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## THE RULE IN SHELLEY'S CASE—IN MEMORIAM?

JOSEPH R. GERAUD\*

*Crawford v. Barber*<sup>1</sup> has been duly litigated, appealed, decided by the Wyoming Supreme Court and placed in its appropriate resting place within the West Publishing Company's system of case reports. To the Wyoming lawyer, it may seem unfortunate that the decision will be located under such a simple style rather than a bold faced epitaph: "Here Lies the Remains of The Rule In Shelley's Case." One may feel that such a distinction should be conferred upon any judicial decision of first impression upon a question of the modern day application of any ancient rule of property; that such recognition is due solely because the Rule has demanded so many pages of learned discussion in treatises and judicial decisions attempting to define and explain it; or that such an inscription befits the memory of hours spent as a law student delving into the system of common law estates which produced the solemn pronouncement that:

It is 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 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.<sup>2</sup>

Perhaps a reading of the Rule will recall from the most hidden recesses of the mind in which the typical practitioner is prone to tuck all matters pertaining to words of purchase or limitation, worthier title, contingent remainders and concepts of a similar ilk (which wishfully belong to past history), the discussions pertaining to the value of changing a contingent remainder to a vested remainder in the ancestor so that the land became freely alienable. In all probability one might recall the condemnation of such a persistent common law rule which operates with precision to defeat the intention of grantor or devisor when many authorities had exposed its ancient social justification as preserving unto the lord the incidents of relief and wardship flowing from the passage of land by inheritance rather than purchase. In the absence of provisions in the Internal Revenue Code clearly re-affirming the necessity of destroying contingent remainders to heirs which are clearly designed to avoid a second estate tax, one might conclude the Rule had ceased to serve any useful public purpose. Indeed, one might speculate that had the million dollar Wyoming ranch been included in the life tenant's taxable estate as a consequence of the operation of the rule, the Wyoming legislature would have sprung into action to strike down such a nefarious medieval meddler in the plans of men.

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1. 385 P.2d 655 (Wyo. 1963).

2. This statement of the Rule is that used in the complete discussion contained in SIMES AND SMITH, *The Law of Future Interests* §§ 1541 to 1572 (1956) to which the reader is referred in general.

The Rule has endured, despite criticism, to the point that it may be considered symbolic of the immutable nature of rules of property law as viewed by Blackstone when he stated "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."<sup>3</sup> It would seem that the courts of the states have retained a modicum of reverence for such rules for it has fallen to the elected representatives of some thirty-seven states to duly proclaim by legislative act that this judicially conceived Rule had outlived its usefulness. Until the recent contest in Wyoming, one of three uncommitted jurisdictions, the courts of only two states had the temerity to deny recognition of the Rule in their present societies, while others felt bound by precedent to honor a rule of property law.<sup>4</sup> There is no need to presently ponder the role of the present day judge in the law making process as contrasted with our legislative bodies, but it is pertinent to recall that the Rule has caused examination of judicial conscience whenever some draftsman's work has afforded the opportunity for this feudal product to emerge. The advocate for application of the Rule in a jurisdiction committed to the common law, but unaligned with regard to the Rule, might well have anticipated defeat on the grounds that it is not applicable to the habits and condition of our society, nor in harmony with the genius, spirit and objects of our institutions. The advocate seeking denial of an ancient property concept could well wish for judges with a temperament akin to those of the thirteenth century that denied any necessity of obtaining the consent of heirs for an alienation of land when their father's enfeoffment had been to him "and his heirs." In the words of Pollock and Maitland, "But above our law at the critical moment stood a high-handed court of professional justices who were all for extreme simplicity and who could abolish a whole chapter of ancient jurisprudence by two or three bold decisions."<sup>5</sup>

The stage was set for a decision as to the fate of Shelley's Rule in Wyoming when an alternate limitation failed and the effective terms of a devise, in essence, provided: "To my son David for life, then divided among his heirs according to the rules of descent and distribution of the State of Illinois." David's surviving spouse was named as sole devisee and she promptly asserted that David was the owner in fee, since Shelley's Rule changed the remainder from one to his heirs into a vested remainder in David. The Supreme Court of Illinois, prior to abolition of the Rule by statute, had held the Rule applicable to identical language involving land in Illinois.<sup>6</sup> The Restatement of Property has long expressed the view that the Rule, where in effect, would apply when the remainder is limited by language which describes the persons who as heirs would inherit the real property of the ancestor on his death intestate.<sup>7</sup> If it could

3. 1 Blackstone's Commentaries on the Laws of England 139 (5th ed.).

4. SIMES AND SMITH, *supra* note 2 at § 1563.

5. 2 POLLOCK & MAITLAND, *The History of English Law* 313 (2d ed. 1909).

6. *People v. Emery*, 314 Ill. 220, 145 N.E. 349 (1924).

7. Restatement, Property § 312, comment, g (1940).

be agreed that the purpose of the Rule was to prevent "heirs" from taking by purchase rather than by descent, one might question whether the Rule is applicable to the fact situation under any theory in view of the fact that the laws of Illinois cannot determine rules of intestate descent for Wyoming. The takers upon death intestate would be a group described by Wyoming law, and the testator's description would appear to be a description of a class of persons who take by purchase since they would not be heirs.

Be that as it may, the significance of *Crawford v. Barber* is to be found in the majority opinion's conclusion that for Shelley's Rule to apply, the word "Heirs" must be used in a technical sense so that the remainder is limited to heirs in an indefinite line of inheritable succession from generation to generation. As used in the devise, the court was satisfied that the testatrix was merely describing the class of takers. Such a result is not a judicial decision that Shelley's Rule is inapplicable in Wyoming. The failure of the court to expressly reject the Rule as a part of Wyoming common law, after considering such a possibility, carries with it a tacit approval of the Rule's continued existence whenever its basic prerequisites are present.

What language will give rise to application of the Rule? The English position, which the court states is correct, is to the effect that in their technical sense the words "heirs" and "heirs of the body" are to be construed to describe all the heirs or heirs of the body the ancestor might have from generation to generation and not just the person or persons who take by intestacy in the first generation, and that the words will be construed as being used in the technical sense unless other words show they were used with some other meaning.<sup>8</sup> The only words which detract from ascribing this technical meaning to the devise in question are "according to the rules of descent and distribution of the State of Illinois." Although the court makes no point of this matter, it must be concluded that if the remainder had been simply "to his heirs", the Rule would have been applied if the English rule is to be followed. If such is not the probable result, then it must be presumed that the conveyance would have to recite "remember to his heirs in an indefinite line of inheritable succession from generation to generation," if the rule is to be applied. The failure of the decision of descent of Illinois, and the emphasis upon the word "heirs" and no others, can well lead to the conclusion that the court is in fact saying that the use of the word "heirs" alone is insufficient to satisfy the requirements for application of the Rule, since its use in the defined technical sense cannot be inferred in this day and age. Such a conclusion is buttressed by the fact the court rejects the Restatement position, which gives repeated illustrations in which the remainder is limited solely to the heirs of the ancestor. If this is the correct interpretation of the decision, then *Crawford v. Barber* does mark the death of the Rule in

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8. *Id.* at comment f.

Shelley's Case in Wyoming. It would seem inconceivable that any draftsman would mistakenly use words sufficient to resurrect an ancient definition or "heirs" when the only effective definition for purposes of distribution can be found by reference to present day statutes defining the term and which merely designate the taker of property.

Unfortunately, however, the court cites three cases from differing jurisdictions in support of its conclusion.<sup>9</sup> The *Troxell* case, is of little value inasmuch as the remainder was "to any child or children of her body or their descendants." The court concluded therein that such words were not the equivalent of "heirs" or "heirs of the body." In the cited *Turner* case the decedent's will gave a joint life estate to two sons with remainder "to their descendants." The court there concluded that the testator was looking to a possibly remote future and that "descendants" and "heirs of the body" were equivalent in meaning so that the Rule in Shelley's case applied. The citation to this case is extremely worrisome, for it is entirely possible that the draftsman would use the word "descendants" to designate the takers of a remainder. In the last cited decision, *Benton v. Baucom*, the devise was of a life estate to a step-daughter, "and then to her lawful heirs, if any, and if not, then it is to go to my own three children, or their heirs, . . .". This decision notes that the Rule in Shelley's case serves valuable purposes in that it prevents the tying up of real estate during the life of the first taker, facilitates its alienation a generation earlier, and, at the same time subjects it to the payment of the debts of the ancestor. The Rule was further referred to as a rule of property which compelled the court to observe it wherever the limitations in any deed or will call for its application. The final conclusion was that the Rule applied to the devise so as to give the stepdaughter a fee simple. In view of the legislative adoption in Wyoming of the common law rule against perpetuities, there can be no objection to a life estate to A, remainder to his heirs as it is permissible under the latter rule and would not violate the policy pertaining to remote vesting. Creditor's rights are no more appealing than in the case of any other life estate.

One must necessarily wonder as to what in the afore cited cases merited citation by the Wyoming Court other than oft cited phrases with respect to the necessity of use of the word "heirs" in its technical sense. Clearly the Court did not want to apply Shelley's Rule but was unwilling to judicially legislate it from the scene of Wyoming jurisprudence, and the majority selected a technique which has not resolved the matter in a clear or complete fashion. But before any final words on the matter, there remain the views expressed in the concurring opinion to *Crawford v. Barber*.

In the opinion of Justice Harnsberger, the legislature of the State of Wyoming had long ago put an end to the ancient mysticism surrounding such words as "heirs" or "heirs of the body." The Wyoming statute enacted in 1884 which he cites provides that "the term heirs, or other words of

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9. 385 P.2d at 657.

inheritance shall not be necessary to create or convey an estate in fee simple, and every conveyance of real estate shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant."<sup>10</sup> It is also to be noted that Wyoming statutes since 1882 provide that "every devise of land in any will shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate."<sup>11</sup> The two statutes evidence a legislative policy to pass all the estate of the grantor or devisor, regardless of technical words, unless a contrary intention is expressed. When the question is one of determining the quantum of the estate taken by a specific grantee or devisee, the statutes would not appear to be an obstacle to the use of time honored words of limitation so as to be precise in drafting the conveyance. However, the broad conclusion is stated that "heirs" or "heirs of the body" were "thereby robbed of significance as words of *limitation*. Consequently, when such words are used after grant of life estate, they merely designate the remaindermen."<sup>12</sup>

It is extremely difficult to speculate with respect to the effect of literal attempts to apply such a conclusion whenever such words are used in a conveyance. Assume the following: to A and the heirs of his body. Justice Harnsberger would apparently construe such language as creating a life estate in A with a remainder in fee simple to those persons who are issue of his body and would take upon intestate distribution of his estate. If the words have no significance as words of limitation, they must be words of purchase. The result would be that the 1949 legislature acted in vain when it provided that the use of language appropriate to create a fee tail creates a fee simple in the person who would have taken a fee tail,<sup>13</sup> for the typical way to create a fee tail is by the use of words of limitation. Assume the following: to A then to B and his heirs. In this situation the word "heir" follows the grant of a life estate. It hardly seems reasonable that this would be construed as a remainder in fee simple in B and those unknown persons who take his property upon death. Such a concept returns to the twelfth century during which time expectant heirs were required to give their consent to a conveyance when the enfeoffment was to B and his heirs.<sup>14</sup> Perhaps an analogy to Wild's case would be drawn so as to give B a life estate only and then remainder in fee to those who would take as in case of intestacy of B.<sup>15</sup>

One other illustration is appropriate. Assume: To A and then remainder to the heirs of his body. The concurring opinion would clearly treat this as a life estate in A, fee simple in those persons who are issue of the body and would take in case of intestate succession. An application of

10. Wyo. Stat. § 34-41 (1957).

11. Wyo. Stat. § 2-48 (1957).

12. 385 P.2d at 657.

13. Wyo Stat. § 34-48 (1957).

14. See POLLOCK & MAITLAND, *op. cit. supra* note 5 at ch. VI, § 2.

15. See Restatement, Property, § 283 (1940).

Shelley's Rule would create a fee tail in A and then the Wyoming statute would be effective to give A a fee simple.<sup>16</sup>

When such a probable result is considered, the validity of Justice Harnsberger's concern with a result that is inconsistent with the testator's intent is beyond question. While the effort to justify the result is overstated in terms of the loss of significance of words of limitation because of statute, it would seem appropriate that the court consider the statute as a legislative indication that ancient technical words are not necessary to conveyancing so that interpretation of a conveyance is to be governed solely by seeking the intent of the conveyor. This alone should provide sufficient legislative direction, which the court inferentially felt was necessary, to support Justice Harnsberger's opinion that the Rule in Shelley's case is not presently applicable. It is perhaps appropriate to note that in a very recent decision the same justice made clear his impatience with artificial deductions, fictions, and legalistic interpretations given words by courts but which are entirely unsuited to serve the purpose and carry out the intention of the laymen that use the words.<sup>17</sup>

What then comprises the "remains of Shelley's Rule" as evidenced by *Crawford v. Barber*? The majority opinion rejects the view that Shelley's Rule applies when a conveyance gives a life estate followed by a remainder to a group which would normally take the property by intestate succession from the life tenant. The Rule is applicable only if the remainder is limited to an indefinite line of inheritable succession from generation to generation. At this point it is not clear if the word "heirs" alone will suffice. Under the facts of the devise, there was not such a limitation. However, the failure of the opinion to refer to such fact and the emphasis upon the word "heirs" alone supports a conclusion that there will have to be additional evidence of an intent to use "heirs" in its ancient meaning. Even under this very restrictive interpretation, something would "remain" of Shelley's Rule and a resurrection is possible, particularly if the court's citation of cases was by way of illustrating when the Rule would be applied.

The concurring opinion completely rejects the Rule as a part of Wyoming law, but for far different reasons than the majority.

There are "remains" of Shelley's Rule which will persist until such time a majority of the court has an opportunity to gain support from legislative direction that will cause it to join the concurring opinion's rationale, or until the legislature takes direct action with respect to the Rule.

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16. *Id.* at § 101.

17. *Witzel v. Witzel*, 386 P.2d 103 (Wyo. 1963) (holding that an expressed intention in a deed that husband and wife take as joint tenants will create a joint tenancy rather than a tenancy by the entireties).