HAS THE RULE IN SHELLEY'S CASE BEEN REVOKED IN ONTARIO?

A curious little point was recently before a Divisional Court (The Chancellor and Latchford and Middleton, JJ.) arising on the construction of a will, whereby the testator devised and bequeathed the residue of his real and personal estate to his three children, H. J. and S., share and share alike "subject as to H.'s share that he should hold the same as trustee of his heirs, and use the income as he may see fit." It was argued that the effect of this provision was to give H. an estate in fee under the rule in Shelley's case, but the court came to the conclusion that the rule did not apply and that H. took a life estate and his heirs a remainder in fee, because, as the court held, the effect of the devise was to vest in H. a legal estate for life, and an equitable estate in remainder for those who should be his heirs, and that these two estates being, as it was said, of different qualities the rule did not apply: because, according to Lord Herschell in *Van Grutten* v. *Foxwell* (1897), A.C. at p. 662, "It is well settled that if the estate taken by the person to whom the lands are devised for a particular estate of freehold, and the estate limited to the heirs of that person are not of the same quality—that is to say, if the one be legal and the other equitable, the rule in Shelley's case has no application." The court also thought that if the words "trustee of his heirs" were referable to persons to be ascertained in a particular way pointed out by the testator, or were used so as to embrace all the descendants of the ancestor collectively, successively and indefinitely, the rule did not apply: and reading the word "heirs" as meaning the persons who should become entitled under our statute law as heirs, the Divisional Court came to the conclusion that *Greaves* v. *Simpson*, 10 Jur. N.S. 609 and *Evans* v. *Evans* (1892), 1 Ch. 173, were authorities for holding that the rule in Shelley's case did not apply to the devise in question. The learned Chancellor, who delivered the judgment of the court described the case as inter apices juris, and it is certainly an illustration how the unlearned testator may contrive ingenious puzzles for judges.