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LAW NOTES

THE APPLICATION OF THE RULE IN SHELLEY'S CASE TO TRUSTS

The Rule in Shelley's Case, non-technically expressed, is that rule which enlarges a life estate into a fee when the life estate is followed by a remainder to the heirs of the life tenant. The remainder to the life tenant's "heirs" is construed to be words of limitation and not words of purchase.

One technical statement of the rule, often adopted by courts, is that when a person takes an estate of freehold legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable character, to his heirs or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation entitles the ancestor to the whole estate.¹

Herein will be considered the effect and impact of the interposition of a trust situation on the application of the rule.

A prerequisite for the application of the rule is that the estate in the ancestor and that in the heirs must be of the same quality before they can coalesce; i.e., they must both be equitable or both legal.² Accordingly, when the estates are of different qualities — the one legal, the other equitable — such as a legal life estate and an equitable remainder, the Rule in Shelley's Case has no application.³ A trust situation often

1. *Green v. Green*, 90 U.S. (23 Wall.) 75, 23 L.Ed. 75 (1874), quoting 1 PRESTON ESTATES 263; *Farrell v. Faries*, 25 Del. Ch. 382, 22 A.2d 380 (1941); *Loring v. Eliot*, 82 Mass. (17 Gray) 568 (1860); *Ware v. Richardson*, 3 Md. 505 (1853). For varying statements of the rule, see 29 L.R.A. (N.S.) 973.

2. *Slater v. Rudderforth*, 25 App. D.C. 497 (1905); *Security Trust Co. v. Cooling*, 28 Del. Ch. 303, 42 A.2d 784 (1945); *Elsasser v. Elsasser*, 159 Fla. 696, 32 So.2d 579 (1947); *Harvey v. Ballard*, 252 Ill. 57, 96 N.E. 558 (1911); *Harlan v. Mannington*, 152 Iowa 707, 133 N.E. 367 (1911); *Cowman v. Classen*, 156 Md. 428, 144 Atl. 367 (1929); *Peter v. Peter*, 136 Md. 157, 110 Atl. 211 (1920); *Steele v. Smith*, 84 S.C. 464, 66 S.E. 200, 29 L.R.A. (N.S.) 939 (1909); *Burnett v. Burnett*, 17 S.C. 545 (1882); *Austin v. Payne*, 8 Rich. Eq. 49 (S.C. 1855); *Danner v. Trescott*, 5 Rich. Eq. 356 (S.C. 1852); *Porter v. Doby*, 2 Rich. Eq. 49 (S.C. 1845); RESTATEMENT, PROPERTY §312, comment *h* (1940); SIMES & SMITH, THE LAW OF FUTURE INTERESTS §1552 (1956).

3. *Green v. Green*, *supra* note 1; *Shackelford v. Bullock*, 34 Ala. 418 (1859); *Elsasser v. Elsasser*, *supra* note 2; *Corwin v. Rheims*, 390 Ill. 205, 61 N.E.2d 40 (1945); *Cowman v. Classen*, *supra* note 2; *Peter v. Peter*, *supra* note 2; *Shugrue v. Long*, 82 N.J.L. 717, 82 Atl. 905, 39 L.R.A.

presents a departure from this requirement. For example, suppose there is a grant to A in trust to manage, collect rents, and pay income to B for life, and at death of B the property is to go to B's heirs. B has an equitable life estate and the heirs have a legal remainder; thus the rule will not apply.

A purely passive, naked, or dry trust, i.e., a trust with no active duties imposed upon the trustee as to either the life tenant or the remainderman, is subject to the operation of the Statute of Uses and, the use being executed, both estates are legal. Both estates are then of the same quality and the Rule in Shelley's Case would apply, giving the life tenant a legal fee, a result which seems to be clearly settled law.⁴ An example of such a trust is a grant to A, in trust for B for life, remainder to the heirs of B. The Statute of Uses executes the use in both the life tenant and the remainder, making both legal. The rule then applies.

As already seen, if the estate of the ancestor and that of the heirs are different in quality, the rule will not apply. Thus in a trust such as "to A in trust to pay income to B for life, remainder to B's heirs," the duty to pay income to the life tenant is an active duty resulting in an equitable life estate and a legal remainder. Accordingly the Rule in Shelley's Case would have no application.⁵ Conversely, if the deed is "to A in trust for B for life, then to convey to B's heirs," the life estate is legal and, the duty to convey being an active duty, the remainder is equitable and the rule has no application.^{5a} But if the trust were active as to both the life tenant and the remainderman, such as a grant "to A in trust to pay income to B for life, then to convey to the heirs of B," active duties

(N.S.) 257 (1912); Appeal of Van Syckel, 319 Pa. 347, 179 Atl. 721 (1935); Thurston v. Thurston, 6 R.I. 296 (1859); Youmans v. Youmans, 115 S.C. 186, 105 S.E. 31 (1920); Steele v. Smith, *supra* note 2; Gadsden v. Desportes, 39 S.C. 131, 17 S.E. 706 (1893); Gourdin v. Deas, 27 S.C. 479, 4 S.E. 64 (1887); Austin v. Payne, *supra* note 2.

4. Burham v. Baltimore Gas & Elec. Co., 217 Md. 507, 144 A.2d 80 (1958) (*semble*); Burris v. Burris, 104 S.C. 441, 89 S.E. 405 (1915); Sligh v. Sligh, 92 S.C. 307, 83 S.E. 260 (1914); Boyles v. Wagner, 91 S.C. 183, 74 S.E. 380 (1911); Clark v. Neves, 76 S.C. 480, 57 S.E. 614, 12 L.R.A. (N.S.) 298 (1907); Burnett v. Burnett, 17 S.C. 545 (1882) (alternative holding); RESTATEMENT, PROPERTY §312, comment *h* (1940).

5. Green v. Green, *supra* note 1; Shackelford v. Bullock, *supra* note 3; Little v. Wilcox, 119 Pa. 439, 13 Atl. 156 (1898); Thurston v. Thurston, *supra* note 3; Gadsden v. Desportes, *supra* note 3; Carrigan v. Drake, 36 S.C. 354, 15 S.E. 339 (1892); Gourdin v. Deas, *supra* note 3; Austin v. Payne, *supra* note 2.

5a. Steele v. Smith, *supra* note 2 (alternative holding).

Anderson: The Application of the Rule in Shelley's Case to Trusts are in the trustee as to both estates, so they would both be of an equitable quality and the rule would apply.⁶

Even so, there is a substantial body of law throughout the various jurisdictions which excepts from the operation of the rule a situation where both estates are of an equitable quality or nature *if the trust is considered to be executory*. One case states, however, that rather than there being a positive rule excepting an executory trust from the operation of the rule, courts will merely attempt to except from the strict rule of law those cases of executory trusts in which they can see from the instrument itself that the rule would contravene the intention of the settlor.⁷ It would seem that this theory rests on the principle that an executory trust is construed or enforced by an equity court, which court, not being bound by the strict rules of law, will attempt to ascertain and enforce the intention of the grantor, thereby excepting such a trust from the rule.⁸

On the other hand, statements seemingly to the contrary are to be found, that in equity, equitable estates are construed as legal estates and are subject to the same incidents, properties, and consequences that belong to similar estates at law.

6. *Croxall v. Sherrerd*, 72 U.S. (5 Wall.) 577, 18 L.Ed. 572 (1867); *Carpenter v. Hubbard*, 263 Ill. 571, 105 N.E. 688 (1914); *Newhall v. Wheeler*, 7 Mass. 189 (1928); *Brown v. Renshaw*, 57 Md. 67 (1881); *Starnes v. Hill*, 112 N.C. 1, 16 S.E. 1011, 22 L.R.A. 598 (1893); *Neff v. Abert*, 9 Ohio App. 286 (1918); *Cowing v. Dodge*, 19 R.I. 605, 35 Atl. 309 (1896); *Angell's Petition*, 13 R.I. 630 (1882); *Burnett v. Burnett*, 17 S.C. 545 (1882) (alternative holding to active trust becoming passive); *Danner v. Trescott*, 5 Rich. Eq. 356 (S.C. 1852) (use upon use situation, giving life tenant fee simple). *But see* *Friedmeyer v. Lynch*, 226 Iowa 251, 284 N.W. 160 (1939) (rule not applicable to trust situation); *Hibler v. Hibler*, 208 Iowa 586, 226 N.W. 8 (1929) (rule applies only if no trust was created).

7. *Angell's Petition*, *supra* note 6. Compare SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* §1553 (2d ed. 1956) (to the effect that there is no exception to the rule with respect to executory trusts).

8. *Green v. Green*, *supra* note 1; *Sims v. Georgetown College*, 1 App. D.C. 72 (1893); *Bross v. Bross*, 123 Fla. 758, 167 So. 669 (1936); *Edmondson v. Dyson*, 2 Ga. 307 (1847); *Baker v. Scott*, 62 Ill. 86 (1871); *Siceloff v. Redman's Adm'r.*, 26 Ind. 251 (1866); *Berry v. Williamson*, 50 Ky. R. 245 (1850); *Loring v. Elliott*, 82 Mass. (16 Gray) 568 (1860) (dictum); *Henderson v. Henderson*, 64 Md. 185, 1 Atl. 72 (1885); *Cushing v. Blake*, 30 N.J. Eq. 689 (1879); *Wood v. Burnham*, 6 Paige 513 (N.Y. 1837); *Eaton v. Tillinghast*, 4 R.I. 276 (1856); *Steele v. Smith*, *supra* note 2; *Reynolds v. Reynolds*, 61 S.C. 243, 39 S.E. 391 (1901); *Shaw v. Robinson*, 42 S.C. 354, 20 S.E. 161 (1894); *Carrigan v. Drake*, *supra* note 5; *Porter v. Doby*, *supra* note 2 (citing *Bagshaw v. Spencer*, 1 Ves. Sr. 142 (1748)).

Thus, in giving effect to the limitations of trusts, courts of equity adopt rules of law applicable to legal estates.⁹

Assuming that the intention of the grantor will govern in cases of executory trusts, a recurrent problem is that of defining such a trust. A variety of definitions are available, the simplest test being whether the settlor of the trust has acted as his own conveyancer, i.e., not merely stating his desires and leaving the conveyancing to the trustee. If the grantor has left the conveying to the trustee, it is considered to be an executory trust.¹⁰ Another test to determine if the trust is executory is whether or not the creator of the trust expressed his intention in general terms and the limitations of the trust are imperfectly declared, leaving the manner in which the intent is to be carried into effect substantially in the discretion of the trustee.¹¹ These two tests appear to be approximately the same, the difference being in construction as to the imperfectly declared limitations. The latter rule, it seems, would include the former. Some cases, apparently relying only on the literal interpretation of the conveyancer test, say that a duty or requirement on the trustee, or even a direction to him, to make a future conveyance will result in an executory trust construction.¹² Others, apparently relying on the required general expression of intent coupled with imperfectly declared limitations, say that something more than a mere direction to convey or a required conveyance is necessary before a trust will be considered executory.¹³

South Carolina has taken the unique position that any active trust is an executory trust. In the ancient case of *Porter v.*

9. *Martling v. Martling*, 55 N.J. Eq. 771, 39 Atl. 203, 204 (1898). *But cf.* SIMES & SMITH, THE LAW OF FUTURE INTERESTS, *supra* note 7.

10. *Wayne v. Lawrence*, 58 Ga. 15 (1875) (dictum); *Sutliff v. Aydelott*, 373 Ill. 633, 27 N.E.2d 529 (1940); *Berry v. Williamson*, *supra* note 8; *Carradine v. Carradine*, 33 Miss. 698 (1857); *Tillinghast v. Coggeshall*, 7 R.I. 383 (1863) (stating rule, but refusing to apply it).

11. *Wiley v. Smith*, 3 Kelley 551 (Ga. 1847); *Carradine v. Carradine*, *supra* note 10; *Martling v. Martling*, *supra* note 9; *Cushing v. Blake*, *supra* note 8; *Williams v. Houston*, 57 N.C. (4 Jones Eq.) 277 (1898); *Neff v. Abert*, *supra* note 6.

12. *Sutliff v. Aydelott*, *supra* note 10 (requirement on trustee to convey raises presumption of executory trust); *Wayne v. Lawrence*, *supra* note 10 (direction to convey where all limitations complete makes trust executory); *Berry v. Williamson*, *supra* note 8 (trust executory though trustee has only to convey); *Steele v. Smith*, *supra* note 2.

13. *Cushing v. Blake*, 30 N.J. Eq. 689 (1879) (direction to convey; all limitations declared; trust not executory); *Neff v. Abert*, *supra* note 6 (must be imperfectly declared limitation coupled with direction to convey); *Martling v. Martling*, *supra* note 11; *Tillinghast v. Coggeshall*, *supra* note 10.

Doby,¹⁴ relying on the English case, *Bagshaw v. Spencer*,¹⁵ it was said that "the test of an executory trust is that the trustee has some duty to perform, for the performance of which it is necessary that the title be regarded as abiding in him."¹⁶ It is here worth noting that while this was the rule in England at one time, it was soon overruled.¹⁷ One possible analysis would be that the court confused the terms "unexecuted trust," meaning a trust which is not executed by the Statute of Uses, and "executory trust," meaning a trust which leaves substantial discretion in the trustee to accomplish the general intention of the settlor.

At any rate, the test enunciated in *Porter v. Doby* was reaffirmed in *Carrigan v. Drake*, *Shaw v. Robinson*, and *Reynolds v. Reynolds*.¹⁸ A subsequent case, *Steele v. Smith*,¹⁹ holds that a duty to convey is such a duty as to prevent the operation of the Statute of Uses and an active duty. The court then states that "as the trust would be executory under the Statute of Uses, we see no good reason for holding it not executory when considering the application of the Rule in Shelley's Case."²⁰ The impact of this statement is to make any active trust executory and therefore without the operation of the Rule in Shelley's Case. If this is correct, a very broad exception to the rule is thus created.

The use of the word "executory" as applied to the non-operation of the Statute of Uses is also worthy of notice. The court, however, seemingly recognizes the generally accepted definition of an executory trust by quoting a treatise²¹ on the subject:

All trusts are executory in one sense of the word; that is, the trustee must have some duty, either active or passive, to perform, so that the Statute of Uses shall not execute the estate in the *cestui que trust*, and leave nothing in the

14. See note 2, *supra*.

15. See note 8, *supra*.

16. *Porter v. Doby*, 2 Rich. Eq. 49, 53 (S. C. 1845).

17. 1 AMERICAN LAW OF PROPERTY §4.46 (1952); SIMES & SMITH, THE LAW OF FUTURE INTERESTS §1553 (2d ed. 1956).

18. *Carrigan v. Drake*, *supra* note 5; *Shaw v. Robinson*, *supra* note 8; *Reynolds v. Reynolds*, *supra* note 8.

19. *Steele v. Smith*, 84 S.C. 464, 66 S.E. 200, 29 L.R.A. (N.S.) 939 (1909).

20. *Id.* at 471, 66 S.E. 200, 202.

21. PERRY, TRUSTS §359; see also 1 AMERICAN LAW OF PROPERTY §4.46 (1952); RESTATEMENT, PROPERTY §312, comment *h* (1940); SCOTT, TRUSTS §127.2 (2d ed. 1956).

trustee. But such is not the meaning of the judges when they speak of *executed* trusts and *executory* trusts. These words refer rather to the *manner and perfection* of their creation than to the action of the trustee in administering the property. Thus a trust created by a deed or will so clear and certain in all its terms and limitations that a trustee has nothing to do but to carry out all the provisions of the instrument according to its letter is called an *executed* trust. In these trusts technical words receive their legal meaning, and the rule applicable to legal estates governs the equitable estates thus created. On the other hand, an *executory* trust is where an estate is conveyed to a trustee upon trust, to be by him conveyed or settled upon other trusts in certain contingencies, or upon certain events, and these other trusts are imperfectly stated, or mere outlines of them are stated, to be afterwards drawn out in a formal manner, and are to be carried into effect according to the final form which the details and limitations shall take under the direction thus given. They are called *executory*, not because the trust is to be performed in the future, but because the trust instrument itself is to be molded into form and perfected according to the outlines or instructions made or left by the settlor or testator.²²

The court then declares the trust *executory* and without the operation of the Rule in Shelley's Case, saying it falls within this definition.²³ Other South Carolina cases also seemingly indicate that the rule will have no application to an active trust, since such a trust is construed to be *executory*.²⁴ Thus, if in South Carolina, a deed is made to T in trust to pay income to A for life, then to convey to A's heirs, the rule will not apply although both estates are equitable, for this is said to be an *executory* trust and without the operation of the Rule in Shelley's Case. It should here be noted that the proposition that the rule will apply when both estates are equitable is still in effect in South Carolina where an active trust situation is *not* present, thus the South Carolina cases applying the Rule in Shelley's Case where both estates are equitable can

22. Note 19 *supra* at 470, 66 S.E. 200, 201.

23. The court also found the rule to be inapplicable because of the difference in the qualities of the estates.

24. Highland Park Mfg. Co., v. Steele, 232 Fed. 10 (4th Cir. 1916); Youmans v. Youmans, 115 S.C. 186, 105 S.E. 31 (1920); Austin v. Payne, 8 Rich. Eq. 49 (S.C. 1855).

be reconciled with the cases just cited. For example, in *Danner v. Trescott*,^{24a} a limitation to A, to the use of A, in trust for B for life, then in trust to and for B's heirs was held to constitute a fee in B, this being a use upon a use resulting in both estates being equitable. South Carolina is said to be unique in this doctrine of an active trust being executory; in fact one authority states that South Carolina is the only jurisdiction reaching this conclusion today.²⁵

This same authority states also that, regardless of cases to the contrary, there is no exception to the Rule in Shelley's Case with respect to executory trusts.²⁶ It would seem, however, from the cases herein cited, that there is a substantial body of law excepting such trusts from the rule, the primary difficulty being the varying definitions of an executory trust.

While the South Carolina definition is contrary to the settled general definition of an executory trust, it appears that the doctrine has merit. The Rule in Shelley's Case has long been held to be a rule of law which operates contrary to the intention of the creator, settlor, or testator. The reason and rationale of the rule have long been extinct, but its application has persisted under the doctrine of stare decisis. Virtually all jurisdictions, including South Carolina, have now recognized this and abolished the rule by statute.^{26a} However, any instrument created prior to the enactment of the statute is to be construed under the common law. By its definition of an executory trust, South Carolina has created a broad exception to the rule, thus giving greater weight to the purpose and intent of the draftsman of the instrument and achieving a result more nearly that intended by the settlor of the trust. As a result, fewer cases in South Carolina reach a result which is obviously contrary to that intended by the settlor.

24a. 5 Rich. Eq. 356 (S.C. 1852).

25. SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* §1553 (2d ed. 1956).

26. *Ibid.*

26a. S.C. CODE §57-2 (1952).

"The rule of law known as the Rule in Shelley's Case is hereby abolished in the following particulars, to wit: When, by deed or will or by any instrument in writing, a remainder in lands, tenements, hereditaments or other real estate shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs or heirs of the body of such tenant for life shall take as purchasers in fee simple, by virtue of the remainder so limited to them. The provisions of this section shall not affect wills, deeds and other instruments in writing executed prior to October 1, 1924, or the construction of such wills, deeds and other instruments in writing."

A further problem arises in that a trust may be active when established, yet become passive due to the occurrence of some subsequent event. For example, prior to the removal of the disability of married women, A transfers to T, trustee, imposing active duties on the trustee to preserve the separate estate of W for her life, then to W's heirs. H, husband of W, dies during W's lifetime. At the outset, it is clear that W has an equitable life estate and there being a legal remainder, the Rule in Shelley's Case will have no application. But after the occurrence of a subsequent event (here the death of H), the active duties terminate and the estates become of like quality. Would the Rule in Shelley's Case then apply?

It seems well settled that the extinguishing of the active duties imposed on the trustee will call the Statute of Uses into play, causing the use to be executed in the beneficiary, and thereby changing his heretofore equitable estate into a legal one.²⁷ From that point the cases are in substantial conflict as to whether the Rule in Shelley's Case can then apply if it were inapplicable when the trust was created.

Pennsylvania has met the problem squarely in holding that events subsequent to the creation of the instrument, causing the estates of the life tenant and the remainderman to become of the same quality, will call the rule into play and the estate will be enlarged into a fee.²⁸ No other jurisdiction is so clear on this issue.

At least one Maryland case, by way of dictum, indicates that upon the termination of an active trust, the estates become of the same quality and the rule would become op-

27. *Jennings v. Kotz*, 299 Ill. 465, 132 N.E. 625 (1921); *Moore v. Stinson*, 144 Mass. 594, 12 N.E. 410 (1887); *Glasgow v. Missouri Car & Foundry Co.*, 229 Mo. 585, 129 S.W. 900 (1910); *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889, Ann. Cas. 1917A, 514 (1916); *Cameron v. Hicks*, 141 N.C. 21, 53 S.E. 728, 7 L.R.A. (N.S.) 407 (1906); *Zelley v. Zelley*, 101 N.J. Eq. 37, 136 Atl. 738 (1927); *Milton v. Pace*, 85 S.C. 373, 67 S.E. 458 (1910); *Kennedy v. Colclough*, 67 S.C. 121, 45 S.E. 139 (1903); *Shaw v. Robinson*, 42 S.C. 347, 20 S.E. 161 (1894); *Davis v. Townsend*, 32 S.C. 115, 10 S.E. 837 (1890); *Burnett v. Burnett*, 17 S.C. 545 (1882); *Austin v. Payne*, 8 Rich. Eq. 9 (1855); *Temple v. Ferguson*, 110 Tenn. 84, 100 Am. St. Rep. 791, 72 S.W. 455 (1903). *Contra*, *Nave v. Bailey*, 329 Ill. 234, 160 N.E. 605 (1928) (stating that statute executes use, if at all, only when use is created); *Lord v. Comstock*, 240 Ill. 492, 88 N.E. 1012 (1909), *affirming* *McFall v. Kirkpatrick*, 236 Ill. 281, 86 N.E. 139 (1908) (trust once active remains so for purposes of Statute of Uses).

28. *Wilson v. Heilman*, 219 Pa. 237, 68 Atl. 674 (1908); *Shalters v. Ladd*, 141 Pa. 349, 21 Atl. 596 (1891) (dictum); *Carson v. Fuhs*, 131 Pa. 256, 18 Atl. 1017 (1890); *William's Appeal*, 83 Pa. 377 (1877); *Dodson v. Ball*, 60 Pa. 492, 100 Am. Dec. 586 (1869) (*semble*); *Nice's Appeal*, 50 Pa. 143 (1865); *McKee v. McKinley*, 33 Pa. 92 (1859); *Stacy v. Rice*, 27 Pa. 75, 67 Am. Dec. 447 (1856).

eratable.²⁹ There is some indication that the same rule would apply in North Carolina.³⁰

As to South Carolina, the question seems not to have been squarely presented. There are inferences, some strong, some weak, to the effect that subsequent events will call the Rule in Shelley's Case into existence when it did not exist originally.³¹ However the problem in these cases was disposed of on other grounds without meeting this issue.

There are other cases posed by the provisions of the 1868 South Carolina Constitution removing the disabilities of married women and eliminating the need for the interposition of a trust to protect the separate estate. Before the constitutional provision, trusts were established such as "to A in trust for the sole use of W [a married woman] for her life," imposing active duties on the trustee, "remainder to W's heirs." The disappearance of the need caused the active duties to terminate and the Statute of Uses to operate, and the theretofore equitable estate of the wife became legal. The problem of the application of the Rule in Shelley's Case was there more directly met, and the position seems to be taken that the quantum or incident of the estate originally granted cannot be changed by that subsequent event.³² Similarly the court, in *First Carolinas Joint Stock Land Bank v. Deschamps*,³³ said:

Even if the trust in this deed was executed upon the death of the life tenant, that does not affect its construction as a trust deed. Such a deed takes effect when it is made, and the construction that would be given it at that time holds true throughout the life of the instrument. The court might have been called upon for the construction of this deed before the death of the life tenant and before the trust became executed. Can it be contended that the construction now asked to be put upon the deed should be different from the construction that would have been put on it if it had come before the court prior to the death

29. *Burnham v. Baltimore Gas & Elec. Co.*, 217 Md. 507, 144 A.2d 80 (1958).

30. *Starnes v. Hill*, 112 N.C. 1, 16 S.E. 1011, 22 L.R.A. 598 (1893) (dictum involving contingent remainder).

31. *Youmans v. Youmans*, *supra* note 24; *Sligh v. Sligh*, 99 S.C. 307, 83 S.E. 260 (1914); *Kennedy v. Colclough*, *supra* note 27; *Reynolds v. Reynolds*, *supra* note 8; *Shaw v. Robinson*, *supra* note 27; *Porter v. Doby*, *supra* note 14.

32. *Milton v. Pace*, *supra* note 27; *Gadsden v. Desportes*, 39 S.C. 131, 17 S.E. 706 (1893); *Withers v. Jenkins*, 14 S.C. 598 (1880).

33. 171 S.C. 466, 172 S.E. 622, (1934).

of the life tenant? The deed cannot be construed as meaning one thing one day and something else the next.³⁴

In this connection also, there are to be found statements to the effect that when the Statute of Uses converts an equitable estate into a legal one, the same conditions, limitations, and qualities attach to the latter as were possessed by the former.³⁵ These statements were made regarding trusts which were passive or dry at the outset, but the general application is readily apparent.

Some authorities take the position that if the requirements of the rule are met after the instrument takes effect, the rule would apply, provided they are met "by virtue of the provisions in the creating instrument which contemplate the later change."³⁶ The rationale of this latter requirement is that were it otherwise, the estates would not have been created in the same instrument and the rule could not apply.

On the other hand, a vigorous dissent to the proposition of subsequent events calling the rule into play is expressed by another authority, whose contention is that if the rule was inapplicable to the conveyance when the instrument took effect, it could not thereafter become operative:³⁷

The Rule in Shelley's Case is absurd enough as usually applied; but to extend it so as to transform a contingent remainder in the heirs into a vested remainder in the ancestor years after the original conveyance and just because the ancestor's equitable life estate became a legal one is even more ridiculous.³⁸

There seems to be considerable merit in this position, for otherwise what had been only a life estate in the ancestor is suddenly enlarged into a fee upon the operation of the rule after some supervening event which allows the Statute of Uses to operate. It would be more consistent with the normal intention of the testator to refuse to apply the rule if it were inapplicable to the instrument when it became effective.

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34. *Id.* at 479-480, 172 S.E. 622, 627.

35. *Young v. McNeil*, 78 S.C. 143, 59 S.E. 986 (1907); *Willimon v. Holmes*, 4 Rich. Eq. 475 (S.C. 1850).

36. 47 AM. JUR., *Rule in Shelley's Case* §§26, 29; 1 AMERICAN LAW OF PROPERTY §4.49 (1952); 3 POWELL, REAL PROPERTY §379 (1952); RESTATEMENT, PROPERTY §312, comment *q* (1940).

37. SIMES & SMITH, THE LAW OF FUTURE INTERESTS §1562 (2d ed. 1956).

38. *Ibid.*