rule is not one of construction, as a matter of fact, it takes effect regardless of the donors' intention, and frequently in direct contravention thereof. It is a rule of property law. Shimer v. Mann (1884), 99 Ind. 190; Fountain County Coal Co. v. Beckleheimer (1885), 102 Ind. 76, 1 N. E. 202; Hochstedler v. Hochstedler (1886), 108 Ind. 506, 9 N. E. 467; Allen v. Craft (1886), 109 Ind. 476, 9 N. E. 919; Coner v. Lowe (1890), 124 Ind. 368, 24 N. E. 889; Teal v. Richardson (1902), 160 Ind. 119, 66 N. E. 435; Burton v. Carnahan (1906), 38 Ind. App. 612, 78 N. E. 982; Gibson v. Brown (1916), 62 Ind. App. 460, 110 N. E. 716, 112 N. E. 894.

"It is therefore clear that the rule not only defeats the intention but substitutes a legal intendment directly opposed to the obvious design of the limitation. A rule which so operates cannot be a rule of construction." Aigler Cases on Titles (1932), p. 581 (n).

Although the Courts in several states have held that the rule in Shelley's Case is a rule of law and not one of construction the theory has been advanced that the Rule involves both: Leach's Cases and Materials on Future Interests (1935), p. 123; 7 Holdsworth, History of English Law pp. 395, 397.

20 "Its operation more frequently defeats the just and undoubted intention of the grantors and testators than any other effect it has." McIlhinny v. Mc-
repeatedly stated that the Rule is not to be used as a "device to discover the testator's intention." 21 On the other hand it is also settled law that "the Rule will not be allowed to defeat the plain intention of a testator." 22 It might be well to remind the reader at this point that it is the duty of the Court in questionable cases first to construe the instrument in question for the express purpose of ascertaining, if possible, the true intent of the maker. This having been accomplished, then the Rule is either invoked or its application denied.

It has been stated that a more liberal construction is accorded wills than deeds, the apparent reason being that courts are prone to indulge the presumption that a testator is not in as favorable position to obtain legal advice as a grantor. 23 However, our courts recognize that deeds as well as wills should be so construed as to bring to light the true intention of the grantor. 24

Since our courts are more inclined to construe wills liberally than deeds, it would seem that the courts should more closely observe the established rules of construction. In one case it was said, "To ascertain the testator's intention, the whole will must be considered, and no word or clause in the will is to be


22 The cardinal rule in the construction of wills is that the intention of the testator must control; but it is also true that when words are used that have a settled legal meaning, full effect must be given to them. Teal v. Richardson (1902), 160 Ind. 119, 66 N. E. 435; Snodgrass v. Brandenburg (1904), 164 Ind. 59, 71 N. E. 137, 72 N. E. 1030; Hayes v. Martz (1909), 173 Ind. 279, 89 N. E. 303, 90 N. E. 309.

Courts will not allow Rule to defeat the plain intention of a testator. Doe v. Jackman (1854), 5 Ind. 283; Siceloff v. Redman (1866), 26 Ind. 251; Helen v. Frisbie (1877), 59 Ind. 526.

23 Shimer v. Mann (1884), 99 Ind. 190; Ridgeway v. Lanphear (1884), 99 Ind. 251; Fountain County Coal Co. v. Beckleheimer (1885), 102 Ind. 76, 1 N. E. 202.

rejected to which a reasonable effect can be given, and that effect must be given to every part of the will if possible.\textsuperscript{25} Other cases hold that "the purpose of construing wills is to ascertain the intention of the testator, and to carry it out so far as it may not interfere with established rules of law."\textsuperscript{26}

Rules of construction are of the utmost importance when related to the Rule in Shelley's Case. When the Rule is involved, the Court is confronted with the problem of ascertaining the meaning and effect of the word "heirs" or similar words when used in a deed or will to create a remainder after a life estate in the ancestor. Otherwise expressed, the court must interpret such word or words as meaning \textit{limitation}, i.e. setting up an estate of inheritance in the ancestor, or meaning \textit{purchase}, in which event the remaindermen would be considered as having been sufficiently described as individuals or as a class \textit{(descriptio personarum)} which would entitle them to take the remainder in fee. The following statement taken from \textit{Taylor v. Cleary} (1877), 29 Grat. (Va.) 448, clearly states the rule:

"Sometimes, we know that the word 'heirs' is used in an instrument, and especially a will, to describe 'children' or 'issue' or some particular class of heirs, and sometimes the word 'children' or some other word is used to describe 'heirs.' This is a question of intention, depending on the terms of the instrument, construed altogether and in connection with the surrounding circumstances, or such of them as may be admissible evidence upon such a question. In deciding the question great weight must be given to the technical meaning of the word 'heirs' which must be presumed to have been intended to be used in such technical sense in the absence of evidence of a plain intention to the contrary.

"If the word 'heirs' was intended to be used in its technical sense, then the Rule applies, and there is an end of the question in the case. But if the word was intended to be used as a description or designation of particular persons who were to take by purchase, in contradistinction to those who would take by inheritance, as 'heirs forever', then clearly

\textsuperscript{25}Fenstermaker v. Holman (1901), 158 Ind. 71, 74, 62 N. E. 699.
the Rule in Shelley's Case does not apply; and the persons thus described as remaindermen are entitled to take by purchase."

The word "heirs" is a powerful one, and it must be given its legal force and effect,27 unless the words of the instrument clearly assign it a different meaning28 and its force is not impaired by the mere use of negative or restraining words.29 Redfield on Wills says that "Conjecture, doubt, or even equilibrium of apparent intention will not suffice."30 The converse is equally true that technical words may be explained by superadded words, and where it clearly and unequivocally appears that the word "heirs" was not used in its technical sense, it will be assigned the meaning given it by the person by whom it was used.31 In *Tinder v. Tinder* (1891), 131 Ind. 381, 383, we find the court admonishing itself by stating "that rigid adherence to the meaning ascribed by law writers to the term 'heir' or 'heirs' has resulted in giving many instruments a meaning very different from that intended by their

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27 Doe v. Jackman (1854), 5 Ind. 283; Siceloff v. Redman (1866), 26 Ind. 251; Nelson v. Davis (1871), 35 Ind. 474.
28 Whenever it is certain that the term heirs is used with the intention that they should take as children, or as purchasers, the will should be so construed. Jones v. Miller (1859), 13 Ind. 337; Rapp v. Matthias (1871), 35 Ind. 332; Brown v. Harmon (1881), 73 Ind. 412; Clifford v. Farmer (1881), 79 Ind. 529.
30 Strong as is the word "heirs," it may be read to mean "children," if the context decisively shows that it was employed in that sense by the testator. Allen v. Craft (1886), 109 Ind. 476, 9 N. E. 919; McClen v. Sekker (1919), 70 Ind. App. 435, 123 N. E. 475; Hochstedler v. Hochstedler (1886), 108 Ind. 506, 9 N. E. 467.
31 Shimer v. Mann (1884), 99 Ind. 190.
30 "While the intention of the testator, if consistent with law, is undoubtedly to be the polar star, yet we are bound to take as our guides those general rules or canons of interpretation which have been adopted and followed by those who have gone before us. It becomes no man and no court to be wise above that which is written. Security of titles requires that no mere arbitrary discretion should be exercised in conjecturing what words the testator would have used, or what form of disposition he would have adopted had he been truly advised as to the legal effect of the words actually employed. That would be to make a will for him instead of construing that which he had made." In Dobbler's Appeal, 64 Pa. St. 9, 15 cited in Teal v. Richardson (1902), 160 Ind. 119, 122, 66 N. E. 435.
31 Fountain County Coal Co. v. Beckleheimer (1885), 102 Ind. 76, 1 N. E. 202; Shimer v. Mann (1884), 99 Ind. 190, 193 and cases cited, Rapp v. Matthias (1871), 35 Ind. 332; Cleveland v. Spilman (1865), 25 Ind. 95.
framers. It is not only the unlearned who use the term 'heirs' as meaning 'children' for the greatest literary men often use the term as meaning children. And so do the Courts.  

In addition to the word "heirs" we find other terms which have fixed legal meanings depending on their use in either a will or deed. These terms such as "issue" and "children" however, like the term "heirs" are subject to construction and may be interpreted as words of limitation or purchase, depending on the intention of the grantor or deviser.

Classification of Words and Phrases

An endeavor has been made to collect most of the Indiana cases dealing with the application of the Rule in Shelley's Case. This classification is an attempt to make available a digest of words and phrases which have been determined by the Indiana courts to either invoke or avoid the Rule. In view of the fact that some words such as "heirs" and "issue" have been construed as both words of purchase and words of limitation, depending on their use, it is obviously necessary to refer to the cases herein cited to ascertain why the court has or has not invoked the Rule. It is to be observed that the classification pursues the following order: First, Wills (a) Words of Purchase, (b) Words of Limitation. Second, Deeds (a) Words of Purchase, (b) Words of Limitation.

A digest of Indiana cases following this classification is inserted at the end of this article as an appendix thereto.

32 Hull v. Beales (1864), 23 Ind. 25; Ridgeway v. Lanphear (1884), 99 Ind. 251.

33 "When word 'issue' is used in a will it may be a word of limitation or purchase depending on the testator's intention as expressed in the context. But when used in a deed it is always a word of purchase." McIlhinny v. McIlhinny (1893), 137 Ind. 411, 37 N. E. 147.

34 In its primary sense the word "children" when used in a devise, is always a word of purchase and not a word of limitation. Sorden v. Gatewood (1848), 1 Ind. 107; Nelson v. Davis (1871), 35 Ind. 474; Bonner v. Bonner (1901), 28 Ind. App. 147, 62 N. E. 497; Edwards v. Bates (1922), 79 Ind. App. 578, 139 N. E. 192.

The word "children" used in a deed has always been held in this court and the courts of England as a word of purchase and not a word of limitation. Sorden v. Gatewood (1848), 1 Ind. 107; Doe v. Jackman (1854), 5 Ind. 283; McIlhinny v. McIlhinny (1893), 137 Ind. 411, 418, 37 N. E. 147.
IV. Conclusion

It would be folly for anyone to attempt a comprehensive discussion of the Rule and label such, "The Rule in Shelley's Case Simplified." It is hoped that the foregoing arrangement of the subject matter, the digest of cases showing the application of the Rule, and the notes citing authorities, at least to a small degree, have brought into focus various elements which may make for a better understanding of the Rule in Indiana.

The writer suggests that the members of the legal profession in Indiana give serious study to the various statutes which have been passed in other states which affect the operation of the Rule, with the view of eventually recommending to the proper authorities a simplification or complete abolishment of the Rule in this state. To date two-thirds of the states in America have, wholly or partially, legislated the Rule out of existence. England, from whom we inherited the Rule, by adopting the Common Law of that country, abolished the Rule by the Acts of 1925, sec. 131.

It will not be seriously contended that the Rule is a necessary rule of property law which may not be amended or totally abandoned by proper legislation. Further, it is surely to be admitted that regardless of careful judicial interpretation of a grantor's or testator's intent the harshness of the Rule, when applied, has a tendency to work and does work injustice in many cases. As another argument against the Rule the writer would like to publish some of the vituperative epithets directed at the Rule which he has heard from lawyers and law students but propriety forbids. In view of the foregoing arguments and those announced by the Courts and legal writers it would appear that the legislature in this State would render a genuine service to the laity as well as the legal pro-

35 Mr. Richard R. Powell, professor of law at Columbia University, in his case book on Future Interests (1937), p. 379-382, offers a helpful note on the Statutory enactments in the United States which affect the application of the Rule in Shelley's Case in which he classifies the states according to the effect of their statutes upon the Rule. Also see 45 Harvard Law Review 571.

36 See Note 2 supra.
fession by abolishing or materially modifying the Rule in Shelley's Case. It would be hard to believe that thirty-three states out of forty-eight, which have so acted, could be in error.

APPENDIX

Digest of Indiana Cases Bearing on Rule in Shelley's Case.

WILLS

(a) Words of Purchase

"Heirs":
- McCray v. Lipp (1871), 35 Ind. 116 (Dissent); Conger v. Lowe (1890), 124 Ind. 368, 24 N. E. 889.

"Lawful heirs":

"Legal heirs":

"Lawful issue":

"Heirs of his body":
- Granger v. Granger (1896), 147 Ind. 95, 44 N. E. 189, 46 N. E. 80.

"Heirs of their bodies":

"Children":

"Their children, the heirs of their bodies forever":
- Doe on the demise of Patterson and Another v. Jackman (1854), 5 Ind. 283.

"His children, if he have any; and if he have no children or if there be no heirs of his body, then * * * to his other heirs of his own blood equally":
- Ridgeway v. Lanphear (1884), 99 Ind. 251.

"Heirs of his body begotten in lawful wedlock":
"His children begotten in lawful wedlock":
   Millett v. Ford (1886), 109 Ind. 159, 8 N. E. 917.

"Issue" and "Children":

"Issue of her body by me begotten":
   Helm v. Frisbie (1877), 59 Ind. 526.

"Remainder to X and Y (named heirs)":
   Baker v. Riley (1861), 16 Ind. 479.

"Persons who would have inherited the same from X had he owned the same in fee, simple at the time of his death":
   Earnhart v. Earnhart (1890), 127 Ind. 397, 26 N. E. 895.

WILLS

(b) Words of Limitation

"Heirs":
   Siceloff v. Redman (1866), 26 Ind. 251; McCray v. Lipp (1871), 35 Ind. 116; Rapp v. Matthias (1871), 35 Ind. 332; Rusing v. Rusing (1865), 25 Ind. 63.

"Lawful heirs":
   Perkins v. McConnell (1893), 136 Ind. 384, 36 N. E. 121.

"Legal heirs":

"Heirs of her body":
   Teal v. Richardson (1902), 160 Ind. 119, 66 N. E. 435.

"Heirs of their body":
   Smith v. McCormick (1874), 46 Ind. 135.

"Her heirs in fee":
   Bonner v. Bonner (1901), 28 Ind. App. 147, 62 N. E. 497; Reddick v. Lord (1891), 131 Ind. 336, 30 N. E 1085.

"Respective heirs":

"Heirs forever":
   Small v. Howland (1860), 14 Ind. 592; Allen v. Craft (1886), 109 Ind. 476, 9 N. E. 919.

"His issue or issue of his body":
   Gonzales v. Barton (1873), 45 Ind. 295.

"Devisees, who are named, and their lawful heirs":
   Hochstedler v. Hochstedler (1886), 108 Ind. 506, 9 N. E. 467.
DEEDS

(a) Words of Purchase

"Heirs at law":
Adams et al v. Alexander, Administrator, (1902), 159 Ind. 175, 64 N. E. 597.

"Heirs of the body":

"Heirs of his body":

"The heirs of A and B":
Hadlock et al v. Gray (1885), 104 Ind. 596, 4 N. E. 167.

"Heirs of person living":
Tinder v. Tinder et al (1891), 131 Ind. 381, 30 N. E. 1077.

"Present heirs":
The Fountain County Coal and Mining Company v. Beckleheimer et al (1885), 102 Ind. 76, 1 N. E. 202.

(Named heirs) "B and C":
Prior and Another v. Quackenbush (1868), 29 Ind. 475.

"Children":
Sorden v. Gatewood (1848), 1 Ind. 107; Owen et al v. Cooper (1874), 46 Ind. 524; Amos et al v. Amos et al (1888), 117 Ind. 19, 19 N. E. 539.

"Children of his body then living":
Jackson v. Jackson et al (1890), 127 Ind. 346, 26 N. E. 897.

"Children and their descendants, their heirs and assigns forever."
(Descendants mean "children"):

"Issue of her body born alive":
McIlhinny v. McIlhinny (1893), 137 Ind. 411, 37 N. E. 147;
(Overruling Fletcher v. Fletcher (1882), 88 Ind. 418, and modifying King v. Rea (1877), 56 Ind. 1.)

DEEDS

(b) Words of Limitation

"Heirs":
Taney et al v. Fahnley et al (1890), 126 Ind. 88, 25 N. E. 882;
Shoe v. Heckley (1922), 78 Ind. App. 586, 134 N. E. 214; Lee

"His heirs":
Shimer v. Mann (1884), 99 Ind. 190.

"Heirs of his (her or their) body":

"A and the heirs of her body by B":
Tipton and others v. LaRose (1867), 27 Ind. 484.

"Bodily heirs":

"Lawful heirs":

"Legitimate heirs":

"Respective heirs":

"Heirs and assigns forever":

"Issue" (Used without explanatory words):

"Issue of her body, their heirs and assigns forever":
King v. Rea (1877), 56 Ind. 1. Modified by McIlhinny v. McIlhinny (1893), 137 Ind. 411, 37 N. E. 147.

"Children" (Grantees had no children at time of grant, but subsequently children were born):
Fletcher v. Fletcher (1882), 88 Ind. 418. (Overruled by McIlhinny v. McIlhinny (1893), 137 Ind. 411, 37 N. E. 147.)