

REAL PROPERTY LAW REFORM—THE RULE IN SHELLEY'S CASE.

writers in relation to pending proceedings in courts of justice. But good sense and good taste alike point it out as an abuse, and while the many discern the abuse, we trust the few who have hitherto acted as if blind to it, will in future discern it, and act accordingly. If not, the courts must be invoked to maintain the majesty of the law. Public opinion is deeply interested in the pure administration of justice, and will abundantly sustain any effort necessary in the direction we have indicated; and the public, in the interest of the laws of decency and propriety, may be compelled ere long to ask if in Canada we have judges of such an independent spirit and unswerving purpose as Lord Hardwicke, Lord Hatherly, or the present Vice-Chancellors, Malins or James.

SELECTIONS.

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The present generation can scarcely realise the fact that there was once a time when the opinion of a Lord Chief Justice upon an abstruse question of conveyancing law would be the talk of the town for weeks. Law reform is now so much the order of the day that abolitions, remodellings, and simplifications have long ceased to surprise anyone. Since the days when an opinion of Lord Mansfield set all the lawyers by the ears in two factions of Shelleyites and anti-Shelleyites, besides drawing down on the great judge the fierce denunciations of Junius, who accused him of wanting to overthrow the laws of England, there has happened a grand turn of the tide. The reforms made are so many indications of the direction in which the current runs. A very few generations of lawyers have passed away since the tendency was all for form and technicality, and "valuable forensic inventions;"—whether in consequence of the accumulations of the previous cycle having become unbearable, or from ever recurrent reaction and oscillation, it is now all for clearing up and cutting down. This is apparent both in legislative reforms and in the tone of judicial decisions, and the tendency shows to the greatest advantage in the latter.

We are going to concern ourselves just now with the particular section of law just alluded to. "The rule in *Shelley's case*;"—"that 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, the word 'heirs' is a word of limitation of the estate of the ancestor," who takes

the whole fee—is one of the first bits of law which most law students learn; it is eminently adapted to be learnt by rote without being comprehended. It is, as Mr. Joshua Williams points out, obviously of far more ancient date than the case, *temp. Elizabeth*, with which it is identified. We do not propose to discuss its origin in this place, beyond pointing out that it is a very natural sequence from the incapacity of alienating which attached to the freeholder of old times. When the tenant could neither sell nor devise, a gift to A. for life with remainder to his heirs would, in practical effect, amount to the same as a gift to A. in fee, or rather, a gift to A. in fee would confer no greater freedom on A.; and it was not strange that the former limitation should be always represented by its shorter equivalent.

As the power of alienation arose, the expressions ceased to be synonymous, but in the meantime the synonyme had become a fixed legal doctrine. It is perhaps the principal evidence of the inconvenience of this technical rule or doctrine (for great lawyers have differed as to which of the two it should be styled) that a large volume may be written upon it without exhausting the subject, and what is worse, without leaving its effect clearly ascertained. Now the rule itself is as much a rule of law as the rule of the descent of real estate *ab intestato*: given an estate of freehold to the ancestor, and it is a rule of law that the same gift cannot make his "heirs" *purchasers* of the reversion in fee. Where they take by descent, that is tantamount to the ancestor taking the fee at once, and the power of alienation attached to an estate in fee thus enables the ancestor to frustrate the testator's intention. Whether or not a particular gift comes within the rule is a question of construction.

Baron Surrebutter, in his stroll round the limbo of departed lawyers and litigants, is made to say—"My attention was arrested by a miserable looking ghost, surrounded by books and papers, which, with a bewildered countenance, he was vainly endeavouring to read through. Upon inquiry I found that this was the shade of the celebrated Shelley, who, for some misdeeds committed upon earth, had been sentenced to read and understand all the decisions and books relating to the celebrated rule laid down in his own case." "The mind sinks," said Lord Eldon, "beneath the multitude of cases" (*Jesson v. Wright*, 2 Bligh, 1).

Shortly, we may take the result to be as follows:—

Where the words "heirs" or "heirs of the body" are used, the ancestor takes the fee, even though the testator has added words of distribution (*e.g.*, "share and share alike") or an ulterior limitation to the heirs of the second generation, or other expressions inconsistent with the notion of the ancestor's taking more than a life interest. The words "issue" (and in some cases even "children") have the like effect, but not quite so strongly, it