5-1-1933

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Recommended Citation

Brendan F. Brown, Lord Hardwicke's Contribution to the Law of Executory Trusts, 8 Notre Dame L. Rev. 413 (1933).
Available at: http://scholarship.law.nd.edu/ndlr/vol8/iss4/4

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LORD HARDWICKE'S CONTRIBUTION TO THE LAW OF EXECUTORY TRUSTS

Equity and the Common Law, especially the Law of Real Property, are the terminal pillars which sustain the arch of our Anglo-American jurisprudence. One of the most interesting and important phases of English Legal History, therefore, concerns the attempt on the part of Equity to make its rules conform, if possible, to the principles of the Common Law. After the eventual interpretation of the Statute of Uses, which gave rise to the modern equitable trust, Equity found itself taking cognizance of a distinctive type of estate, resulting from the non-operation of that Statute in the case of certain Uses. The Common Law had assumed control of those Uses which this Statute executed. They became legal estates. They were governed by the rules of the Common Law, but Equity was confronted with the task of building up a set of principles for the regulation and control of the equitable estates. In doing this, Equity endeavored as much as possible to imitate the Rules of the Common Law. This was the general tendency. But it seems that variations were essential at times as in the domain of the principles which had been early generated in the English Land Law as the result of the impact of Feudalism. Because of the peculiarly feudal character of the English Real Property Law, and because of the genesis of a revolutionary juristic philosophy, which was being followed by the Chancellors, it appears that in the matter of such prin-

1 The Statute of Uses, 27 Henry VIII, c. 10, was passed in 1535. The juridical philosophy of the Statute of Uses, which was called an enactment for the transferring of uses into possession, consisted in this, that the use was to be executed or converted into a legal estate. There was no longer to be a distinction between the legal and equitable estates with reference to those uses to which the Statute applied. As to such uses, the equitable interest in the 
cestui que use was changed by the Statute into a legal estate with all the usual liabilities and responsibilities growing out of such estates.
principles as the Rule in Shelley's Case, for example, there could not be a perfect correspondence between the equitable and legal attitudes.

Should Equity apply by way of analogy the Rule in Shelley's Case to the newly formed trust or equitable estates in land which were springing up in the middle of the seventeenth century? A line of Chancellors from that period until the time of Lord Hardwicke had inclined to the view that there should be a similarity between the two types of estate in this respect, subject, however, to a certain exception. In this matter, Equity followed the Law to avoid confusion in the realm of English jurisprudence. This exception was that the Rule in Shelley's Case should not apply to an executory trust. The exception which the Common Law recognized, i.e., that the Rule in Shelley's Case would not be applicable where it could be affirmatively proved that the word "heirs" had not been employed in reference to the descent forever, was endorsed by Equity. Did Lord Hardwicke invariably sustain the view of his predecessors on the wool-sack, or did he at times overrule some of the precedent which had grown up on this subject during the century of equitable growth preceding his Chancellorship?

Before the era of Lord Hardwicke, the expression executory trust had a variable meaning. It might mean a trust which had come within the operation of the Statute of Uses,

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2 In Shelley's Case, 1 Coke 94, "the heirs are words of limitation of the estate and not words of purchase." This case was decided in 1581, but while the rule derives its name from this case, it had been established in the fourteenth century. See: Holdsworth, History of English Law (1931) III, 107 and following. Briefly according to this Rule, 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" or the heirs of his body, the ancestor (the beneficiary first designated) will take an estate tail, convertible into a fee simple, through the defeat of the entail.

3 Lord Hardwicke's decisions established the limits of the Equitable System. His Chancellorship began in 1737 and ended in 1756, approximately. He was the second of the great triumvirate, Lord Nottingham, Lord Hardwicke, and Lord Eldon. His contributions in the equitable field are extremely important since they represent largely the development which took place in Chancery in the eighteenth century, the great formative epoch.
or it might describe a situation where the testator or settlor had not given complete directions for the settling of his estates with perfect limitations, so that something had to be done by the trustees to make the trust more complete. In the first instance, a merely passive trust, for example, would not be executory for it would be executed by the Statute of Uses, and it would cease to be a trust at all. It was in this sense that the word was used in *Broughton v. Langley* (1703).⁴ There trustees were named to permit a beneficiary to take certain rents and profits during his lifetime. Another illustrative case was the one of *Jones v. Lord Say and Seal* (1728).⁵ In this latter cause, a reference was made to *Broughton v. Langley*, and a distinction was drawn between the two cases. The explanation was that the Statute of Uses executed the trust in *Broughton v. Langley* because it was merely passive, but it did not execute the trust in *Jones v. Lord Say and Seal* because there the trust was active. It involved the collection and payment of legacies and a conveyance of the surplus to a beneficiary. But in both adjudications, the expression *trust executed* meant a use executed by the Statute of Uses, and *trust executory* designated the opposite idea.

Lord Hardwicke himself at times continued to use the words *executed* and *executory* in the sense just described. At the beginning of his Chancellorship, in *Hopkins v. Hopkins* (1737),⁶ he used the terms *executed* and *executory* to designate the effect of the Statute of Uses upon the trust in question. In that case, he said that all trusts not executed by the Statute of Uses were executory in a court of Equity. A similar usage of the expression occurred in *Roberts v. Dixwell* (1738),⁷ where the trustees were to make a conveyance, so that the legal estate remained in the trustees unexecuted

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⁴ 2 Ld. Raymn. 873 (1703).
⁵ 1 Eq. Ca. Abr. 383 (1728).
⁶ 1 Atk. 581 (1737); Ca. T. T. 44; see 1 Vern. 268.
⁷ 1 Atk. 607 (1738).
by the Statute of Uses. It was declared in *Newcoman v. Bethlehem Hospital* (1741)\(^8\) that in an executory trust it was necessary for the trustee or trustees actually to perform something in order to show that the device of the trust was *bona fide* and really necessary. The following year, in *Bagshaw v. Spencer* (1742),\(^9\) he expressed a similar opinion. To the same effect was *Colson v. Colson* (1743).\(^10\) In 1753, in *Tollett v. Tollett*,\(^11\) he asserted that all trusts were executory to a degree. Further examples were *Villiers v. Villiers* (1740),\(^12\) *Trodd v. Downs* (1742),\(^13\) *Bullock v. Stones* (1754),\(^14\) and *Gibson v. Rogers* (1750).\(^15\) From all these decisions, the conclusion may be drawn that Lord Hardwicke repeatedly employed the expression *trust executed* to describe a trust which had been executed by the Statute of Uses.

But while both before and during the period of Lord Hardwicke an executed trust was a trust which had come within the operation of the Statute of Uses, yet the term *executed* might be applied to a trust not executed by the Statute of Uses to designate a trust in which no further conveyance or settlement was to be made by the trustees, although they had active duties to perform, as distinguished from an *executory* trust in which the testator or settlor had not given complete directions to the trustees for settling his estates with perfect limitations. Executed trusts, therefore, were those which were so fully declared by the person creating them that nothing further remained to be done to make them complete, as where the terms of the trust were designated by the terms of the instrument declaring it. That this usage

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\(^{8}\) Amb. 9 (1741).
\(^{9}\) 1 Ves. Sen. 152 (1742).
\(^{10}\) 2 Atk. 247 (1743).
\(^{11}\) Amb. 195 (1753).
\(^{12}\) 2 Atk. 72 (1740).
\(^{13}\) 2 Atk. 364 (1742).
\(^{14}\) 2 Ves. Sen. 522 (1754).
\(^{15}\) Amb. 93 (1750).
of the words *executed* and *executory*, respectively, had existed before the time of Lord Hardwicke appears from the case of *Glenorchy v. Bosville* (1733),\(^\text{16}\) which was decided by Lord Talbot.

Lord Hardwicke most generally employed the term trust executory to describe the non-operation of the Statute of Uses, but he did employ the expression at times to indicate the degree of completeness with which a settlor had created the trust, *i. e.*, in the sense mentioned in the preceding paragraph. He made the following statement in *Roberts v. Dixwell* (1738):\(^\text{17}\)

"... the latter part of the trust was merely executory, to be carried into execution after the performance of previous trusts, so that the whole direction fell upon the Court of Equity, which was to direct how the parties were to convey."

Other illustrations may be cited. Thus he said in *Hopkins v. Hopkins* (1738)\(^\text{18}\) that a distinction had been made between extraordinary trusts, where the will itself directed a conveyance, and trusts where there was no conveyance directed but where only the trust was directed by the will. He said that he would not oust that distinction.

The variable usage of the expressions *executed* and *executory* as applied to trusts must be taken into consideration in any attempt to determine whether the Rule in Shelley's Case was applicable to trusts in the formative epoch which is here being discussed. It was said that generally this Rule did apply to equitable limitations in both the Hardwicke and pre-Hardwicke periods. This meant that it applied to trusts executed (the word *executed* describing the degree of completeness of the trust), for at an early date it was determined that the Rule in Shelley's Case did not extend to an executory trust. The holdings in Chancery support the view that the Rule in Shelley's Case did apply to executed

\(^{16}\) 2 Eq. Ca. Abr. 743, no. 3 (1733).
\(^{18}\) 1 Atk. 580 (1738).
trusts unless it plainly appeared that the word "heirs" was not used in its strictly legal signification, so that even at Law the Rule would not apply to the case in question.

It is certain that in the post-Hardwicke period of the eighteenth century Chancery was definitely of the opinion that the Rule in Shelley's Case applied to executed trusts. But the authorities are divided as to whether this principle was fixed in the pre-Hardwicke and Hardwicke epochs. Some maintain that it was an early equitable principle, but others incline to the belief that at least under Lord Hardwicke, to judge from his decision in Bagshaw v. Spencer (1743), the doctrine was doubtful.

If the expression trust executed is taken in the sense of a trust which has come within the operation of the Statute of Uses, of course, the estate referred to would be legal, and there would be no possibility of the non-application of the Rule in Shelley's Case, except when it appeared from the entire instrument that the word "heirs" was not used in its strictly legal sense to indicate a line of descent forever. This Rule applied to the trust in Broughton v. Langley (1703), to which reference has already been made, where there was a merely passive trust. The trustees were to stand seised to the use of A and the heirs of his body. The result was that A, the first beneficiary, took an estate tail.

At what time, approximately, was it determined in Chancery that the Rule in Shelley's Case extended to executed trusts (the term executed here describing the trust's completeness)? Maddock has submitted that this was de-

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19 See Wright v. Pearson, Amb. 358, and Jones v. Morgan, 1 Bro. C. C. 206.
21 See Fearne, Contingent Remainders, (1st Am., from 6th London ed., 1819), 136, and following; Kales, Application of the Rule in Shelley's Case where the Limitations are equitable, or where there is an Executory Trust (1913) 8 Ill. L. Rev. 153.
22 2 Atk. 570, 580 (1743).
24 Maddock, op. cit. supra note 20, at p. 694.
cided as early as the Chancellorship of Lord Talbot, and that Lord Hardwicke himself admitted the fact that the word *executed* might be employed not only to indicate a trust within the Statute of Uses, but also to convey a meaning in no way connected with that Statute. Fearne has written that Lord Hardwicke, in *Roberts v. Dixwell*, "expressly distinguished between legal estates and trusts in general and between several sorts of trusts; and therefore in terming one sort of trust executory, he recognized a distinction between that and other trusts, that were not so, and clearly pointed out the nature of that distinction by saying the trust in question was merely executory and to be carried into execution, and referring to the very cases in which the line of distinction between trusts executory and executed had been explicitly and clearly drawn." This authority also claims that Lord Hardwicke had resorted to the distinction "between two species of trusts, respectively termed executory and executed, as relative to the latitude of the construction of the trust, in a manner different from the legal import of the words of the will." Lord Hardwicke said:

"To be sure, where an estate has been granted or given to A for life and to the heirs of the body of A, such a devise has been by the Common Law so united in the first person as to convey to him an estate tail, and the same construction has prevailed with respect to trust estates."

From what he subsequently said in this opinion, by "trust estates" he evidently meant executed trust estates.

But Fearne has argued that *Bagshaw v. Spencer* (1743) was an anomalous case wherein Lord Hardwicke
adjudged that the Rule in Shelley's Case should not apply to an executed trust, and by implication that this Rule should not extend to equitable interests at all, since it had been settled that the Rule did not apply to executory trusts. This is also the view of other writers,\(^3\) although there are contrary opinions expressed by legal commentators.\(^4\) But before the effect of the decision in Bagshaw v. Spencer,\(^5\) is analyzed, consideration will be given to the principle that the Rule in Shelley's Case did not apply to executory trusts.

In the instance of trusts executed, the construction of courts of Law and Equity was the same at an early date, because the testator was thought not to suppose that any further conveyance would be made, but in executory trusts, he was thought to mean to leave something to be done. For this reason, the court of Equity would not follow the Rule in Shelley's Case, that is, the strict legal effect of the terms used by the testator, for the trusts were obviously to be executed in a more careful and accurate manner. Equity would direct a settlement which would effectuate the intent that the "heir" or "heirs of the body" should take by purchase. This was uniformly the rule throughout the whole eighteenth century. In 1728 Lord King decided in the case of Papillon v. Voice\(^6\) that the legal principle should prevail in that limitation in a will which carried the estate in question, but this rule did not control the construction of that part of the will which was wholly executory, although the words of the will declaring the two trusts were identical otherwise. In this case, a legacy was directed to be laid out in lands to be settled. Besides there was a devise of lands simply to the same uses. The trust was held to be executory in the first instance, unaffected by the Rule in Shelley's Case, but executed in the second, governed by this Common Law

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\(^3\) See Kales, *op. cit. supra* note 21, at p. 155.
\(^4\) See Maddock, *op. cit. supra* note 20, at p. 708; Fonblanque, *op. cit. supra* note 20, at p. 359, and following.
\(^6\) 2 P. Wms. 478 (1728).
Rule. This had been the equitable viewpoint even earlier, for it obtained in *Leonard v. Sussex*,\textsuperscript{38} which was decided in 1705. The facts were that a mother devised lands to trustees to pay debts and legacies and then to settle the remainder on her son and the "heirs of his body," with remainders over. The court said that the trust was executory, to be construed as if a similar provision had been included in marriage-articles. A "strict settlement" was, therefore, decreed, \textit{i. e.}, the son was held to be only a tenant for life.

Since the trust was executory, the Rule in Shelley's Case did not apply. A third illustration is the case of *Glenorchy v. Bosville* (1733).\textsuperscript{39}

This early eighteenth century precedent to the effect that the Rule in Shelley's Case should not apply in the instance of an executory trust was endorsed by Lord Hardwicke. Thus at the beginning of his Chancellorship, he held in *Roberts v. Dixwell* (1738)\textsuperscript{40} that if a testator by will directed his trustees to convey to his daughter for life and to the "heirs of her body," the trust would be executory and the daughter would take only an estate for life in the lands devised. In this adjudication\textsuperscript{41} Lord Hardwicke said:

"Where the trusts are merely executory, and something remains to be done to perfect and carry into effect the testator's intention, the court is not confined to the strict rules of the Common Law but governs itself by the testator's intention and does that which will best answer and support it."

The first exception to the general rule that the Rule in Shelley's Case should by analogy apply to equitable estates arose from the fact that in executory trusts Chancery thought that it should effectuate the true intent of the settlor when he did not act as his own conveyancer. It was thought that in an executory trust when the words "to \(A\) for life, remainder to the heirs of his body" occurred, the testator or settlor

\textsuperscript{38} 2 Vern. 526 (1705).
\textsuperscript{39} Ca. T. T. 3 (1733).
\textsuperscript{40} \textit{Op. cit. supra} note 7.
\textsuperscript{41} Roberts v. Dixwell, \textit{op. cit. supra} note 7, at p. 608.
actually intended a succession of beneficial interest; hence the heirs took as purchasers. Lord Talbot had declared in the case of *Glenorchy v. Bosville* (1733)\(^{42}\) that in trusts executory the testator's intent was to prevail. Other cases of similar import were *Papillon v. Voice* (1728)\(^{43}\) and *Leonard v. Sussex* (1705).\(^{44}\) Lord Hardwicke was of the same opinion. He expressed the conviction in *Newcoman v. Bethlem Hospital* (1741)\(^{45}\) that there had been created in that case an executory trust so that the intent of the testator should be followed. This principle was repeated in *Marryat v. Townley*,\(^{46}\) which he decided in 1748. Other cases which showed that Lord Hardwicke was of this opinion were *Roberts v. Dixwell*,\(^{47}\) and *Garth v. Baldwin* (1755).\(^{48}\) To quote from his opinion in *Read v. Snell*:\(^{49}\)

"... where it is a trust executory, this court is bound to see a settlement is made agreeable to the intention of the testator . . ."

The second exception to the general rule that the Rule in Shelley's Case should apply to equitable estates was that the heirs would take as purchasers where it could be affirmatively demonstrated that the word "heirs" was not used technically to designate the line of descent forever. In this respect, Equity followed the Common Law, for such a demonstration would defeat the application of the Rule in Shelley's Case even at law. As an example of this may be cited the case of *Allgood v. Withers* (1735).\(^{50}\) The first beneficiary took an estate for life and the heirs took by purchase. Lord Talbot came to this conclusion because "the limitation to the heirs of the body of the first beneficiary was blended with that to the heirs of the bodies of several

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\(^{42}\) 2 Eq. Ca. Abr. 744 (1733).
\(^{43}\) 2 P. Wms. 478 (1728).
\(^{44}\) 2 Vern. 526 (1705).
\(^{46}\) 1 Ves. Sen. 103 (1748).
\(^{48}\) 2 Ves. Sen. 646 (1755).
\(^{49}\) 2 Atk. 642, 648 (1743).
\(^{50}\) Cited, 1 Ves. Sen. 150 (1735).
others, who could not take otherwise than by purchase; and there were words of limitation not only to the heirs, but to the assigns of all the said heirs of the bodies alike." 51 Was this the position which Lord Hardwicke took in the much controverted case of Bagshaw v. Spencer? 52

The holding in Bagshaw v. Spencer, 53 has been variously interpreted. The facts were that a testator devised lands "to the use of T, his nephew for life, without impeachment of waste, and after the determination of that estate, to the trustees and their heirs during the life of T to support contingent remainders, and after his decease to the use of the heirs of the body of T." The trust was executed (in reference to the completeness of the trust). But Lord Hardwicke ruled that the heirs should take as purchasers, i. e., that the Rule in Shelley's Case should not apply to this situation. The trustees were to perform active duties, so that the limitations were equitable. There is a sharp division of opinion as to the correctness of this ruling and as to the reason for it. Especial objection is made to that part of Lord Hardwicke's opinion 54 wherein he said:

"All trusts are in the notion of law executory and are to be executed in this court. At law before the Statute of Uses, every Use was a trust. Then the Statute executed the legal estate and united it to the Use, and hence a trust executed is a legal estate."

As Maddock 55 and Fonblanque 56 have correctly pointed out, Lord Hardwicke was by this statement simply calling attention to the fact that the term executed might indicate the effect of the Statute of Uses upon certain types of trusts; he was not denying the distinction between arrangements wherein the settlor had precisely defined the settlement which was to be made by the trustees, although the trustees

51 Fearne, op. cit. supra note 21, at pp. 120, 121.
54 Bagshaw v. Spencer, op. cit. supra note 22, at p. 583.
55 Maddock, op. cit. supra note 20, at p. 708, and following.
56 Fonblanque, op. cit. supra note 20, at p. 352, and following.
had active duties to perform, and situations wherein the settlor had not acted as his own conveyancer. They have reasoned that Lord Hardwicke in Bagshaw v. Spencer\(^{57}\) was of the opinion that the expression *trust executed*, when properly employed, described a trust which had been changed into a legal estate by the Statute of Uses. But their implication that Lord Hardwicke in that case was arguing against the propriety of using the expressions *executed* and *executory*, respectively, without reference to the effect of the Statute of Uses is unwarranted, for he employed the word *executed* in that same opinion to indicate the jurisdiction which Equity exercised over equitable estates; he declared that "all trusts... are to be executed in this court."\(^{58}\) But they are correct in maintaining that Lord Hardwicke in Bagshaw v. Spencer\(^{59}\) was not wiping out the distinction between trusts executed and executory in the sense of trusts which were fully declared and those in which the settlor did not settle his estate with perfect limitations. Indeed it has been shown that Lord Hardwicke actually recognized this distinction in numerous decisions which he handed down. Authorities like Fearne\(^{60}\) and Kales\(^{61}\) are not justified by the facts in concluding that Bagshaw v. Spencer\(^{62}\) is an anomalous case, subsequently over-ruled, and that it stands for the proposition that the Rule in Shelley's Case is not to apply when the interests are equitable. At the same time, it appears that Maddock and Fonblanque have not demonstrated the inaccuracy of these two conclusions simply by stating that Lord Hardwicke was challenging the propriety of employing the words *executory trust* without reference to the Statute of

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60 Fearne, op. cit. supra note 21, at p. 136.
61 Kales, op. cit. supra note 21, at pp. 153, 154, 155.
Uses, because actually the trust in *Bagshaw v. Spencer* was executed (*i.e.*, the settlor had acted as his own conveyancer), and yet Lord Hardwicke refused to be guided by the Rule in Shelley's Case. But if this is so, why are not Fearne and Kales justified in making the inferences to which reference has been made?

First objection to *Bagshaw v. Spencer*: that Lord Hardwicke there held that the Rule in Shelley's Case did not apply when the limitations were equitable. But Lord Hardwicke in numerous decisions acted upon the distinction between trusts created by a settlor who acted as his own conveyancer (*trust executed*) and those where this was not the situation (*trust executory*). From these decisions, it appears that Lord Hardwicke believed that the Rule in Shelley's Case should not apply when the trust was executory, but that it should when the trust was executed, unless the word "heirs" was not employed in its strictly legal sense to designate the line of descent forever. This view had prevailed before his time both in Law and Equity. Lord Hardwicke did not apply the Rule in Shelley's Case in *Bagshaw v. Spencer*, even though the trust was executed, because he thought that this case came within the exception mentioned above. Only in rare situations, according to the viewpoint of eighteenth century Equity, should this exception be allowed to prevail in executed trusts to prevent the operation of the Rule in Shelley's Case. But the exception had been admitted. Evidently Lord Hardwicke's *ratio decidendi* in *Bagshaw v. Spencer* could not be criticized on the ground that he overthrew precedent; the wisdom of the decree itself could be attacked only on the ground that the facts in the case were not sufficient to justify Lord Hardwicke in concluding that the word "heirs" had been used as a word of purchase to designate the immediate heirs

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of the first beneficiary at his death. These facts were, first, the insertion of trustees by the testator to preserve contingent remainders after the determination of the equitable life estate, and secondly, the giving of an equitable life estate to the ancestor without impeachment of waste. The sufficiency of these two elements to justify Lord Hardwicke in reaching the conclusion which is found in Bagshaw v. Spencer is truly an issuable matter.

Second objection: that Bagshaw v. Spencer was an anomalous case, subsequently over-ruled. But obviously it was not anomalous for it was in agreement with what Lord Hardwicke had said in other adjudications, and in accord with pre-Hardwicke precedent on the subject. It is true, however, that Lord Hardwicke in certain parts of his opinion in Bagshaw v. Spencer has so over-emphasized the importance of intent in the construction of equitable interests as to obscure the real basis of his decision, namely, the right of both Law and Equity to ignore the Rule in Shelley's Case when the word "heirs" has not been used in its strictly technical or legal meaning. The two cases usually cited to show that Bagshaw v. Spencer was subsequently over-ruled in the eighteenth century are Wright v. Pearson (1758) and Jones v. Morgan (1778). But Lord Keeper Henley in deciding the case of Wright v. Pearson actually reconciled his holding with the principle upon which Lord Hardwicke acted in Bagshaw v. Spencer. He declared that Lord Hardwicke had assumed no more power than every court of Law had. He said in effect that Lord Hardwicke was correct in deciding the case of Bagshaw v. Spencer, as he did, even though the trust was executed, because of the manner in which the word "heirs" was employed, and that he himself

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66 See Fearne, op. cit. supra note 21, at pp. 130, 131, 134, 135; Kales, op. cit. supra note 21, p. 154.
68 Amb. 358 (1758).
69 1 Bro. C. C. 206 (1778).
proceeded on the same principle in *Wright v. Pearson.* The legal principle expressed in *Bagshaw v. Spencer* was not over-ruled in *Jones v. Morgan* although Lord Thurlow may have been correct when he expressed dissatisfaction with the decree in *Bagshaw v. Spencer,* for it is doubtful whether the elements of the will in this latter case were strong enough to defeat the operation of the Rule in Shelley's Case in an executed trust, which in this connection was on the same plane as a legal estate, but this was a matter of interpretation, not of principle. Lord Hardwicke in *Bagshaw v. Spencer* acted upon established principles, so that the case could not be anomalous. Lord Thurlow himself in *Jones v. Morgan* admitted that Lord Hardwicke had explained his holding in *Bagshaw v. Spencer* in the subsequent case of *Garth v. Baldwin* (1755), where it was stated that the construction of trusts executed must be according to the construction of legal estates, unless there was such evidence of the non-technical use of the word "heirs," as for example, when it meant "children," as would over-rule the legal construction.

Today the Rule in Shelley's Case is still the law in England and Canada, but it has been abrogated as to wills or deeds or both in a majority of the American States. The need for understanding when a principle analogous to the Rule in Shelley's Case, therefore, should be applied to trusts is diminishing but has not disappeared. If Lord Hardwicke in *Bagshaw v. Spencer* actually held that the Rule in Shelley's Case should not apply where the limitations or interests were equitable, he was anticipating almost two hundred years ago the majority action which has been taken in the United States. If he did not go that far in *Bagshaw v. Spencer,* and it is submitted that he did not, still it is

71 1 Bro. C. C. 222 (1755).
72 See 28 L. R. A. (N. S.) 1159 to 1170.
evident that he did not believe that the Rule in Shelley’s Case should prevail as to equitable limitations in every possible instance. Though the action of Lord Hardwicke in this case may be impugned in so far as he may have misinterpreted the effect of certain testamentary clauses and wrongly concluded from them that even if the limitations had been legal instead of equitable the Rule in Shelley’s Case would be non-operative in Bagshaw v. Spencer, so that he evoked the wrath of Judges and legal Commentators, in both England and the United States, nevertheless in so far as he tended not to rely on the fetish of the Rule in Shelley’s Case, he was in accord with the prevailing American attitude.⁷⁴

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Kales, op. cit. supra note 21, has concisely summarized the rules for the determination of executory trusts.