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## Limitations of Personal Property

Manley O. Hudson

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## LIMITATIONS OF PERSONAL PROPERTY.

1. Since chattels personal were never subjects of feudal tenure,<sup>1</sup> the creation of legal interests in them is not restricted by the artificial rules which apply in the creation of legal interests in realty. Though it may be proper to speak of the seisin of chattels,<sup>2</sup> there has never been a principle that such seisin cannot be put in abeyance. Land can only be held of some one,<sup>3</sup> but chattels may be owned absolutely.<sup>4</sup> Strictly speaking, *estates* in chattels are therefore impossible,<sup>5</sup> for *estate* connotes qualified ownership. Any disposition of a chattel, unless it be by way of pledge or bailment, or unless otherwise limited, will pass the absolute interest in it. Words of limitation are unnecessary; while a conveyance of land to A formerly passed but a life estate,<sup>6</sup> a similar gift of a chattel made him absolute owner. The usual limitation of personalty to A, his executors, administrators and assigns is no more effective than a limitation to A.<sup>7</sup> So a limitation to A and his heirs—the words “and his heirs” are so much surplusage,<sup>8</sup> for there can be no *descent* of personalty. A gift of personalty to A and the

1. Williams, *Personal Property* (16th ed.) 1 to 3.

2. See Professor Maitland's "The Seisin of Chattels," 1 *Law Quarterly Review* 324, and Professor Ames' "The Disseisin of Chattels," 3 *Harvard Law Review* 23.

3. In the United States a tenant in fee simple holds of the State, unless tenure has been abolished, or *Quia Emptores* is not in force. Gray, *Perpetuities* (2d ed.) §§ 22 *et seq.*; Williams, *Real Property*, (17th int. ed.) 68.

4. In mediæval times chattels were probably not owned absolutely. 2 Pollock & Maitland, *History of English Law* (2d ed.) 150 to 153.

5. Williams, *Real Property* (17th int. ed.) 7, 365; Leake, *Property in Land* (2d ed.) 3; Tiffany, *Real Property*, § 17, note; Schouler, *Personal Property*, § 17.

6. This common law rule was changed by the Missouri Statute of 1855. Now Revised Statutes 1909, § 2870.

7. Jarman, *Wills* (6th ed.) 1182, 1617.

8. No joint ownership could result, for A cannot have heirs while yet living, and the words are words of limitation, not of purchase. It is possible that the context may show the word "heirs" to have been used in another than its technical sense, to designate children, Jarman, *Wills* (6th ed.) 1570, in which event joint ownership will result if children are alive at the time of the gift. On the application of the Rule in *Wild's Case* (1599) 6 Coke 16b, see *infra*.

heirs of his body confers on A the absolute interest since an estate tail cannot be created in such property,<sup>9</sup> neither in chattels personal nor chattels real.

2. Is the Rule in Shelley's Case,<sup>10</sup> or any similar rule, applicable to personal property? The Missouri statutes have abolished this Rule as to realty,<sup>11</sup> but they do not in terms apply to personalty.<sup>12</sup> As originally applied, the Rule in Shelley's Case had to do only with realty, for it was probably a "rule of tenure founded on feudal principles."<sup>13</sup> But more recently, the statement is frequently made that "it is no less applicable to gifts of personalty."<sup>14</sup> It is settled in the English law that where a bequest is made to A for life and then to A's "executors, administrators and assigns," A takes the absolute interest.<sup>15</sup> This is only a rule of construction,<sup>16</sup> but it is fre-

9. *Halbert v. Halbert* (1855) 21 Mo. 277; *State ex rel. Haines v. Tolson* (1880) 73 Mo. 320 (*semble*); *Machen v. Machen* (1849) 15 Ala. 373; *In re Walker* (1908) 2 Ch. 705; 3 Law Series, Missouri Bulletin, p. 9, note 48; Tiffany, Real Property, § 26; Jarman, Wills (6th ed.) 1193 (citing numerous cases).

10. (1581) 1 Co. Rep. 93 b.

11. Revised Statutes 1825, p. 794; *Ibid.* 1845, c. 32, § 7; *Ibid.* 1865, c. 108, § 6, now *Ibid.* 1909, § 2874. For a discussion of the effect of the various changes made in the wording of this statute, see, 1 Law Series, Missouri Bulletin, p. 10, note 35; p. 11, note 36.

12. The statute of 1845, Revised Statutes 1845, c. 32, § 7, provided that the donees of the remainder should take as "purchasers," but its phrasing applies only to realty; the statute of 1865, now Revised Statutes 1909, § 2874, provides for their taking as "purchasers in fee simple," which precludes its application to personalty. See also Revised Statutes 1909, § 578, which is expressly limited to devises of real estate.

13. *Van Grutten v. Foxwell* (1897) Appeal Cases 658, 668. See 23 Harvard Law Review 51.

14. *Comfort v. Brown* (1878) 10 Ch. Div. 146. See 29 L. R. A. (N. S.) 1146; 22 Am. & Eng. Encyc. 512, and cases cited.

15. *Avern v. Lloyd* (1868) L. R. 5 Eq. 383; Jarman, Wills (6th ed.) 1860; Theobald, Wills (5th ed.) 423; 4 Illinois Law Review 639. The proposition stated in the text may be due to a statement of Lord Coke's. Co. Lit. 54 b. The use of the word "assigns" tends to show that the executors and administrators were not intended to take beneficially. *Graftey v. Humpage* (1838) 1 Beav. 46, 52; Williams, Personal Property (16th ed.) 365. In *Alger v. Parrott* (1866) L. R. 3 Eq. 328, the remainder was given to "personal representatives," but the original donee took absolutely.

16. *Powell v. Boggis* (1866) 35 Beav. 535, 541; *Atkinson v. L'Estrange* (1885) L. R. Ir., 15 Ch. 340, 343; Williams, Personal Property (16th ed.) 365. Professor Kales well states the proposition in the text in 4 Illinois Law Review 639.

quently referred to as analogous to the Rule in Shelley's Case.<sup>17</sup> Where the bequest is to A for life, with remainder to his heirs, it has been held<sup>18</sup> that A takes the absolute interest by analogy to the Rule in Shelley's Case, but the intention of the testator for a different result will be effectuated.<sup>19</sup> Now the Rule in Shelley's Case is a rule which defeats intention where necessary.<sup>20</sup> It would seem, therefore, that it is a rule of construction instead of the Rule in Shelley's Case which is applied to personal property. The more recent and better considered cases hold that the Rule has no application to personalty,<sup>21</sup> and this view has met general approval from commentators.<sup>22</sup>

There is more difficulty where a bequest to A for life is followed by a remainder to the heirs of A's body. In numerous decisions it has been held that this confers an absolute interest on A.<sup>23</sup> This is probably to be attributed to a general rule of construction that "terms, which, if applied to real property, would give an estate tail, pass the absolute interest in personal

17. *Glover v. Condell* (1896) 163 Ill. 566; but see *Lord v. Comstock* (1909) 240 Ill. 492; *Knox v. Barker* (1898) 8 N. D. 272.

18. *Horne v. Lyeth* (1818) 4 Har. & J. (Md.) 431 (the decision is by a *nisi prius* court). Cf. *Hammer v. Smith* (1853) 22 Ala. 433; *Warner v. Sprigg* (1883) 62 Md. 14; *Taylor v. Lindsay* (1884) 14 R. I. 518; *Knox v. Barker* (1898) 8 N. D. 272; *Comfort v. Brown* (1878) 10 Ch. Div. 146. The American cases are discussed by Professor Kales in 4 Illinois Law Review 639.

19. *Dull's Estate* (1890) 137 Pa. St. 112; *Evans v. Weatherhead* (1902) 24 R. I. 502; *Bennett v. Bennett* (1905) 217 Ill. 434. But cf. *Hughes v. Niklas* (1889) 70 Md. 484.

20. Tiffany, Real Property, § 132. Lord Mansfield expressed a contrary view in *Perrin v. Blake* (1769) 1 W. Bl. 672, but his decision was overruled and is not law. See 5 Gray, Cases on Property (2d ed.) 89. But his conception of the Rule may have influenced the decision of the personal property cases. 4 Illinois Law Review 643.

21. *Smith v. Butcher* (1878) 10 Ch. Div. 113; *Jones v. Rees* (Del., 1908) 69 Atl. 785; *Lord v. Comstock* (1909) 240 Ill. 492.

22. 8 Columbia Law Review 573; 23 Harvard Law Review 51; 4 Illinois Law Review 643.

23. *Dott v. Cunningham* (S. C., 1794) 1 Bay 453 (deed); *Polk v. Faris* (Tenn., 1836) 9 Yerg. 209 (deed); *Watts v. Clardy* (1848) 2 Fla. 369 (will and deed); *Machen v. Machen* (1849) 15 Ala. 373 (will); *Powell v. Brandon* (1852) 24 Miss. 343 (will); *Hampton v. Rather* (1855) 30 Miss. 193 (deed); *Hughes v. Niklas* (1889) 70 Md. 484 (leasehold); *Mason v. Pate* (1859) 34 Ala. 379; *Smith v. McCormick* (1874) 46 Ind. 135. The English cases are in accord. *Garth v. Baldwin* (1755) 2 Ves. 646; Theobald, Wills (5th ed.) 424.

property."<sup>24</sup> As a rule of construction, it should yield to a clear expression of intention,<sup>25</sup> and the more recent cases show a tendency toward this liberalization.<sup>26</sup> It may be doubted whether terms which would create an estate tail in realty only by implication should ever be held to give an absolute estate in personalty,<sup>27</sup> unless such an intention is clearly expressed. Logically, the Rule in Shelley's Case cannot be applied where the later gift is to "heirs of the body" unless it is also to be applied where the later gift is to "heirs." It is submitted that the Rule has no application to personalty and that the cases which profess to apply it may all be explained on other grounds. Though the Rule was recognized in Missouri as applying to realty before the statutes abolished it,<sup>28</sup> there is no reason for now applying it to personalty, and the fact of its abolition as to realty is strong reason against such application.<sup>29</sup>

3. Does the Rule in Wild's Case,<sup>30</sup> or any similar rule, apply to personal property? This Rule is a rule of construction to the effect that "if a devise is made to A and his children,

24. *Halbert v. Halbert* (1855) 21 Mo. 277.

25. Gray, *Perpetuities* (2d ed.) § 647, note 3. In *Audsley v. Horn* (1859) 1 De G. F. & J. 226, 236, Lord Campbell said, "The general rule, that words in a will which create an estate tail in realty will give an absolute interest in personalty, is founded upon the desire to give effect to the intention of the testator as far as the rules of law will permit. But the rule ought not to prevail where it would entirely defeat the intention of the testator, and where, without any violation of the rules of law, the intention of the testator may be carried into effect."

26. *Ex parte Wynch* (1854) 5 De G. M. & G. 188 (gift of an annuity to A for life and then to her issue. Held, A takes for life only); *Tingley v. Harris* (1898) 20 R. I. 517; *In re Bishop and Richardson's Contract* (1899) 1 I. R. 72.

27. 3 Law Series, Missouri Bulletin, p. 9, note 48; *Tothill v. Pitt*, (1816) 1 Madd. 488.

28. *Riggins v. McClellon* (1859) 28 Mo. 23; *Tesson v. Newman* (1876) 62 Mo. 198.

29. *Sands v. Old Colony Trust Co.* (1907) 195 Mass. 575. But cf. *Powell v. Brandon* (1852) 24 Miss. 343. In the latter case it is not clear that the Rule had been abrogated as to realty.

30. (1599) 6 Coke 16b. The rule as stated in Wild's Case was not involved by its facts: "If A devises his lands to B and to his children or issue, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issues should take and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore there such words shall be taken as words of limitation."

and A has children living at the time of the devise, A and the children are at common law joint tenants<sup>31</sup> for life; if A has, at that time, no children he takes an estate tail.<sup>32</sup> In the latter event, "children" is a word of limitation. The reason for the Rule is well stated by Lord St. Leonards, "because the children cannot take, not being in *rerum natura* at the time of the devise; therefore an estate tail is given to the parent in order that it may descend upon them."<sup>33</sup> Obviously, no such reason exists for construing gifts of personalty for no estate tail in personalty can be created, and if the parent were given an absolute interest, his children could never take by descent. To confer an estate tail in realty on the parent is to make some provision (not certain, in view of the possibility of docking the entail) for the children; but an absolute interest in personalty in the parent is in no sense a provision for the children. When personalty is given to A and his children and no children are alive at the time, A becomes absolute owner because an immediate gift is intended and A is the only donee to take.<sup>34</sup> This result is reached without any application of the Rule in Wild's Case. But if an annuity were so given, A would take only for life unless the Rule in Wild's Case be applied.<sup>35</sup> In *Doe d. Gigg v. Bradley*,<sup>36</sup> the word "children" was held to be a word of limitation, as a matter of construction, but the Rule in Wild's Case was not mentioned. On the authority of that case, Lord Brougham in *Heron v. Stokes*,<sup>37</sup> said entirely *obiter*, that the Rule applies to personalty. But in *Audsley v. Horn*,<sup>38</sup> Lord Campbell, who took part in the decision of *Heron v. Stokes*, held "deliberately" that the Rule does not

31. In Missouri, today, they would be tenants in common unless otherwise designated. Revised Statutes 1909, § 2878.

32. 5 Gray, Cases on Property (2d ed.) 250.

33. *Heron v. Stokes* (1842) 4 Ir. Eq. 284, 291.

34. Jarman, Wills (6th ed.) 1915.

35. *Ibid.* 1138; *Nichols v. Hawkes* (1853) 10 Hare 342; *Blight v. Hartmoll* (1879) 19 Ch. Div. 294.

36. (1812) 16 East 399.

37. (1845) 12 Cl. & F. 161. Previous decisions of the same case are reported in 3 Ir. Eq. 163 and 4 Ir. Eq. 284. In the latter, Lord St. Leonards (then Sir Edward Sugden) was clearly of the opinion that the Rule in Wild's Case has no application to personalty.

38. (1859) 1 De G. F. & J. 226 (affirming 26 Beav. 195).

apply to personalty. This seems to be settled in English law.<sup>39</sup>

In the United States, only one case seems to have applied the Rule in Wild's Case to personalty, and it was poorly considered. In *Johnson v. Johnson*,<sup>40</sup> there was a gift of land and slaves to A "and her children after her." A was held to be absolute owner of the slaves as a result of the Rule. It is submitted that on the authority of the English cases the Rule in Wild's Case should not be applied to personalty in Missouri.<sup>41</sup>

4. Does the doctrine of *cy pres* apply to personalty? If land is devised to an unborn person for life, remainder to his children and the heirs of their bodies, the unborn person takes an estate tail,<sup>42</sup> else the interest in the children would be defeated entirely on account of remoteness.<sup>43</sup> This is the doctrine of *cy pres*.<sup>44</sup> Does a similar doctrine apply to personalty so that a gift of personalty to an unborn person for life, remainder to his children and the heirs of their bodies, will pass the absolute interest to such unborn person? The whole doctrine is one of approximation to an expressed intent. But as to personalty its application will not accomplish such approximation, since the children could not take by descent from their parent. It is submitted, therefore, that the doctrine should not be applied to gifts of personalty.<sup>45</sup>

39. *Buffar v. Bradford* (1741) 2 Atk. 220; *In re Jones* (1910) 1 Ch. 167; Jarman, Wills (6th ed.) 1915.

40. (S. C., 1842) 1 McMullan Eq. 345. But cf. *Cleveland v. Havens* (1860) 13 N. J. Eq. 101. The result of *Johnson v. Johnson* can be achieved independently of the Rule in Wild's Case, as shown by the text.

41. The Missouri Courts have apparently never been called upon to apply the Rule in Wild's Case to either realty or personalty: In *Allen v. Claybrook* (1874) 58 Mo. 124, children were in existence at the time of the devise. Cf. *Kinney v. Matthews* (1879) 69 Mo. 520; 1 Law Series, Missouri Bulletin, p. 11, note 40.

42. *Humbertson v. Humbertson* (1716) 1 P. Wms. 332; Gray, Perpetuities (2d ed.) §§ 643 *et seq.*; 17 Harvard Law Review 559.

43. 1 Law Series, Missouri Bulletin, p. 10. This is one of the cases in which the rule against perpetuities has influenced construction.

44. It is to be carefully distinguished from the doctrine of *cy pres* which is applied to gifts of both realty and personalty to charities. 3 Law Series, Missouri Bulletin, p. 22.

45. Gray, Perpetuities (2d ed.) § 647, note 3. Cf. *Roulledge v. Dorril* (1794) 2 Ves. Jr. 357; *Somerville v. Leihbridge* (1795) 6 T. R. 213.

It may be noted here that the Rule in *Whitby v. Mitchell* (1890) 44 Ch. Div. 85, discussed in 3 Law Series, Missouri Bulletin, p. 29, does not apply to personalty. *In re Bowles* (1902) 2 Ch. 650.

5. The discussion of the foregoing questions has been evoked by the recent decision of *State ex rel. Farley v. Welsh*.<sup>46</sup> A testator divided his property, real and personal, into fifths, one of which he gave to his daughter Agnes and the heirs of her body; other fifths were given to other children "absolutely." There was a proviso that Agnes should "take and keep all of the legacy under this will as her own separate estate to the exclusion of her husband." It was admitted, if indeed it had not been previously decided,<sup>47</sup> that under the statute abolishing estates tail<sup>48</sup> Agnes got only a life estate in the realty. It was contended that she got the absolute interest in the personalty. The Rule in Shelley's Case had no application since no remainder was expressly limited to the heirs of Agnes' body.<sup>49</sup> Agnes had no children when the testator died, and the court talked about the application of the Rule in Wild's Case, saying that it applies to personal property.<sup>50</sup> But even if this were true, the facts of this case would not call for its application, for the Rule should not be applied to personalty where it would not be applied to realty, and an estate tail in the realty was expressly limited. The Court did not apply the Rule, but because Agnes' gift was not in the same terms as gifts to other children, it found an intention that Agnes should take but a life interest with a remainder to the heirs of her body.<sup>51</sup> It

46. (1913) 175 Mo. App. 303, 162 S. W. 637.

47. (1911) 237 Mo. 128.

48. Revised Statutes 1909, § 2872 was in force in 1889, when the testator died.

49. On this point, the first headnote in 162 S. W. 637 is misleading.

50. The court cites, for this *dictum*, *Heron v. Stokes* (1845) 12 Cl. & F. 161; *Byng v. Byng* (1862) 10 H. L. C. 171; *Clifford v. Koe* (1880) 5 App. Cases 447. None of these cases is authority for the court's *dictum*. *Heron v. Stokes* is discussed *supra*. In *Byng v. Byng*, only realty was involved, though the gift included heirlooms also. In *Clifford v. Koe*, the Rule was applied to realty, but the question of its applying to personalty was not even raised.

51. The possibility of so-called remainders in personal property following life interests, is now well recognized in Missouri. *Threlkeld v. Threlkeld* (1911) 238 Mo. 459; *Gibson v. Gibson* (1911) 239 Mo. 490; *Zook v. Welty* (1911) 156 Mo. App. 703. For a discussion of "Future Interests in Personal Property," see 14 Harvard Law Review 397. It may be doubted whether executory interests in personalty can be created in Missouri by deed. *Wilson v. Cockrell* (1843) 8 Mo. 1. See Gray, *Perpetuities* (2d ed.) § 91; 3 Law Series, Missouri Bulletin, p. 7. Apparently, the nature of future interests in chattels real has not been discussed in the Missouri decisions.

may well be doubted whether such an intention appears in the will, and the proviso for Agnes' taking, "all of the legacy . . . as her own separate estate" would seem to negative it. It is not clear that the court recognized the well-established rule that a gift of personalty to A and the heirs of his body confers the absolute interest on A.<sup>52</sup> The result of the decision is that though the words "heirs of the body" were read as words of limitation as to the realty, they were given the effect of creating a remainder in the personalty.<sup>53</sup>

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52. This is evidenced by the court's statement that "applying this rule [in Wild's Case] to the case before us, we would be compelled to hold that the words of the will gave an estate in fee tail to Agnes, and unless defeated before death, in some of the ways permissible in such estates, would go in succession by descent, and not by purchase, to these plaintiffs as after-born children." The will shows no intention to use the words "heirs of the body" to mean "children." See note 8, *supra*.

53. It is true that the same words in a will may be construed differently as to realty and personalty. *Forth v. Chapman* (1720) 1 P. Wms. 663; 3 Law Series, Missouri Bulletin, p. 8. But they should never be construed, as in the principal case, as words of limitation as to the realty and as words of purchase as to the personalty.