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Valoria C. Hoover
University of Dayton

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PROPERTY LAW: THE RULE IN SHELLEY'S CASE REARS ITS UGLY HEAD—*Society National Bank v. Jacobson*, 560 N.E.2d 217 (Ohio 1990).

I. INTRODUCTION

> Conceived in the mists of antiquity, receiving its nourishment in the fruits of the feudal system, and cast in the mold of a rule of property, the Rule in Shelley's Case presents the spectacle of an obsolete doctrine tenaciously clinging to the legal structure in defiance of legislative onslaughts.[1]

> But it is one thing to put a case like Shelley's in a nutshell and another thing to keep it there.[2]

The Ohio Supreme Court in *Society National Bank v. Jacobson*[3] recently resurrected the archaic common law Rule in Shelley's Case,[4] almost fifty years after its total abrogation in Ohio.[5] The court erroneously held that prior to its abrogation,[6] the Rule in Shelley's Case applied to personal property.[7] The court, perhaps responding sympathetically to the facts of this case, disregarded the prerequisites of the common law doctrine of the Rule in Shelley's Case.[8] While the court was capable of effectuating its subjective justice in this particular case, the court used the premise of applying the Rule in Shelley's Case when the rule did not apply to the facts of *Jacobson*.[9]

Commentators on the Rule in Shelley's Case have been very creative in their description and criticism of the Rule.[10] The Rule in Shelley's Case has been described as the Don Quixote of the law.[11] It also

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1. Comment, *The Rule in Shelley's Case Has Been Abolished*, 4 FORDHAM L. REVIEW 316, 316 (1935); *see, e.g.*, Comment, *Legislative Attacks Upon the Rule in Shelley's Case*, 45 HARV. L. REV. 571 (1932) (discussion and history on how different states have abolished the rule).

2. Van Grutten v. Foxwell, [1897] App. Cas. 658, 671.

3. 560 N.E.2d 217 (Ohio 1990).

4. Wolfe v. Shelley, 76 Eng. Rep. 206 (C.B. 1581).

5. OHIO REV. CODE ANN. § 2107.49 (Anderson 1990) (virtually identical to Ohio General Code section 10504-70 which was effective Aug. 21, 1941).

6. OHIO GEN. CODE § 10504-70 (1941) (total abrogation of the Rule in Shelley's Case).

7. *Jacobson*, 560 N.E.2d at 223.

8. *Id.*

9. *Id.*

10. *See, e.g.*, LEWIS M. SIMES, FUTURE INTERESTS 43 (2d. ed. 1966) ("Probably no other rule in the law of property has evoked to such a marked extent the delight of legal technicians and the anathemas of practical men as the rule in Shelley's case."); Joseph R. Geraud, *The Rule in Shelley's Case - In Memoriam?*, 18 WYO. L.J. 17 (1963); James A. Webster, Jr., *A Relic North Carolina Can Do Without - The Rule in Shelley's Case*, 45 N.C. L. REV. 3 (1966).

11. Stamper v. Stamper, 28 S.E. 20, 22 (N.C. 1897). "The Rule in Shelley's Case . . . is the Don Quixote of the law, which, like the last knight errant of chivalry, has long survived every

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has been characterized as "a nefarious medieval meddler in the plans of men,"[12] and as an artificial technicality.[13] The Rule, however, has survived in at least three states.[14]

This casenote first discusses the rise and fall of the Rule in Shelley's Case in both England and the United States, particularly the State of Ohio. Second, this note argues that the Ohio Supreme Court misconstrued and misapplied the Rule in Shelley's Case in *Jacobson*.[15] Ultimately, this note considers the consequences of the Ohio Supreme Court's misapplication of an ancient common law doctrine.

II. THE RULE

In 1832, the Ohio Supreme Court announced its intention to follow the common law Rule in Shelley's Case.[16] Specifically, the court stated: "The rule is, where the ancestor takes a freehold, and by the same conveyance, whether deed or devise, is limited, either mediately or immediately, to his heirs, the word *'heirs'* is a word of limitation, not of purchase, and the fee vests in the ancestor."[17] Thus, under the Rule in Shelley's Case, if a grantor conveys a life estate to A and in the

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cause that gave it birth, and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous." *Id.*

12. Geraud, *supra* note 10, at 17.

13. King v. Beck, 15 Ohio 559, 563 (1846) (hereinafter *King v. Beck II*). "[Shelley's Rule] is at best a mere artificial technicality; and just in proportion as it lacks reasons, it appears to have won upon the affections of the profession." *Id.*

14. *See* Rogers v. Kaylor, 299 S.W.2d 204 (Ark. 1957); Springbitt v. Monaghan, 50 A.2d 612 (Del. 1956); Andrews v. Spurlin, 35 Ind. 262 (1871).

As of 1977, Arkansas, Delaware, Indiana and North Carolina had not abolished the Rule in Shelley's Case. 1 AMERICAN LAW OF PROPERTY § 4.51 (A. James Casner ed. 1952 & Supp. 1977). *But see* N.C. GEN. STAT. § 41-6.3 (1991 Cum. Supp.) (abolishing the Rule in Shelley's Case in North Carolina to transfers on or after October 1, 1987).

15. Society Nat'l Bank v. Jacobson, 560 N.E.2d 217, 223 (Ohio 1990).

16. McFeely's Lessee v. Moore's Heirs, 5 Ohio 465, 466 (1832).

17. *Id.* at 466; *see also* Brockschmidt v. Archer, 60 N.E. 623, 624 (Ohio 1901). The Rule in Shelley's Case has also been stated as follows:

> [W]here a freehold is limited to one for life and, by the same instrument, the inheritance is limited, either mediately or immediately, to his heirs or to the heirs of his body, the first taker takes the whole estate, either in fee simple or in fee tail.

Dix v. Benzler, 32 Ohio L. Abs. 599, 603 (1940).

"Words of purchase" are defined as words in the instrument which when taken alone, without reference to other words in the instrument, indicate the persons entitled to take under the instrument. Doyle v. Andis, 102 N.W. 177 (Iowa 1905). "Words of limitation" measure the duration of the estate that has already been indicated to some person. *Id.*

> [W]hether the words employed in the instrument in disposing of the remainder are words of limitation (that is, measuring the duration and defining the extent of the estate of the taker of the freehold), or words of purchase (that is, pointing out and designating the objects of the conveyance or gift of the remainder to whom it passes directly from the grantor or devisor).

Id.

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same deed the grantor purports to give A's heirs a remainder, then A takes both the life estate and the remainder and A's heirs take nothing. The effect of this Rule is to give the ancestor a fee simple estate, thereby divesting the heirs of any interest in the estate that the heirs may have held through the conveyance.[18]

An example of the limitation that might place a devise or conveyance under the Rule in Shelley's Case is "to A for life, remainder to her heirs." Thus, if the Rule in Shelley's Case were to apply then the property would fully vest in "A," and "her heirs" would be entitled to nothing.[19]

In order to apply the Rule in Shelley's Case, there are five prerequisite circumstances. First, there must be a freehold estate in the ancestor.[20] A freehold estate is an estate in real property for an indeterminate amount of time.[21] For example, an estate to A for A's life is a freehold estate because the estate is held by A for the period of A's life which is of indeterminable duration. In contrast, an estate for years is not a freehold estate because the estate for years will terminate after the proscribed number of years.[22] Thus, a lease for ninety-nine years is an estate for years and not a freehold estate because *it will* terminate after ninety-nine years.

Second, the ancestor must acquire the prior estate in the same instrument, a deed[23] or a will,[24] which contains the limitations to his or

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18. *McFeely's Lessee*, 5 Ohio at 465. The Rule in Shelley's Case as announced by Lord Coke is substantially the same. Wolfe v. Shelley, 76 Eng. Rep. 206, 234 (C.B. 1581).

> [I]t is a rule of 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 are not words of purchase.

Id.

19. Another common example of such language is "to B for life, remainder to the heirs of his body."

In *Society National Bank v. Jacobson*, the language was "during the period of his natural life, and upon his death, share and share alike to the heirs of his body, or the descendants of such heirs . . . ." 560 N.E.2d 217, 218 (Ohio 1990).

20. King v. Beck, 12 Ohio 390, 471 (1843) (hereinafter *King v. Beck I*); Armstrong v. Zane's Heirs, 12 Ohio 287, 296 (1843).

21. Ralston Steel Car Co. v. Ralston, 147 N.E. 513, 516 (Ohio 1925). "All authorities agree that in the last analysis the true test of a freehold is indeterminate tenure . . . . A freehold estate is necessarily real property." *Id.* "[The] primary and technical sense [of] the term 'estate' refers only to an interest in land . . . ." Black v. Sylvania Producing Co., 137 N.E. 904, 905 (Ohio 1922). *See generally* BLACK'S LAW DICTIONARY 598 (5th ed. 1979).

22. *Ralston Steel Car Co.*, 147 N.E. at 516. "Estates less than freehold include estates for years, at will and by sufferance . . . ." *Id. See generally* BLACK'S LAW DICTIONARY 598 (5th ed. 1979).

23. The Rule in Shelley's Case as to deeds was abrogated in 1941 by Ohio General Code section 10504-70.

24. The Rule in Shelley's Case as to wills was abrogated in 1840 by 38 Ohio Laws 116.

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her heirs.[25] Thus, the Rule in Shelley's Case would apply only if A received a freehold estate in the same deed (or same will) as A's heirs received a remainder. Third, the limitation to the heirs must be by inheritance from the ancestor and be made by way of a remainder of the same estate which was conveyed or devised to the ancestor.[26]

Fourth, the interest acquired by the ancestor and the heirs must be of the same quality—both must be legal or both must be equitable.[27] For example, if the instrument creates an equitable interest for the ancestor and a legal interest for the heirs then the Rule in Shelley's Case would not apply.[28] The quality of the ancestor's estate, being equitable, would not be the same as the quality of the heir's estate, being legal.[29] An example of this type of transfer occurs when there is an active trust for the benefit of a person for her life and upon her death the trust terminates giving her heirs title in fee simple.[30] The beneficiary of the trust would receive the income from the trust during her life.[31] This is an equitable interest because the "legal" title of the property is not in the beneficiary's name but she is entitled to the benefits of ownership.[32] The legal title is in the trustee's name.[33] The trustee is vested with all the management responsibilities for the property that is held in trust.[34] If the quality of the estates are not the same, then the Rule in Shelley's Case would not apply.[35]

Finally, the words "heirs"[36] or "heirs of the body"[37] must be used in their technical sense.[38] The technical meaning of the words "heirs"

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25. Armstrong v. Zane's Heirs, 12 Ohio 287, 299 (1843); *see supra* note 17 (explaining words of limitation).

26. *Armstrong*, 12 Ohio at 299.

27. *Id.*; *King v. Beck I*, 12 Ohio 390, 471 (1843).

28. *See, e.g.*, Webster, *supra* note 10, at 15.

29. *Id. But see* Davis v. Saunders, 8 Ohio N.P. 161, 163 (1900). The *Davis* court analyzed a deed to determine whether the estates could merge. *Id.* The court determined that because absolute control of the estate had been given to the life beneficiary, the life estate in essence became a legal estate as opposed to an equitable estate. *Id.* Therefore, the court allowed the Rule in Shelley's Case to apply. *Id.*

30. *See* RESTATEMENT (SECOND) OF TRUSTS § 2f (1965); *see also* SCOTT ON TRUSTS § 2.7 (4th ed. 1987).

31. *Cf.* SCOTT, *supra* note 30, § 2.7.

32. *Id.*

33. *Id.*

34. *See Id.; see also* BLACK'S LAW DICTIONARY 483 (5th ed. 1979).

35. *Cf.* Armstrong v. Zane's Heirs, 12 Ohio 287, 299 (1843).

36. "An heir begotten or borne by the person referred to, . . . as meaning the persons who from generation to generation become entitled by descent . . . ." BLACK'S LAW DICTIONARY 651 (5th ed. 1979).

37. *See, e.g.*, Tootle v. Tootle, 490 N.E.2d 878, 880 (Ohio 1986) ("heirs of the body" meaning lineal descendants by blood).

38. Brockschmidt v. Archer, 60 N.E. 623, 625 (Ohio 1901); Turley v. Turley, 11 Ohio St. 175, 182 (1860). "Heirs" must be used in its technical sense as importing a class of persons to take indefinitely in succession from the ancestor. *Armstrong*, 12 Ohio at 299.

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or "heirs of the body" is that the words indicate a class of persons to take indefinitely in succession from generation to generation.[39] If the words "heirs" or "heirs of the body" are not used in a technical sense, then the words must be words of purchase[40] and the Rule in Shelley's Case would not apply.[41] If the instrument used the words "heirs" or "heirs of the body" in the sense of the ancestor's children, then the court should hold that the instrument did not use the words in their technical, legal sense, but as words of purchase.[42] This is because the words in the instrument indicate the specific persons to take under the instrument, the ancestor's children.

The Rule in Shelley's Case is a rule of law and not merely a rule of construction.[43] Therefore, the intention of the testator or grantor as to the disposition of the estate is not to be considered if the Rule in Shelley's Case is applicable.[44] "It is . . . clear that the rule not only

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39. *Brockschmidt*, 60 N.E. at 625; *Turley*, 11 Ohio St. at 182; *King v. Beck II*, 15 Ohio 559, 561-62 (1846).

40. "Words of purchase" are words in the instrument which words when taken alone, without reference to other words in the instrument, indicate the persons entitled to take under the instrument. Doyle v. Andis, 102 N.W. 177 (Iowa 1905). "Words of limitation" measure the duration of the estate that has already been indicated to some person. *Id.*

41. *Brockschmidt*, 60 N.E. at 625; *Turley*, 11 Ohio St. at 182; *King v. Beck II*, 15 Ohio at 561-62.

42. *King v. Beck II*, 15 Ohio at 561-62; *see also* Mack v. Champion, XXVI Ohio Weekly L. Bulletin 113, 115 (1890).

> There are exceptions to this rule, as when the grantor annexes words of explanation to the word "heirs," as to the heirs of "A[]" *now living*, showing thereby that he meant by the words "heirs" a mere *descriptio personarum* or specific designation of certain individuals or when the grantor superadds words of limitation, and a new inheritance is grafted upon the heirs or grantees who take the estate.

Id.

43. *Brockschmidt*, 60 N.E. at 624; *King v. Beck II*, 15 Ohio at 562; McFeely's Lessee v. Moore's Heirs, 5 Ohio 464, 465 (1832).

A rule of construction is designed to implement the probable intent of the grantor or testator. A rule of construction "raises a presumption for the court's guidance where the intent of the testator is not otherwise determinable." Brown v. Robbins, 59 A.2d 378, 379 (N.J. 1948). When contrary facts and circumstances are known, the rule of construction does not apply. *Id.* Conversely, a rule of law operates regardless of the grantor's or testator's intent. It applies even if the express intention of the grantor or testator is thereby made impossible. BLACK'S LAW DICTIONARY 1196 (5th ed. 1979). Rules of law are rigid and inflexible as opposed to rules of construction which operate to effectuate the grantor's or testator's intent.

44. *Brockschmidt*, 60 N.E. at 624-625. Justice Blackstone stated:

> I believe there never was an instance when an estate for life was expressly devised to the first taker, that the devisor intended he should have anything more. But if he afterwards gives an estate to the heirs of the tenant for life, it is the consequence or operation of the law that in this case supervenes his intention, and vests a remainder in the ancestor, which remainder, if it be immediate, merges his estate for life, and gives him the inheritance in possession; but if mediate only, by reason of some interposing estate, then it vests the inheritance in the tenant for life, as a future interest, to take effect in possession when the interposition is determined. And therefore it has frequently been adjudged that though an

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defeats the intention [of the grantor or testator], but [also] substitutes a legal intendment directly opposed to the obvious design of the limitation."[45] The Rule's absolute ability to defeat a grantor's or testator's intention is a main reason why the Rule has been severely criticized.[46]

III. FACTS AND HOLDING

On April 30, 1931, Sallie W. Perkins, as grantor, entered into an irrevocable inter vivos trust[47] agreement.[48] She appointed Central United National Bank of Cleveland as trustee.[49] Sallie Perkins directed the net income of the trust to be paid to her during her lifetime.[50] She had two children, Francis P. Brooks and Ralph Perkins.[51] Francis P. Brooks had predeceased the trust's creation and had one child, James C. Brooks, Jr.[52] Upon the death of Sallie Perkins, the distribution of the trust's net income was provided for as follows:

> (a) One-fourth (¼) of such net income to James C. Brooks, Jr., grandson of the Grantor, during the period of his natural life, and upon his death, share and share alike to the heirs of his body, or the descendants of such heirs, taking per stirpes.
>
> In the event of the death of said James C. Brooks, Jr., leaving no heirs of his body, or descendants of such heirs, the share of income otherwise payable to him shall be distributed in the manner herein provided for the distribution of the remaining three-fourths (¾) of the net income of the Trust Estate.[53]

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estate be devised to a man for life only, or for life *et non aliter*, or with any other restrictive expressions, yet, if there be afterwards added apt and proper words to create an estate of inheritance in his heirs, or the heirs of his body, the extensive force of the latter words shall overbalance the strictness of the former, and make him tenant in tail or in fee.

Id. at 625 (quoting Perrin v. Blake, 98 Eng. Rep. 355 (1770)).

45. Martin v. Knowles, 142 S.E. 313, 314 (N.C. 1928) (emphasis omitted).

46. *King v. Beck II*, 15 Ohio at 562; Neff v. Abert, 9 Ohio App. 286, 290 (1918).

47. *See generally* GEORGE G. & GEORGE T. BOGERT, TRUSTS & TRUSTEES §§ 233-244 (2d ed. rev. 1977) (explaining irrevocable inter vivos trust as when the settlor permanently gives up control of the gift property during her lifetime as opposed to at the time of her death).

48. Society Nat'l Bank v. Jacobson, 560 N.E.2d 217, 218 (Ohio 1990).

49. *Id.*

50. *Id.*

51. *Id.* at 219.

52. *Id.*

53. *Id.* at 218. Three-fourths is distributed as follows:

> (b) Three-fourths (¾) of such net income to Ralph Perkins, son of the grantor, during the period of his natural life. Upon the death of said Ralph Perkins, out to the remaining three-fourths (¾) of the income of the Trust Estate there shall be paid to Leigh Haskell Perkins, son of Ralph Perkins, if living, the sum of Ten Thousand Dollars ($10,000.00), and to Gertrude Perkins, daughter of the said Ralph Perkins, if living, the sum of Ten Thousand Dollars ($10,000.00), and thereafter three-fourths (¾) of the income from the Trust Estate shall be paid during the periods of their natural lives to Elizabeth Perkins, Jacob B. Perkins, II, and Ralph Perkins, Jr., in such proportions as may have been directed by the last Will and Testament of Ralph Perkins, son of the grantor, and in the absence of

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On December 11, 1931, Sallie Perkins died and was survived by Ralph Perkins, his five children and James C. Brooks, Jr., her grandson.[54]

As required in the trust agreement, one-fourth of the trust income was distributed to James C. Brooks, Jr., until he died on August 7, 1985.[55] James C. Brooks, Jr. left no descendants by blood; however, he was survived by his daughter Frances Brooks Bator, whom he adopted in 1942.[56] Frances Brooks Bator had two natural children, Christopher J. Bator and Jeffrey B. Bator.[57]

Society National Bank, as successor in interest to Central United National Bank of Cleveland, filed a declaratory judgment action.[58] Society National Bank asked the probate court to decide to whom it, as trustee, should distribute the one-fourth share of the trust's net income which had been previously distributed to the late James C. Brooks, Jr.[59]

The probate court held that Frances Brooks Bator and her two children were not to take the one-fourth share of the net income which had been previously distributed to her adopted father, the late James

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such direction, the balance of the net income from the Trust Estate, after the payments above set forth shall be distributed share and share alike to Elizabeth Perkins, Jacob B. Perkins, II, and Ralph Perkins, Jr., during the periods of their natural lives.

Id. at 218-19. Per stirpes means by or according to stock or root as in taking by representation. Rings v. Borton, 140 N.E. 515, 516 (Ohio 1923). Per stirpes is to be contrasted with per capita which literally means "by head." Hasse v. Morison, 143 N.E. 551, 554 (Ohio 1924). When a group of persons takes share and share alike by dividing the estate into equal shares by the number of persons in the group taking, this is per capita. *See generally* Note, *Effect of the Rule in Shelley's Case on Directing a Distribution Per Stirpes or Per Capita,* 36 ILL. L. REV. OF NW. U. 798 (1942); BLACK'S LAW DICTIONARY 1022 (5th ed. 1979). In per stirpes, unequal division of the estate occurs because one or more persons is entitled to inherit as a representative of a person who, if she had lived, would have taken equally with the others. *See generally* Note, *supra,* (for full description of per stripes); BLACK'S LAW DICTIONARY 1030 (5th Ed. 1979).

54. *Jacobson,* 560 N.E.2d at 219.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* The action was filed in the probate court. *Id.*

59. *Id.* It is interesting to note that this case was decided before the trust's corpus was dispersed. Total disposition of the trust would occur when the last person with a life estate interest died. Thus, it is possible that this same trust and the Rule in Shelley's Case could come before the courts again sometime in the future. The interest acquired by James C. Brooks, Jr., however, was an equitable interest in the trust and the disposition of the corpus of the trust would be a legal interest in the assets of the trust. Therefore, the interest acquired by the ancestor and the interest acquired by the heirs through the dispersion of the trust would not be of the same quality. In order for the Rule in Shelley's Case to be applicable the interest must either be both equitable or both legal. *See* Armstrong v. Zane's Heirs, 12 Ohio 287, 299 (1843); *see supra* text accompanying notes 27-31. It would seem that the Rule in Shelley's Case would not apply to the dispersion of the trust because the trust does not give the same quality of interest to both the ancestor, James C. Brooks, Jr. and the "heirs of his body." Yet, as the present case demonstrates, the Ohio Supreme Court may again misconstrue the Rule in Shelley's Case in order to accomplish its subjective justice. *See infra* text accompanying notes 201-21.

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C. Brooks, Jr.[60] The probate court reasoned that Frances Brooks Bator and her children were not heirs of the body[61] of James C. Brooks, Jr.[62] The probate court based this result on its finding that the testator used the words "heirs of his body" to exclude any adopted child.[63] The probate court then ordered the Trustee to distribute the one-fourth share of net income which was previously dispersed to the late James C. Brooks, Jr., under the alternate distribution provision.[64]

Frances Brooks Bator and her children appealed.[65] The Cuyahoga County Court of Appeals held that the Rule in Shelley's Case had been statutorily abolished and, therefore, did not apply to the Sallie Perkins trust.[66] The court considered both the trust's language, requiring "heirs of his body," and the trust's general scheme of disposition.[67] The court concluded that Sallie Perkins intended to limit the distribution of the trust income to descendants by blood.[68] Therefore, the court affirmed

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60. *Jacobson*, 560 N.E.2d at 219. The action was first heard by a referee who concluded that Sallie Perkins intended to exclude adopted children as beneficiaries. *Id.* Francis Brooks Bator and her children objected to the referee's report. *Id.* The probate court overruled the Bator's objections to the referee's report. *Id.*

61. *See, e.g.*, Tootle v. Tootle, 490 N.E.2d 878, 880 (Ohio 1986) ("heirs of the body" meaning lineal descendants by blood).

62. *Jacobson*, 560 N.E.2d at 219.

63. *Id.*

64. *Id.* The alternative distribution provision provided:

> In the event of the death of said James C. Brooks, Jr., leaving no heirs of his body, or descendants of such heirs, the share of income otherwise payable to him shall be distributed in the manner herein provided for the distribution of the remaining three-fourths (¾) of the net income of the Trust Estate.

Id. at 218; *see supra* note 53 (description of distribution of three-fourths of the trust).

65. *Jacobson*, 560 N.E.2d at 218.

66. *Id.* at 223. Shelley's Rule was abolished totally without any exceptions in 1941. OHIO REV. CODE ANN. § 2107.49 (Anderson 1990) (former OHIO GEN. CODE § 10504-70).

67. *Jacobson*, 560 N.E.2d at 219.

68. *Id.* The court of appeals relied on the "stranger to the adoption" doctrine to support its conclusion. Society Nat'l Bank v. Jacobson, No. 55157, 1989 Ohio App. LEXIS 1446, at *11-12 (Ohio Ct. App., Apr. 20, 1989).

> [T]he [adopted] child shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the rights of inheritance to real estate, or to the distribution of personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock: *provided, such child shall not be capable of inheriting property expressly limited to the heirs of the body of the adopting parent or parents*
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> . . . .

OHIO GEN. CODE § 8030 (emphasis added); *see also* Ohio Citizens Bank v. Mills, 543 N.E.2d 1206, 1209 (Ohio 1989). The "stranger to the adoption" doctrine states that there is a presumption that a testator or grantor intended to include an adopted child within a stated class if the grantor or settlor adopted the child. *Ohio Citizens Bank*, 543 N.E.2d at 1209. If the testator or settlor is a stranger to the adoption of another then the presumption is that the adopted child was not intended to be included within the class. *Id.* "If the facts show that the adoption took place within the lifetime of the testator or settlor, and he knew about and approved of such adoption, the adopted child may well be included within the class." *Id.*

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the probate court's judgment.[69] The Ohio Supreme Court accepted a motion to certify the record.[70]

The Ohio Supreme Court found that the court of appeals erred in retroactively applying Ohio Revised Code section 2107.49, which abrogated the Rule in Shelley's Case in 1941, to the trust which was executed in 1931.[71] Therefore, the court concluded that the Rule in Shelley's Case could be applicable to the trust.[72] The majority of the Ohio Supreme Court, however, found two problems "with fitting the facts of the subject trust agreement to the Rule in Shelley's case . . . ."[73]

First, the court said that the trust was created in a fee tail[74] because it contained the words "heirs of his body."[75] To overcome this obstacle, the court used a statute that was in effect at the time of the creation of the trust.[76] The statute converted the fee tail estate into "an absolute estate in fee simple to the issue of the first donee in tail

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69. *Jacobson*, 560 N.E.2d at 219.

70. *Id.*

71. *Id.* at 220.

> [A] statute will not be applied retrospectively unless a contrary [legislative] intention clearly appears. Where a statute is to be applied prior to its effective date in such a manner as to entirely abrogate a long standing common-law rule, the General Assembly must clearly state its intention in order to do so.

Ohio Citizens Bank, 543 N.E.2d at 1210 (citations omitted).

72. *Jacobson*, 560 N.E.2d at 220. The appellees contended that the Rule in Shelley's Case did not apply but that the "stranger to the adoption" doctrine did apply to this case. *Id.* at 220; *see supra* note 68 (describing "stranger to the adoption rule"). The court said that if Shelley's Rule applied it was a rule of law; therefore, it would override the "stranger to the adoption" doctrine. *Jacobson*, 560 N.E.2d at 220-21.

73. *Id.* at 222.

74. *See generally* Dix v. Benzler, 32 Ohio L. Abs. 559, 602 (1940). The contrast between an estate tail and a life estate under the laws of Ohio may be summed up as follows:

> The incidents of a tenancy in tail are that the tenant in tail might commit waste; the wife has dower therein; the husband has curtesy of the estate tail. A life estate has none of these incidents and although a life estate may be of identically the same endurance as the particular estate held by the first donee in tail, nevertheless, there is a wide difference in the characters of a life estate and a particular estate in tail . . . . When a life estate has been carved out and granted or devised to one, the remainder does not pass to those who take it as an estate of inheritance from and through the life tenant, but the remainderman take from the grantor or devisor directly as an estate by purchase. The fee is vested in the remaindermen and not in the life tenant, whereas, as heretofore pointed out, the fee in the estate tail is vested by the grant or devise in the first taker, the first donee in tail, and passes from him at death by operation of law to the immediate heirs of his body.

Id.; *see also* J. Richard Hamilton, *The Fee Tail in Ohio*, 17 OHIO ST. L.J. 335 (1956) (explaining the fee tail). "[F]ee-simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during [the owner's] life, and descending to [the owner's] heirs and legal representatives upon [the owner's] death intestate." BLACK'S LAW DICTIONARY 554 (5th ed. 1979).

75. *Jacobson*, 560 N.E.2d at 222; *See also Dix*, 32 Ohio L. Abs. at 602 (a common approach to creating a fee tail).

76. *Jacobson*, 560 N.E.2d at 222 (citing OHIO GEN. CODE § 8622).

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. . . ."[77] According to the court, Frances Brooks Bator would be the first donee in tail.[78]

Next, the court stated that a share in the income from a trust is personal property as opposed to real property.[79] The court noted that in many jurisdictions in the United States, the Rule in Shelley's Case does not apply to personal property.[80] The court held, however, that in Ohio the Rule in Shelley's Case applied to personal property.[81] The court based its conclusion on its interpretation of the case of *King v. Beck I*[82] and recognized that the Rule in Shelley's Case applied to personal property.[83] *King v. Beck I* was later overruled by *King v. Beck II*.[84]

Thus, according to the majority of the Ohio Supreme Court, the Rule in Shelley's Case applied to the Sallie Perkins trust.[85] Therefore, the grant of the one-fourth interest in the trust income was an absolute gift to James C. Brooks, Jr., and his adopted daughter would take through him.[86] The court reversed the court of appeals judgment and remanded the cause to the trial court.[87]

Justice Holmes wrote the dissenting opinion with Chief Justice Moyer concurring.[88] The dissent agreed with the majority of the court in that the laws existing at the time of a trust's creation should govern its interpretation.[89] The dissent, however, strongly disagreed with the majority's application of the Rule in Shelley's Case.[90] The dissent asserted that in Ohio, the Rule in Shelley's Case did not apply to personal property.[91] The dissent noted that the overwhelming view in the United States is that the Rule in Shelley's Case does not apply to personalty.[92]

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77. *Id.* at 222. *See generally supra* note 74 (for an explanation of fee simple). "[A]ll estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." *Jacobson*, 560 N.E.2d at 222 (quoting OHIO GEN. CODE § 8622).

78. *Jacobson*, 560 N.E.2d at 222.

79. *Id.*

80. *Id.*

81. *Id.* at 223.

82. *Id.*; *see King v. Beck I*, 12 Ohio 390 (1843).

83. *Jacobson*, 560 N.E.2d at 223.

84. 15 Ohio 559, 565 (1846).

85. *Jacobson*, 560 N.E.2d at 223.

86. *Id.* The court by using the Rule in Shelley's Case found that James C. Brooks, Jr. received an absolute gift in the one-fourth interest in the trust. *Id.* Therefore, his adopted daughter would receive that one-fourth interest in the trust because she would inherit it through his estate. *Id.*

87. *Id.*

88. *Id.* at 224-26 (Holmes, J., dissenting).

89. *Id.* at 224 (Holmes, J., dissenting).

90. *Id.*

91. *Id.*

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Specifically, the dissent criticized the majority's interpretation of *King v. Beck I*.[93] According to the dissent, *King v. Beck I* could only be reasonably interpreted to allow the application of the Rule in Shelley's Case to personal property when both personal and real property were passed under the same instrument.[94] The Rule in Shelley's Case is not a substantive rule of law for personalty, but merely a rule of construction.[95] Therefore, the Rule in Shelley's Case as applied to personal property could be rebutted by the testator's or grantor's intent.[96]

The dissent also stated that the Ohio Supreme Court in *King v. Beck II*[97] took an unusual step of reviewing its *King v. Beck I* decision.[98] The court in *King v. Beck II*, besides reversing *King v. Beck I*, "specifically noted that any application of the [Rule in Shelley's case should] be limited to specific instances where the words of the will [or devise] would reasonably require such application."[99] The dissent placed more authority on *King v. Beck II* and, therefore, said that the Rule in Shelley's Case could not apply to this case.[100] Thus, the dissent would look to the intent of Sallie Perkins.[101] The dissent would not have allowed the adopted child of James C. Brooks, Jr. to receive the income from the trust.[102]

IV. BACKGROUND

A. England

The rule has a curious history.[103]

In order to have an understanding of the Rule in Shelley's Case, it is necessary to examine the history of the Rule. Although no one is certain how long the Rule in Shelley's Case has existed,[104] the earliest

93. *Id.*; *see also King v. Beck I*, 12 Ohio 390 (1843).
94. *Jacobson*, 560 N.E.2d at 224 (Holmes, J., dissenting).
95. *Id.*
96. *See supra* notes 43-46 and accompanying text (discussing differences between rules of law and rules of construction).
97. 15 Ohio 559 (1846).
98. *Jacobson*, 560 N.E.2d at 225 (Holmes, J., dissenting).
99. *Id.*
100. *Id.* at 226.
101. *Id.*
102. *Id.*
103. Van Grutten v. Foxwell, [1897] App. Cas. 658, 668.
104. *Id.*

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case in which the Rule was recorded is *Abel's Case*.[105] The Rule, however, took its name from the famous case of *Wolfe v. Shelley*.[106]

The most accepted reason for the Rule's existence is that it is a rule of feudal origin.[107] The Rule's purpose was to prevent overlords[108] from being defrauded of the fruits incident to inheritances.[109] The overlord was to be paid a fee whenever a tenant passed away and the land passed to the tenant's heirs by inheritance.[110] If the land passed by inter vivos transfer, by purchase rather than by succession, however, then the overlord would be deprived of his fees.[111] The courts, by applying the Rule in Shelley's Case, guaranteed that the tenants' heirs took

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105. *Translated in* Harrison v. Harrison, 135 Eng. Rep. 381, 383 (C.P. 1844).

106. 76 Eng. Rep. 206 (C.B. 1582).

107. Society Nat'l Bank v. Jacobson, 560 N.E.2d 217, 221 (Ohio 1990); Brockschmidt v. Archer, 60 N.E. 623, 624 (Ohio 1901). "The rule is said to be of feudal origin, and was intended to secure to lords the fruits incident to inheritances . . . ." *Brockschmidt*, 60 N.E. at 624.

For alternative origins of the Rule in Shelley's case, see *Van Grutten v. Foxwell*, [1897] App. Cas. 658, 668 and Norman Block, *The Rule in Shelley's Case in North Carolina*, 20 N.C. L. REV. 49, 51-54 (1941). The reasons advanced for the origin of the rule are as follows: (1) The rule prevented fraud by the tenants by ensuring payments to the overlords of the feudal dues; (2) the rule prevented seisin from being in abeyance; (3) the relationship between heirs and ancestor required that the same words should have the same operation and construction; (4) contingent remainders were not recognized by law at the time when the rule began, therefore in order for the heirs to take the estate the heirs had to take by descent; (5) common law would not allow heirs to take by purchase because only joint tenancy estates and tenancy in common estates could have more than one purchaser; (6) "A man cannot make his heirs take by purchase when they would have taken by descent;" therefore, the rule was to "keep the distinction between descent and purchase;" (7) the rule was to keep land freely alienable. *Id.*

108. *See* SIMES, *supra* note 10, at 5-6.

> [Land] was thought of as having been parceled out by the king to superior lords, who in turn had parceled it out to lesser lords, who in turn had parceled it out to lesser lords who held of them. This process went on until we come to the man at the bottom of the ladder who actually used the land. Each person below the king was regarded as rendering some sort of tenurial services in recognition of the fact that he held his land of some higher lord.

Id.

109. Webster, *supra* note 10, at 18.

110. *Id. See generally* John V. Orth, *Observation - Requiem for the Rule in Shelley's Case*, 67 N.C. L. REV. 681, 681-82 (1989).

> In its origins and stripped of its inessential trappings, the Rule in Shelley's Case made perfect sense. Expressed in terms a modern generation can understand, it closed a tax loophole. Under feudalism heirs were obliged to pay 'relief,' a sort of inheritance tax to their lords. Feudal lawyers, not unlike their modern successors, were ever astute for means to save their client money. Since those who took possession by means other than inheritance were not liable for relief and since devises were not yet possible, some shrewd medieval scrivener must have perceived that if one who would have been an heir could take under the terms of a conveyance, relief could be avoided. The judges promptly saw through the maneuver and, since modern concepts of separation of powers did not then exist, immediately plugged the loophole by judicial means.

Id.

111. *Id.* The land would pass by purchase rather than succession. *See supra* notes 40-41 and accompanying text (explanation of words of purchase and words of limitation).

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the land as successors and not as purchasers, therefore, assuring that the fees would be due to the overlords.[112]

A modern reason proffered for the Rule is that the Rule facilitates the alienation of property.[113] By applying the Rule, the first taker is able to acquire full ownership of the property in fee simple instead of a life estate.[114] The Rule in Shelley's Case put the land in commerce sooner, therefore, keeping the land alienable.[115]

In 1769, Lord Mansfield, in the case of *Perrin v. Blake*,[116] held that the Rule in Shelley's Case did not apply because it was merely a rule of construction.[117] Lord Mansfield's decision was subsequently overruled. The English courts concluded that the Rule in Shelley's Case was a rule of law.[118]

In 1925, at the height of England's reform movement, the Rule in Shelley's Case was abolished in England.[119] "Its feudal origin was a disgrace. Its antiquity was a reproach."[120] The Rule's extinction, however, was not universal.

B. Ohio

> [T]he rule [in Shelley's Case is] a gothic column found among the remains of feudality . . . preserved in all its strength to aid in sustaining the fabric of the modern social system.[121]

In 1832, the Ohio Supreme Court first applied the Rule in Shelley's Case in *McFeely's Lessee v. Moore's Heirs*,[122] which involved a will.[123] The court acknowledged that the Rule in Shelley's Case had a feudal origin and may not have been adaptable to nineteenth century

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112. *Id.*; *see supra* notes 17-46 and accompanying text (explaining the Rule in Shelley's Case).

113. Van Grutten v. Foxwell, [1897] App. Cas. 658, 668; *see also* Brockschmidt v. Archer, 60 N.E. 623, 624 (1901). "[T]he largest estate a freeholder could have in lands . . . so that, when an estate was made to one and his heirs, he acquired the full and absolute dominion over the land, and could dispose of it as he saw fit." *Brockschmidt*, 60 N.E. at 624.

114. *Id.* at 624; Perrin v. Blake, 98 Eng. Rep. 355, 356 (1770).

115. *Brockschmidt*, 60 N.E. at 624.

116. 96 Eng. Rep. 392 (1769), *rev'd*, 98 Eng. Rep. 355 (1770).

117. *Id.*

118. *Perrin*, 98 Eng. Rep. at 356. A fierce controversy followed the decision of the court of Exchequer Chamber which had reversed Lord Mansfield's judgment. Van Grutten v. Foxwell [1897] App. Cas. 658, 670. During the litigation of the celebrated case of *Perrin*, the English bar is said to have been divided into "Shelleyites" and the "Anti-Shelleyites." Doyle v. Andis, 102 N.W. 177, 179 (Iowa 1905).

119. LAWS OF PROPERTY ACT § 131 (1925) (15 Geo. 5, c. 20). *See generally* Duncan C. Lee, *Recent Changes in English Law of Property*, 12 A.B.A. J. 573, 576 (1926). Beginning in 1836, the land reform movement rapidly gained momentum, the climax being reached in 1925. *Id.*

120. Van Grutten v. Foxwell [1897] App. Cas. 658, 669.

121. Polk v. Faris, 17 Tenn. (9 Yer.) 209, 233 (1836).

122. 2 Ohio 469, 469 (1832).

123. *Id.*

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Ohio.[124] The court held, however, that the Rule had been "too long established to be abrogated" by the court.[125]

In Ohio, the Rule in Shelley's Case was abolished as to wills in 1840,[126] but the Rule was still enforced as to deeds and other instruments.[127] By 1941, in the United States, thirty-two states and the District of Columbia had totally abolished the Rule in Shelley's Case.[128] It was not until 1932, however, when Ohio recognized no "distinction between ancestral and non-ancestral property," that Ohio had the potential to abrogate the Rule in Shelley's Case.[129] In 1941, Ohio totally abrogated the Rule in Shelley's Case.[130] The intent of the transferor was no longer to be arbitrarily defeated by a rule that had originated in medieval England.

Prior to Ohio's total abrogation of the Rule in Shelley's Case, Ohio courts deemed the Rule as a rule of law.[131] Ohio courts, however,

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124. *Id.*

125. *Id.*; *see* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, *supra*, at 469; *see also* Orth, *supra* note 110, at 686.

> The Rule in Shelley's Case had become part of the prized arcana of the law, one of the secrets shared by lawyers and judges which the public would never guess. Its mastery was a test of legal attainment: "What, sir, is the Rule in Shelley's Case?" was asked of innumerable candidates at the bar. Its very outmodedness endeared the Rule to some in the profession: it was a standing reminder of just how old the common law really was.

Orth, *supra* note 110, at 686. (citations omitted).

126. 38 Ohio Laws 1126 (1840).

127. *See* Robert Jenson, *Future Interests - Rule in Shelley's Case Abolished in Ohio - Application of the Ohio General Code, Section 10504-70*, 21 Ohio Op. 234, 235 (1941).

128. *Id.*

129. *Id.* at 236. The recognition of the difference between ancestral and non-ancestral property was the primary objection raised as to why Ohio should not abandon the Rule in Shelley's Case. *Id.* After the distinction was abolished, the objections to the abrogation of the Rule in Shelley's Case no longer existed. *Id.*

130. OHIO GEN. CODE § 10504-70 (1941) (now OHIO REV. CODE ANN. § 2107.49 (Anderson 1990)).

131. *E.g.*, Brockschmidt v. Archer, 60 N.E. 623, 624 (Ohio 1901); *King v. Beck II*, 15 Ohio 559, 563 (1846); McFeely's Lessee v. Moore's Heirs, 5 Ohio 464, 465 (1832).

The courts applied the rule because the courts were bound by the force of precedent. *McFeely's Lessee*, 5 Ohio at 465. Since 1791 when Massachusetts used a statute to abolish the rule as to wills, the legislatures have been abolishing the rule. *See generally* Comment, *Legislative Attacks Upon the Rule in Shelley's Case*, 45 HARV. L. REV. 571 (1932). One commentator has listed reasons for the Rule's abrogation as:

> The intent of the transferor is admittedly defeated. The many technicalities governing its application tend to provoke long and expensive litigation. And when it is realized that its operation can probably be defeated by careful draftsmanship, the Rule is revealed simply as a snare for the uninformed or unwary.

Id. (citations omitted).

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severely criticized the Rule before its total abrogation.[132] In applying the Rule in Shelley's Case, the Ohio Supreme Court had declared that the Rule should not be extended beyond its defined limits.[133]

With the exception of one case,[134] the Ohio cases involving the Rule in Shelley's Case had not related to personal property but to real property.[135] In *King v. Beck I*,[136] the property consisted of both real estate and personal property.[137] The Ohio Supreme Court held that because both personal property and real property were disposed of in the same bequest, the same words would not "receive different meanings."[138] According to this holding, the Rule in Shelley's Case applies to personal property if it is disposed of in a gift which also disposes of real property.[139] Until *Society National Bank v. Jacobson*,[140] Ohio had never held that the Rule in Shelley's Case applied to personal property alone.[141]

V. ANALYSIS

In *Society National Bank v. Jacobson*,[142] the Ohio Supreme Court misconstrued and misapplied the Rule in Shelley's Case[143] in order to allow the adopted child to inherit under the Sallie Perkins trust.[144] The court made two crucial mistakes in its application of the Rule in Shelley's Case.[145] First, the court applied the Rule in Shelley's Case when the Sallie Perkins trust did not use the words "heirs of his body" in their technical sense.[146] Second, the court applied the Rule in Shelley's

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132. *See, e.g.*, Turley v. Turley, 11 Ohio St. 173, 182 (1860) ("[T]he rule itself finds but little favor in this country, and ought not be extended."); *King v. Beck II*, 15 Ohio 559, 562 (1846) (Rule in Shelley's Case a mere artificial technicality); Neff v. Abert, 9 Ohio App. 286, 290 (1918) (Rule in Shelley's Case criticized in other states).

133. *Turley*, 11 Ohio St. at 182; *King v. Beck II*, 15 Ohio at 563; *see supra* notes 17-46 and accompanying text (discussing the Rule in Shelley's Case).

134. *King v. Beck I*, 12 Ohio 390 (1843).

135. *See Brockschmidt*, 60 N.E. at 624; Pollock v. Speidel, 17 Ohio St. 439 (1867); Armstrong v. Zane's Heirs, 12 Ohio 287 (1843); *McFeely's Lessee*, 5 Ohio 465; Watson v. Watson, 171 N.E. 257 (Ohio Ct. App. 1929); *Neff*, 9 Ohio App. 286.

136. 12 Ohio 390 (1843).

137. *Id.* at 391.

138. *Id.* at 474.

139. *See* Society Nat'l Bank v. Jacobson, 560 N.E.2d 217, 224 (Ohio 1990) (Holmes, J., dissenting).

140. 560 N.E.2d 217 (Ohio 1990).

141. *Id.* at 223.

142. 560 N.E.2d 217 (Ohio 1990).

143. Wolfe v. Shelley, 76 Eng. Rep. 206 (C.B. 1581).

144. *Jacobson*, 560 N.E.2d at 223.

145. *Id.* The dissent in *Jacobson* also criticized the majority because the trust was not a freehold estate. *Id.* at 224 (Holmes, J., dissenting).

146. *See infra* text accompanying notes 154-72.

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Case to personal property when, in Ohio, prior to its abrogation, the Rule had not been applied to personal property.[147]

The impact of the court's reasoning is another reason why the Ohio Supreme Court should have been more accurate in its application of the Rule in Shelley's Case. The court's decision will make many lawyers less certain of the law when drafting documents because the court stated that it was applying a common law doctrine, but in essence the court reasoned as it did for the sake of the adopted daughter. Further, the court's decision leaves the lawyer with an impression that all matters are gray and will be decided by distorted equitable reasoning as opposed to being decided by legal reasoning. A lawyer who reads the Ohio Supreme Court's opinion readily sees that the court was merely offering the Rule in Shelley's Case as a justification for its decision. The lawyer will have to wonder what other doctrines the Ohio Supreme Court will misapply in order to accomplish its subjective view of justice.

A. Misapplication of Shelley's Rule

The majority of the Ohio Supreme Court in *Jacobson* dredged up the Rule in Shelley's Case in order to justify its decision that the adopted daughter should inherit, through her father, the one-fourth net income of the trust.[148] There are, however, five prerequisites for the Rule in Shelley's Case to apply to an instrument.[149] In *Jacobson*, two of the five prerequisites were not present in the Sallie Perkins trust.[150]

First, in the Sallie Perkins trust, the words "heirs of the body"[151] were not used in the technical sense, therefore, the Rule cannot apply to the trust agreement. Second, in Ohio, the Rule in Shelley's Case, prior to its abrogation, had never applied to personal property;[152] therefore, because the trust was personal,[153] the Rule in Shelley's Case would not have applied to the Sallie Perkins trust property.

1. Technical Sense of Heirs of the Body

In order for the Rule in Shelley's Case to be applicable, the instrument must contain the words "heirs of the body" in the technical sense,

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147. *See infra* text accompanying notes 173-99.

148. *Id.*; *see supra* notes 53 & 85-87 and accompanying text (granting clause of the trust and the Ohio Supreme Court's decision).

149. *See supra* notes 20-46 and accompanying text (for the five prerequisites).

150. Society Nat'l Bank v. Jacobson, 560 N.E.2d 217, 217 (Ohio 1990).

151. *See supra* text accompanying notes 36-42 (explaining heirs of the body in a technical sense).

152. *See supra* notes 135-41 and accompanying text (explaining application of the Rule in Shelley's Case to personal property in Ohio).

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153. *Jacobson*, 560 N.E.2d at 222.

meaning a class of persons taking indefinitely in succession.[154] In the Sallie Perkins trust, the words "heirs of his body" were not used in the technical sense; therefore, the Ohio Supreme Court should not have applied the Rule to the trust.

To determine whether the words "heirs of the body" were used in the technical sense, a court should examine the granting clause to determine if there were superadded words of limitation.[155] If the clause has superadded words of limitation, then "heirs of the body" would designate specific individuals to take, as opposed to a class of persons taking indefinitely in succession.[156] Also, a court should examine the instrument to determine if the instrument as a whole indicates that the words were used in the technical sense.[157]

In *Jacobson*, the granting clause of the Sallie Perkins trust stated in pertinent part: "and upon his [James C. Brooks, Jr.] death, share and share alike to the heirs of his body, or the descendants of such heirs, taking per stirpes."[158] In this clause, the superadded words of limitation are: (1) "share and share alike;"[159] (2) "descendants of such heirs;"[160] and (3) "taking per stripes."[161] Thus, the words "heirs of his body" were intended, not in their technical sense as a class of persons taking indefinitely in succession, but as meaning the blood children of James C. Brooks, Jr.[162]

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154. Brockschmidt v. Archer, 60 N.E. 623, 625 (Ohio 1901); *see also supra* notes 36-42 and accompanying text (explaining the use of heirs of the body in the technical sense).

The technical meaning of the words "heirs" or "heirs of the body" is that the words indicate a class of persons who would be entitled under law to inherit. *King v. Beck II*, 15 Ohio 559, 563 (1846); *see also* Arnold v. Baker, 185 N.E.2d 844, 847 (Ill. 1962).

> The rule applies . . . only where the gift in remainder refers to an indefinite line of succession, rather than to a specific class of takers. The remainder must be to the heirs of the first taker by the name of heirs as meaning a class of persons to succeed to the estate from generation to generation, and not to heirs as meaning or explained to be individuals. Where to the word "heirs" other words are added which so limit its meaning that it does not include the whole line of inheritable succession but only designates the individuals who are at the death of the life tenant to succeed to the estate, and who are themselves to constitute the source of future descent, then the rule in Shelley's case does not apply.

Arnold, 185 N.E.2d at 847.

155. *King v. Beck II*, 15 Ohio at 563; *see supra* note 42 and accompanying text (explaining superadded words as words that clarified the intent of the grantor).

156. *King v. Beck II*, 15 Ohio at 561-62; *see also* Mack v. Champion, XXVI Ohio Weekly L. Bulletin 113, 115 (1890); *supra* note 42 (example of superadded words as heirs of A now living).

157. *Brockschmidt*, 60 N.E. at 625.

158. Society Nat'l Bank v. Jacobson, 560 N.E.2d 217, 218 (Ohio 1990); *see supra* text accompanying note 53 (the pertinent granting clause).

159. *Jacobson*, 560 N.E.2d at 218.

160. *Id.*

161. *Id.*

162. *Cf.* Brockschmidt v. Archer, 60 N.E. 623, 625 (Ohio 1901). The Ohio Supreme Court stated:

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The most important superadded words in the clause are "descendants of such heirs." If Sallie Perkins had intended "heirs of his body" to be used in a technical sense, there would have been no reason to hold over the gift to the descendants of the "heirs of his body."[163] All "the descendants of such heirs" of the heirs of James C. Brooks, Jr. would also be the "heirs of the body" of James C. Brooks, Jr. Therefore, if the words "heirs of his body" were used in their technical sense, indicating a class of persons to take indefinitely in succession, the second part of the clause would be superfluous. The superadded words of "the descendants of such heirs" indicate that some meaning other than "the whole line of inheritable succession,"[164] was intended by the clause "heirs of his body."[165]

The clause holding over the gift to the descendants of the "heirs of [the] body" of James C. Brooks, Jr. shows that Sallie Perkins intended "heirs of his body" to be used in the sense of the blood children of James C. Brooks, Jr.[166] Therefore, the words should have been construed as words of purchase, not as technical words of succession.[167] The Rule in Shelley's Case would not be applicable to the Sallie Perkins trust because the words "heirs of his body" were words of purchase.[168]

Next, the trust's general scheme of disposition clearly demonstrates that Sallie Perkins did not use the words "heirs of his body" in the technical sense.[169] The trust provided that if there were no heirs of James C. Brooks, Jr.'s body, then the income from one-fourth of the trust would pass to the natural children of Ralph Perkins, Sallie Perkins' son.[170] This clause shows that Sallie Perkins intended the words

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> [T]he devise was to the testator's brother Christian of all his property, to be used by him while he lives, and at his death to go to "his heirs or heirs born in lawful wedlock," and, should he die without such heirs, then over to the children of two of his sisters . . . . This devise over . . . . showed that the testator had used the word "heirs" in the sense of children; for if he had used it in its technical sense there could have been no devise over to the children of his two sisters, and the estate would have gone to his heirs general . . . .

Id.

163. Turley v. Turley, 11 Ohio St. 173, 181 (1860). *See generally* BLACK'S LAW DICTIONARY 400 (5th ed. 1979). Descendants are defined as "issue, offspring or posterity in general." *Id.*

164. Arnold v. Baker, 185 N.E.2d 844, 847 (Ill. 1962).

165. *Jacobson*, 560 N.E.2d at 219.

166. *Brockschmidt*, 60 N.E. at 625.

167. *Id.*; *see supra* notes 36-42 and accompanying text (explaining the use of heirs of the body in the technical sense).

168. *See supra* note 40 (defining words of purchase).

169. *Jacobson*, 560 N.E.2d at 218-19.

170. *Id.*; *see supra* text accompanying note 53 (describing distribution of one-fourth share of the Sallie Perkins trust).

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"heirs of his body" to be limited and not to be a general class of persons who would be descendants at law.[171]

Furthermore, the Ohio Supreme Court previously stated that Ohio courts should not struggle to bring dispositions of property within the Rule in Shelley's Case.[172] Certainly, the Ohio Supreme Court in the case of *Jacobson* strained to exclude the superadded words of limitation in the trust and struggled to ignore the entire structure of the Sallie Perkins trust. It is clear from both the trust's language and the general scheme of distribution that the words "heirs of his body" were not used in the technical sense. Therefore, the Rule in Shelley's Case should not apply to the trust agreement.

2. Application of the Rule to Personal Property

In Ohio, the Rule in Shelley's Case, before it was abrogated, did not apply to personal property.[173] One of the prerequisites that must be present in order for the Rule in Shelley's Case to apply is that there be a freehold estate in the ancestor.[174] A freehold estate is an estate in real property for an indeterminate amount of time.[175] A freehold estate must be "immobil[e], that is the property must be either land or some interest issuing out of or annexed to land . . . ."[176] Therefore, personal

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171. *Jacobson*, 560 N.E.2d at 218-19. Sallie Perkins clearly intended to limit distribution to blood descendants of the life beneficiaries by using "heirs of the body" thirty-one times in the trust. Record at 22-26. Further evidence of Sallie Perkins' intent to use "heirs of his body" in a nontechnical way is evident by her use of the "heirs at law" clause at the end of her trust. *Id.* at 25-26.

> Should there be no heirs of the body, or descendants of such heirs of Elizabeth Perkins, Jacob B. Perkins, II, and Ralph Perkins, Jr., living at the time of distribution, the share of the Trust Estate otherwise distributable to them shall be distributed to the then living heirs of the body of James C. Brooks, Jr., or descendants of such heirs of his body, taking per stirpes, and should there be no such heirs, or descendants thereof, living at the time of distribution, I direct the Trustee to make distribution of the Trust Estate in the proportions and to the persons who would be entitled, as my *heirs-at-law*, to distribution thereof under the then existing statutes of the State of Ohio.

Id. (emphasis added). Only if there were no heirs of the body of the named beneficiaries would "heirs" generally take the gift. *Id.* This further advances the argument that Sallie Perkins had a strong desire to keep the estate within the lineal line of the life beneficiaries, her grandchildren and not going to collateral heirs.

172. *King v. Beck II*, 15 Ohio 559, 563 (1846).

173. *See supra* notes 135-41 and accompanying text (examining the use of the Rule in Shelley's Case in Ohio to personal property).

174. *See supra* text accompanying notes 21-22 (explaining a freehold estate).

175. Ralston Steel Car Co. v. Ralston, 147 N.E. 513, 516 (Ohio 1925). "All authorities agree that in the last analysis the true test of a freehold is indeterminate tenure . . . . A freehold [estate] is necessarily real property." *Id.* "[The] primary and technical sense [of] the term 'estate' refers only to an interest in land . . . ." Black v. Sylvania Producing Co., 137 N.E. 904, 905 (Ohio 1922). *See generally* BLACK'S LAW DICTIONARY 598 (5th ed. 1979).

176. BLACK'S LAW DICTIONARY 598 (5th Ed. 1979).

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property is not a freehold estate and the Rule in Shelley's Case should not apply to personal property.[177]

The historical reasons for the Rule in Shelley's Case do not justify its application to personal property.[178] Furthermore, other states have held that the Rule in Shelley's Case does not apply to personal property.[179]

The majority in *Jacobson* stated that "a fair number of courts have applied the Rule in Shelley's Case to conveyances of personal property by way of analogy and as a rule of construction *in order to promote the intention of the grantor or testator.*"[180] However, the reasoning of five of the seven cases that the majority cites for support of its decision to apply the Rule in Shelley's Case to personalty state that the Rule in Shelley's Case is only to be used to further the intent of the grantor.[181] In these cases, the Rule in Shelley's Case is a rule of construction which can be defeated by the grantor's intent.[182]

If the majority in *Jacobson* used the Rule in Shelley's Case as a rule of construction which could be defeated by the intention of the grantor, then the court would have had to analyze Sallie Perkins' intent. If the court had analyzed Sallie Perkins' intent, then the court would have found that Sallie Perkins clearly intended to limit the beneficiaries of the trust to the blood children of the named beneficiaries.[183]

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177. *But see* Society Nat'l Bank v. Jacobson, 560 N.E.2d 217, 222 n.6 (Ohio 1990).

178. Van Grutten v. Foxwell, [1897] App. Cas. 658, 668; *see supra* notes 107-15 and accompanying text (modern historical reason justifying the Rule in Shelley's Case to facilitate the alienation of *real property* not personal property).

179. *See, e.g.*, Jones v. Rees, 69 A. 785, 787 (Del. 1908) (refusing to extend the Rule in Shelley's Case to gifts of personal property); Bross v. Bross, 167 So. 669, 674 (Fla. 1936) (holding that "[t]he rule in Shelley's Case is a rule of construction rather than an arbitrary rule of law, and does not prevail over the intention of the testator . . ."); Lord v. Comstock, 88 N.E. 1012, 1018 (Ill. 1909) (stating that "[o]n authority and reason the Rule in Shelley's Case should not be held to apply to gifts of personalty"); *In re* Trusteeship of Creech, 159 N.E.2d 291, 296 (Ind. Ct. App. 1959) (stating that the rule in Shelley's case "never did apply to personal property"); *In re* Mitinger's Estate, 1 A.2d 572, 574 (Pa. Super. Ct. 1938) (stating that the Rule in Shelley's Case does not apply to personal property).

180. *Jacobson*, 560 N.E.2d at 223 (emphasis added).

181. De La Vergne Machine Co. v. Featherstone, 147 U.S. 209, 222 (1893) ("[I]f resorted to in connection with personal estate, [the Rule in Shelley's Case] is only by way of analogy, and as a rule of construction in order to promote the intention [of the grantor]."); Bross v. Bross, 167 So. 669, 674 (Fla. 1936) ("The rule in Shelley's Case is a rule of construction rather than an arbitrary rule of law, and does not prevail over the intention of the testator in this state."); Hughes v. Nicklas, 17 A. 398, 399 (Md. Ct. App. 1889) (the Rule in Shelley's Case applied by analogy); Sands v. Old Colony Trust Co. 81 N.E. 300, 301 (Mass. 1907) ("[T]here is no inflexible rule of law which requires us to apply the rule in Shelley's Case, but that we should ascertain and carry out the intention of the settlor or donor as expressed in the instrument itself."); *In re* Thorne's Estate, 25 A.2d 811, 819 (Pa. 1942) ("The 'rule in Shelley's Case' . . . has nothing to do with this case except by way of analogy.").

182. *De La Vergne Machine Co.*, 147 U.S. at 222; *Bross*, 167 So. at 674; *Sands*, 81 N.E. at 301; *Hughes*, 17 A. at 399; *In re Thorne's Estate*, 25 A.2d at 819.

183. *See supra* text accompanying notes 154-72.

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Therefore, the court would have ruled that the Rule in Shelley's Case was inapplicable to the trust because the Rule acted to contradict Sallie Perkins' intent.

In *Jacobson*, the majority of the Ohio Supreme Court also relied on dicta from the case of *King v. Beck I*[184] for the proposition that prior to the total abrogation of the Rule in Shelley's Case, the Rule applied to conveyances of personal property.[185] In *King v. Beck I*, the property being disposed of consisted of both real property and personal property.[186] The testator of the will used the same bequest with the same words to convey both types of property.[187] In *King v. Beck I*, the Ohio Supreme Court held that the Rule in Shelley's Case did apply to the real property in the case.[188] The court next determined what should happen to the personal property.[189] The court held that because the personal property was conveyed in the "same words of the same sentence of the same bequest," those words would not receive a different meaning for the two different types of property.[190] As Justice Holmes' dissent in *Jacobson* correctly points out: "It can reasonably be stated that if that case [*King v. Beck I*] stands for anything, it is only that the rule may be applied to personalty in those instances where the rule has been applied to realty passing under the identical gift."[191]

King v. Beck I[192] was overruled by *King v. Beck II*.[193] The Ohio Supreme Court reviewed its prior determination that the Rule in Shelley's Case applied to the real property.[194] The court held that the Rule did not apply because the testator did not use the word "heirs" in its technical sense.[195]

In *King v. Beck II*, the Ohio Supreme Court said that it would not "strain a point to bring a case within the operation of the rule in Shelley's case . . . ."[196] In *Jacobson*, however, after acknowledging that the Rule in Shelley's Case, before its abrogation, had not been applied to personal property in Ohio, the Ohio Supreme Court did, in fact, apply the Rule to personal property.[197] The court acknowledged that the

184. 12 Ohio 390, 473 (1843).
185. Society Nat'l Bank v. Jacobson, 560 N.E.2d 217, 223 (Ohio 1990).
186. *King v. Beck I*, 12 Ohio at 474.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Jacobson*, 560 N.E.2d at 224.
192. 12 Ohio 390 (1843).
193. 15 Ohio 559 (1846).
194. *Id.* at 562.
195. *Id.* at 564. The testator used the words "heirs" to mean children. *Id.*
196. *Id.* at 563.
197. Society Nat'l Bank v. Jacobson, 560 N.E.2d 217, 223 (Ohio 1990).

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prevailing view in the United States was that the Rule in Shelley's Case did not apply to personal property.[198] In order to justify its conclusion that the adopted daughter should receive the inheritance, the court extended the abrogated Rule in Shelley's Case to personal property.[199] Thus, the Ohio Supreme Court ignored legal precedent to ensure that the Rule in Shelley's Case applied to the Sallie Perkins trust.

B. *Legal Realism*

Analysis of the Ohio Supreme Court's decision in *Society National Bank v. Jacobson*[200] would be incomplete if it did not include a discussion of the impact of the court's decision.[201] Before the *Jacobson* decision, the Rule in Shelley's Case, in Ohio, did not apply to personal property.[202] Obviously, the Ohio Supreme Court's decision in *Jacobson* may have an impact on any trust created before 1941. The Rule in Shelley's Case may now apply to any pre-1941 trust containing the specific language that the Rule covers.[203] This impact is limited, however, because realistically few pre-1941 trusts are still in existence.

The important aspect of the Ohio Supreme Court's decision is the extent to which it undermines the certainty in the common law. The Ohio Supreme Court misapplied an "anachronistic common-law rule" for its own conclusion of subjective justice.[204] Any attorney reading the court's opinion will wonder if the Ohio Supreme Court could so easily do subjective justice in *Jacobson*, then in what other ways will the court circumvent the application of the law.

A state's common law is living law that continually expands and contracts with every case. It is more susceptible to evolution than are statutes. Once a common law doctrine has been abrogated by a legislative enactment, the common law doctrine is suspended. Once abrogated, the common law doctrine no longer expands or contracts because the doctrine is not susceptible to change.

" '[O]beying a rule' is a practice."[205] Karl Llewellyn[206] said that certainty in the legal sense was being able to predict the outcome of a

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198. *Id.* at 221.

199. *Id.* at 224 (Holmes, J., dissenting).

200. 560 N.E.2d 217 (Ohio 1990).

201. *Id.*

202. *See supra* text accompanying notes 173-99.

203. *See supra* text accompanying notes 18-19 (example of the language that would place a conveyance within the Rule in Shelley's Case).

204. *Jacobson*, 560 N.E.2d at 224 (Holmes, J., dissenting).

205. LAWRENCE WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 202 (G. Anscombe trans. 1958).

206. The legal writings of Karl N. Llewellyn are too numerous for review in this article. *See generally* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973) (examining the life and work of Karl Llewellyn within the realist movement and setting forth a bibliography of selected works). Karl Llewellyn "was not perfect; he was merely, in his many-faceted

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law suit.[207] If the Ohio Supreme Court can redefine common law rules that were abrogated by statute, then the certainty that Llewellyn spoke of will not exist. In *Jacobson,* the Ohio Supreme Court redefined the Rule in Shelley's Case, almost fifty years after its abrogation, by expanding its application to personal property and by ignoring the prerequisite of using "heirs of the body" in the technical sense.[208] By the court's total disregard for how the Rule in Shelley's Case is to be applied, the Ohio Supreme Court tread into dangerous water.

The court was sympathetic to the adopted daughter because today adopted children are no longer discriminated against as they once were.[209] Lawyers reading the court's decision will readily see that the court was merely offering the Rule in Shelley's Case as a justification for its decision. Blackstone stated that judges must decide cases according to objective rules.[210] Objective rules are known beforehand and do not arbitrarily favor one party over the other.[211] Accordingly, a judge preserves the stability of a legal system by reasoning from objective rules to the specific facts.[212] Therefore, because the result in *Jacobson* is not dictated by the Rule in Shelley's Case, the *Jacobson* rationale undermines the stability of Ohio's judicial system.

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humanity, a strong and humble man, a man of great kindness and charity, a man of understanding, a man of wit - a man who came closer than most of us do, or will, to wisdom." Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 815 (1962).

207. KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 76 (M. Ansaldi trans., 1989). "[L]egal certainty in the American sense, . . . is, the prediction of the outcome of a lawsuit based on deduction from the existing content of a legal rule . . . ." *Id.*

> [W]hy people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897). This is Holmes' famous predictive theory of law: "The profecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." *Id.* at 461. In contrast, Lon L. Fuller wrote that law is "the enterprise of subjecting human conduct to the governance of rules." LON L. FULLER, THE MORALITY OF LAW 91 (rev. ed. 1969). Fuller, however, also wrote that "[t]o act on rules confidenty, men must . . . be assured that in case of a dispute about their meaning there is available some method for resolving the dispute." *Id.* at 56-57.

208. *Jacobson*, 560 N.E.2d at 223; *see supra* text accompanying notes 154-99.

209. *See supra* note 68 (explaining the "stranger to the adoption" doctrine).

210. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 62-90 (1765).

211. *Id.*

212. *Id.*

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One may view the Ohio Supreme Court's decision in two ways because state supreme courts have two functions in deciding cases.[213] First, the state supreme court's decisions set binding precedent for subordinate courts in its jurisdiction.[214] Second, the state supreme court ought to decide "individual cases justly."[215] "Sometimes an individual party's well-being will be sacrificed to that of the general public, but sometimes the demand for justice in an individual case will result in unwise or even impractical rules."[216] Whether the court decides the case for the benefit of society or for the benefit of the individual party, the court should accurately explain its reasons for its conclusion.

The court in *Jacobson* did what it thought was just for the adopted daughter. The court, however, misused an archaic rule that had been statutorily abrogated to justify its conclusion. The court may have tried to limit the effect its decision would have on future cases because it used a rule that would only affect trusts created before 1941.[217] By misusing the Rule in Shelley's Case, however, the court's decision will affect the certainty of the law in Ohio because intellectually the court did not accurately explain its reasons for its conclusion.

The next question which arises is why the court tried to mask its decision with the Rule in Shelley's Case as opposed to plainly stating that its decision was equitable. "[O]ne [can]not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before . . . ."[218] The decision in *Jacobson* makes it questionable whether the Ohio Supreme Court will apply any doctrine of the law virtuously. If the court had stated that it was sympathetic for the adopted daughter in *Jacobson*, and that it was going to give an equitable result, then a lawyer could not be hesitant to follow the rules laid down by the Ohio Supreme Court. The lawyer desires to have certainty in the law because certainty creates an atmosphere in which there is less of a litigation threat for her clients.[219]

The court did not acknowledge what it was doing except by way of a tortured justification. The danger is that the Ohio Supreme Court will continue down this path of subjective justice and will not apply the rules of law upon which lawyers rely when drafting documents and deciding whether a matter is contestable in court. An essential element in

213. LLEWELLYN, *supra* note 207, at 68.
214. *Id.*
215. *Id.*
216. *Id.*
217. The *Jacobson* decision is binding precedent on all trusts created before 1941.
218. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).
219. *Cf. supra* note 107 (Holmes' predictive theory of law). Litigation is an expensive avenue for a client. If a lawyer can prevent litigation, then the client does not incur needless expenses.

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a lawyer's understanding of the law is that "if matters ever came to litigation"[220] the document would be treated in a reasonable manner.[221] After the decision in *Jacobson*, the lawyer will not know if the document will be treated in a reasonable manner. Therefore, the lawyer cannot determine whether she has placed her client too close to the possibility of litigation.

Citizens will also be unable to determine whether their actions are or are not within the boundaries of "the law." The legal system will become more unpredictable and more litigious. As the litigation grows, the courts will become even more burdened than they are today.

The Ohio Supreme Court manipulated the ancient Rule in Shelley's Case in order to do its subjective justice. In *Jacobson*, the Ohio Supreme Court should have acknowledged that it was merely giving an equitable result by today's standards.

VI. CONCLUSION

In *Society National Bank v. Jacobson*, the Ohio Supreme Court, perhaps responding to the sympathetic facts of the case, disregarded the common law doctrine of the Rule in Shelley's Case. The Rule had been totally abolished in Ohio in 1941. The court misapplied and misconstrued the Rule in Shelley's Case in order to allow the adopted daughter to inherit under the Sallie Perkins trust. First, the court applied the Rule in Shelley's Case when the Sallie Perkins trust did not use the words "heirs of his body" in their technical sense. Second, the court applied the Rule in Shelley's Case to personal property when, in Ohio, prior to its abrogation, the Rule had not been applied to personal property. The repercussions of the Ohio Supreme Court's decision effects the certainty of the law in Ohio.

One hopes that in Ohio, the Rule in Shelley's Case is once again dormant. One fears, however, that the Ohio Supreme Court may continue to do its subjective justice by misapplying or misconstruing any common law rule. This misconstruction would lead to instability in the law of Ohio. One hopes, for the sake of certainty and stability, that the Ohio Supreme Court will no longer try to justify its conclusion in a case by misapplying a rule of law. To avoid instability in the judicial system, the Ohio Supreme Court should have acknowledged that in *Jacobson* it was merely doing subjective justice.

Valoria C. Hoover

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220. LLEWELLYN, *supra* note 207, at 82.

221. *Id.* "[T]he more important type of legal certainty consists in knowing that some dealing of his would be treated - *if* matters ever came to litigation - in a manner that a reasonable man might have anticipated . . . ." *Id.*

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