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FUTURE INTERESTS — RULE IN SHELLEY'S CASE — WHERE REMAINDER TO HEIRS IS "CONTINGENT"— A grantor conveyed premises to his daughter and her husband "For and during their lifetime, then to the heirs of the body of our daughter, Henrietta Ann Briegel, and if she leaves no child or children surviving her, then to her heirs according to law." Henrietta died without ever having had children and devised all her property to her husband, defendant herein. Plaintiff as heir at law of Henrietta brought suit for partition. *Held,* the remainders created were contingent with a double aspect. The rule in Shelley's case does not apply where the remainder in the heirs is contingent.[1] Defendant took nothing by the devise. Plaintiff and other heirs took the fee by purchase subject to defendant's life estate. *Gehlbach v. Briegel,* (Ill. 1934; rehearing denied, 1935) 194 N. E. 591.

In holding that the rule in Shelley's case does not apply where the remainder to heirs is contingent, the Illinois court is taking a step completely unjustified

[1] Every remainder to heirs is really contingent in the sense that until a person's death it cannot be determined who will be his heirs. In speaking of contingent remainders to heirs the text writers and courts, subsequently referred to, evidently are referring to remainders conditioned on some other condition precedent than the determination of persons who will take as heirs. The present writer will also use the term in this sense.

by the great weight of authority. All of the great text writers from Preston to Tiffany agree that the rule in Shelley's case operates with the same force where the remainder is subject to an express condition precedent as where it is unconditional.[2] Said Fearne, "If the subsequent limitation, instead of being unconditional . . . is expressly limited upon a contingency, still, it will not be a contingent remainder to the heir general or special as a purchaser, but will attach originally in the ancestor, as a contingent remainder; so that his heir can only take by descent." [3] The problem seems to have come before the courts in relatively few cases, but of these, the great majority follow the view of the text writers.[4] The North Carolina court has taken a peculiar intermediate view.[5] Its position is that the heirs take as purchasers and the rule does not operate *until* the happening of the event on which the remainder is contingent, when it will operate to vest the remainder in the life tenant. This view could cause considerable difficulty applied to such a situation as in the instant case where the event is the death of the life tenant without surviving children. Query, could she devise such a remainder? The only case support for the view taken by the Illinois court is the rather dubious authority of two New Jersey cases [6] in which there was involved a devise to *A* for life and then to the lawful issue of her body, her surviving, with remainder over to *B* if she should die without issue surviving. After considerable loose language, the court stated that since the remainder to the heirs of the body was contingent as to persons, the rule in Shelley's case was inapplicable.[7] What is the actual holding in these cases it is difficult to ascertain, but there is some indication that they were really decided on the basis of construing the word "heirs" as a designation of particular persons and not as an indefinite succession. There is language in the holding in the instant case to indicate that the court was really but seizing an opportunity to narrow the application of a rule which admittedly is in derogation of the intent of the grantor. This is not surprising in view of the fact that there are statutes abolishing the rule in thirty states.[8] In the instant case

[2] 1 PRESTON, ESTATES 267, 319 (1820); 2 FEARNE, CONTINGENT REMAINDERS (ed. by Josiah Smith), sec. 418, p. 212 (1844); 1 HAYES, CONVEYANCING 544 (1840); 2 WASHBURN, REAL PROPERTY, 6th ed., 528 (1902); CHALLIS, LAW OF REAL PROPERTY, 3rd ed., 163 (1911); KALES, ESTATES AND FUTURE INTERESTS, sec. 440 (1920); 1 TIFFANY, REAL PROPERTY 530-531 (1920).

[3] 2 FEARNE, CONTINGENT REMAINDERS (ed. by Josiah Smith), sec. 418, p. 212 (1844).

[4] Eby v. Shank, 196 Pa. 426, 46 Atl. 495 (1900); Loring v. Eliot, 82 Mass. (16 Gray) 568 (1860); Pratt v. McCawley, 20 Pa. St. 264 (1853); Dennett v. Dennett, 40 N. H. 498 (1860); McNeal v. Sherwood, 24 R. I. 314, 53 Atl. 43 (1902); In re White & Hindle's Contract, 7 Ch. Div. 201 (1877).

[5] Starnes v. Hill, 112 N. C. 1, 16 S. E. 1011 (1893); Cotten v. Moseley, 159 N. C. 1, 74 S. E. 454 (1912) (dicta).

[6] Robeson v. Duncan, 74 N. J. Eq. 745, 70 Atl. 685 (1908); Tantum v. Campbell, 83 N. J. Eq. 361, 91 Atl. 120 (1914).

[7] But is not every remainder to heirs or to heirs of the body contingent as to persons? Query as to what the court meant by this statement.

[8] In Kansas, New Hampshire, Ohio, and Oregon the statutory abolition operates only as to limitations contained in wills. In some 26 other states the statutes apply equally to deeds and wills, but variations exist as to completeness of the abolition. Ver-

the first limitation was to the heirs of the body of the grantee. In accordance with the peculiar interpretation which the Illinois courts give their statute of entails,[9] this would create a life estate in the grantee with a contingent remainder in the heirs of her body until birth of issue. But upon birth of children the remainder would immediately vest in the children subject only to be diminished by the birth of other children.[10] The effect of this upon the subsequent limitation to her heirs in case she die without children surviving would be that until the birth of children it would be a contingent remainder. After the birth of children it could only take effect as an executory interest.[11] But there is a rule at common law that a limitation that may take effect as a remainder shall take effect in no other way. If this rule applies here, upon the birth of issue the limitation to heirs would become void.[12] If it does not apply, we run afoul of the rule that the rule in Shelley's case does not apply to an executory interest,[13] and the question is raised immediately as to operation of the rule in Shelley's case upon a remainder which is subject to the possibility of being turned into an executory interest. In the instant case the court did not have to face any of these perplexing problems, because the life tenant died without ever having had children. It may be, however, that its decision was influenced by a genuine desire to lay down a rule that would in future cases lead them clear of the difficulties suggested above.

J. S. W.

mont without a statute has virtually abolished the rule by holding it is only a rule to ascertain intent. 1 POWELL, CASES ON TRUSTS AND ESTATES 725-726 (1932).

[9] Sec. 6, Conveyancing Act. Ill. Rev. Stat. (Cahill 1933), p. 690.

[10] Winchell v. Winchell, 259 Ill. 471, 102 N. E. 823 (1913); Moore v. Reddel, 259 Ill. 36, 102 N. E. 257 (1913); Voris v. Sloan, 68 Ill. 588 (1873). Before the construction of the Illinois statute of entails became fixed, it was held that the rule in Shelley's case was completely abolished as to estates tail. But from the above cases it appears to be the view of the court that the rule applies to determine whether at common law a fee tail estate would have been created. See KALES, ESTATES AND FUTURE INTERESTS, sec. 418 and pp. 451, 470 (1920).

[11] KALES, ESTATES AND FUTURE INTERESTS, sec's. 105, 410, 411 (1920). Since an estate in fee simple vests in the children on birth, any subsequent limitation must necessarily be an executory interest.

[12] KALES, ESTATES AND FUTURE INTERESTS, sec's. 105, 411 (1920). Kales suggests that the remainder may be split as to contingencies where one contingency would create a valid contingent remainder and the other an executory interest void for remoteness. He does not hazard a guess as to result where the executory interest would be perfectly valid.

[13] 29 L. R. A. (N. S.) 963 at 1018 (1911); KALES, ESTATES AND FUTURE INTERESTS, sec. 411 (1920). As a matter of fact, with the abolition of the rule recognizing the destructibility of contingent remainders there appears to be no substantial difference between a contingent remainder and an executory interest except that the rule in Shelley's case does not apply to executory interests.