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# A Reversion And A Remainder Distinguished

## IV. Conclusion

Having pointed out what appear to be the major weaknesses in the majority's attempt to establish the existence of a duty, be it *reciprocal, assumed,* or *statutory,* the negligent performance of which would serve as a basis for imposing liability upon the defendant, it is submitted that the proper action for the Court of Appeals would have been to affirm the decision of the Appellate Division of the Supreme Court. "To correct an indefensible situation is highly desirable. To correct one by the creation of another is equally undesirable."[49] While it is true that the police department of New York is under a *broad duty* to protect the general public, this duty, under the present statutory provisions, does not inure to the individual members of the public so as to give them a cause of action against the City. It is quite possible that some sort of special duty should be created in this area, when the criminal is known to be dangerous and the police have actual knowledge of the threats made to the informer, but since the legislature has exhibited its willingness to create similar special duties in other areas, and has refrained from creating a special duty in this area, it is not for the court, in a broad, all-encompassing decision such as this, to impose a special duty.

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# A REVERSION AND A REMAINDER DISTINGUISHED

A person making a disposition of his property by creating a life estate followed by a remainder in fee simple will often use a limitation providing that upon the termination or failure of the prior estates, the property will go to the heirs of the conveyor. Such a limitation raises the problem as to the proper time for the determination of the membership of this class. Should the interest become vested at the death of the transferor, or should identification of the members of the class be at some prior or subsequent time?

This problem was presented to the Supreme Court of South Carolina in *Dean v. Lancaster.*[1] Certain tracts of land passed under a will providing that a son of the testator and the son's wife were to have

involved was exercising a discretionary function . . . ." Miller, Recent Substantive Developments Affecting Municipal Tort Liability, 21 U. Cinc. L. Rev. 31, 44-45 (1952).

[49]Lloyd, Municipal Tort Liability in New York, 23 N.Y.U.L.Q. Rev. 278, 292 (1948.)

[1]233 S.C. 530, 105 S.E.2d 675 (1958).

a life estate therein for the life of the survivor, with the remainder in fee simple to their children. The testator further provided, however, that if the life tenants should die childless, the property "shall *revert* to my Estate ... and shall be divided among my heirs according to the Statute of Distribution."[2]

The son of the testator died childless in 1910, being survived by his wife who was still living at the time the case was tried. By agreement of the parties, the land was sold. The conflict arose over the distribution of the proceeds, the question being whether the heirs of the testator should be ascertained at the date of the testator's death in 1909, at the death of his son in 1910, or at the end of the life estate. In the latter instance, since the life estate had not ended, present distribution would have been defeated.

The court admitted that when there is a limitation to one's heirs, the presumption is, absent a showing of a contrary intention, that the membership in the class should be determined at the death of the ancestor. It was felt, however, that the limitation in question created a contingent remainder in the heirs of the testator, indicating the testator's possible intention that "futurity was annexed to the substance of the gift,"[3] in which case the heirs could not have been ascertained until the "gift vested in right or interest."[4] It was decided that the members of the class entitled to take should be determined no later than the son's death in 1910, because the remainder in the heir of the testator became vested at that time.

The court recognized the rule of construction that a limitation to the heirs of a particular person is normally construed to refer to the persons who become the heirs of the designated ancestor at the time of his death.[5] However, in attempting to show the possibility that the testator's intention was contrary to the normal construction, the court found that the interest created by the limitation in question was alternative and substitutional, to take effect only in case the prior one did not,[6] and was therefore necessarily a contingent remainder.

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[2]Id. at 676. (Emphasis added.)

[3]Id. at 677.

[4]Ibid.

[5]Mercer v. Safe-Deposit & Trust Co., 91 Md. 102, 45 Atl. 865 (1900); Holloway v. Holloway, 5 Ves. Jun. 399, 31 Eng. Rep. 649 (Ch. 1800); Restatement, Property § 308 (1940). This doctrine has been recognized as a general rule even in those cases finding a contrary intention on the part of the transferor. Delaware Trust Co. v. Delaware Trust Co., 33 Del. Ch. 135, 91 A.2d 44 (1952); Harmon v. Nason, 181 Misc. 411, 45 N.Y.S.2d 209 (Sup. Ct. 1943). Annot., 38 A.L.R.2d 327 (1954).

[6]The words "alternative" and "substitutional" are used here to describe a provision that another shall take what was originally intended for the first donee, if a

By so reasoning, it would appear that the court ignored another prime rule of construction, the rule of *Bingham's Case*,[7] commonly known as the rule of worthier title or the rule of reversion.[8]

The rule of reversion as known at common law would invalidate the limitation in *Dean* and would create no interest in the heirs. They took, if at all, not by purchase as remaindermen, but as reversioners by descent from the conveyor.[9] The interest was a reversion and not a remainder, the former being considered by the common law courts to be the superior interest.[10]

The fact that an interest is a reversion rather than a remainder makes a considerable difference in many cases.[11] Had the interest in the *Dean* case been found to be a reversion in the testator's heirs, the membership in that class could have been determined only at the death of the testator.

A reversion has been defined as the interest remaining in the conveyor after making a partial disposition of his property,[12] or as stated by Blackstone, "the residue of an estate left in the grantor, to com-

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specific event shall happen. Davis v. Mitchell, 27 Tenn. App. 182, 178 S.W.2d 889 (1943).

Usually the words "substitutional" or "substitutionary," when used to refer to a gift, is intended to refer to a provision in a will to prevent a lapse of the gift due to the death of the donee prior to the death of the testator. In re Waring's Will, 293 N.Y. 186, 56 N.E.2d 543 (1944).

[7]Bingham's Case, 2 Coke 91a, 76 Eng. Rep. 611 (K.B. 1600).

[8]The rule is most commonly referred to as the "doctrine of worthier title." Simes & Smith, Future Interests § 1601 (2d ed. 1956). However, it has been argued that this title should only be applied to rule with reference to intervivos transactions. Warren, A Remainder to the Grantor's Heirs, 22 Texas L. Rev. 22 (1943). To avoid confusion it has been suggested that the rule be simply termed the rule of reversion. Oler, "Remainders" to Conveyors' Heirs or Next of Kin, 44 Dick L. Rev. 247 (1940).

[9]Bedford v. Russel, Popham 3, 79 Eng. Rep. 1126 (K.B. 1935); Bingham's Case, 2 Coke 91(a), 76 Eng. Rep. 611 (K.B. 1600); Godolphin v. Abingdon, 2 Atk. 57, 26 Eng. Rep. 432 (Ch. 1740). See also Fidelty & Columbia Trust Co. v. Williams, 268 Ky. 671, 105 S.W.2d 814 (1937).

[10]The reversion was thought to be superior to the remainder in that the former retained the valuable feudal incidents of wardship and marriage in the overlord of the grantor. Simes & Smith, op. cit. supra note 8, § 1602; Restatement, Property § 314, Comment a (1940).

[11]If a limitation to the heirs of the conveyor is found to be a reversion, it may adversely affect the creditors of the heirs. Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919). Conversley, the creditors of the conveyor may be able to subject the reversion to their claims. Sequin State Bank & Trust Co. v. Locke, 129 Tex. 524, 102 S.W.2d 1050 (Comm'n App. 1937). If the interest is a reversion, the conveyor may reconvey the interest. West Tennessee Co. v. Townes, 52 F.2d 764 (N.D. Miss. 1931). In the case of a trust, the life tenant and the grantor might by joint action compel termination of the exclusion of the heirs. Bixby v. California Trust Co., 33 Cal. 2d 495, 202 P.2d 1018 (1949); Richardson v. Richardson, 298 N.Y. 135, 81 N.E.2d 54 (1948).

[12]Simes, Future Interests 25 (1951).

mence in possession after the determination of some particular estate granted out by him."[13] A reversion is always a vested interest.[14] Under the rule of reversion, a conveyance by deed or will to the transferor's heirs is in effect a retention of an interest in himself. The heirs therefore take through the conveyor and not from him. They take by descent, and not by purchase.[15] Upon the conveyor's death the reversion passes and immediately becomes vested in the persons who at that moment become heirs.

In England, the rule of reversion was undoubtedly an absolute rule of law,[16] and was originally so considered in most American jurisdictions.[17] But in recent decisions, the American courts have tended to treat the doctrine as a rule of construction rather than an absolute rule of law.[18] A limitation in favor of the heirs of the conveyor is construed to be the reservation of a reversion in the heirs, but it may be shown from the instrument that the conveyor intended to create some other type of interest.[19] The rule of reversion has bowed in modern times to the cardinal rule of construction that the intent of the conveyor will be given effect wherever it may be clearly ascertained.[20]

Courts often find an intention on the part of the conveyor to create

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[13]2 Blackstone, Comm. *175.

[14]Gray, The Rule Against Perpetuities § 113 (4th ed. 1942). Though always technically vested, a reversion may be indefeasibly vested, or vested but subject to being completely divested. Simes, op. cit. supra Note 12 at 25; Restatement, Property § 154, comment e (1936).

[15]Biwer v. Martin, 294 Ill. 488, 128 N.E. 518 (1920); Godolphin v. Abingdon, 2 Atk. 57, 26 Eng. Rep. 432 (Ch. 1740); 1 Page, Wills § 214 (1941); Simes & Smith, op. cit. supra note 8, § 1601.

[16]See cases cited note 9 supra. The rule has been abrogated in England by the Inheritance Act, 1833, 3 & 4 Will. 4, c. 106, § 3.

[17]Miller v. Fleming, 7 D.C. (7 Mackey) 139 (1889); Mayes v. Kuykendall, 112 S.W. 673 (Ky. 1908); Stephens v. Moore, 298 Mo. 215, 249 S.W. 601 (1923); Brolasky's Estate, 302 Pa. 439, 153 Atl. 739 (1931).

[18]Frank Fehr Brewing Co. v. Johnston, 30 Ky. L. Rep. 211, 97 S.W. 1107 (Ct. App. 1906); Shaw v. Arnett, 226 Minn. 425, 33 N.W.2d 609 (1948); Norman v. Horton, 344 Mo. 290, 126 S.W.2d 187 (1939); Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919).

[19]"But at least the ancient rule [rule of reversion] survives to this extent: That, to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed." Doctor v. Hughes, supra note 18, 122 N.E. at 222.

[20]"These rules [of construction] are not mere arbitrary formalities. They have been formulated to aid in the ascertainment of the testator's true intent.... There [sic] the product of wisdom and experience of the ages in seeking amid ambiguous phrases the intent of those engaged in the serious and solemn business of making a final disposition of property by will." Alsman v. Walters, 184 Ind. 565, 106 N.E. 879, 881 (1914); Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929).

a remainder rather than a reversion by showing that the word "heirs" was used in a sense other than its technical one, i.e., that the word was used not merely to describe a class of persons who would be entitled to inherit by descent upon the death of the conveyor,[21] but used to describe a class, the membership of which is to be ascertained at some future time.[22] As commonly stated, futurity is found to be annexed to the substance of the gift.[23]

The court in the *Dean* case found that the devise was alternative and substitutional and therefore necessarily contingent, thereby bringing attention to the possibility that "futurity was annexed to the substance of the gift."[24] *Jones v. Holland,* another South Carolina case, was cited as authority.[25] The limitation in that case provided that in default of issue of the life tenant, the property was to go to the grandchildren of the testator. The court held that the interest created in these grandchildren was a contingent remainder and that membership in the class should not be determined until the interest became vested, i.e., upon the death of the life tenant without issue. However, the fact that the limitation was to the grandchildren of the testator in the *Jones* case, while the limitation in the *Dean* case was to the heirs, presents the crucial distinction between the two cases. Only a limitation to the "heirs" or words of similar import, such as "next of kin," have been held to reserve a reversion in the class described in the limitation.[26] A limitation to one's children or grandchildren is something quite different. In such a case, a present interest is created in this class by the instrument and this interest is a remainder.[27] In *Jones V. Holland,* the remainder was predicated upon

[21]The word "heirs" is normally construed to refer to those persons who would inherit from the designated ancestor if he should die intestate. Perry v. Bulkley, 82 Conn. 158, 72 Atl. 1014 (1909); Wallace v. Diehl, 202 N.Y. 156, 95 N.E. 646 (1911); Restatement, Property § 305 (1940).

[22]Grey v. Union Trust Co., 171 Cal. 637, 154 Pac. 306 (1915); Schoellkopf v. Marine Trust Co., 267 N.Y. 358, 196 N.E. 288 (1935); Lemmon v. Wilson, 204 S.C. 50, 28 S.E.2d 729 (1944).

[23]Lemmon v. Wilson, supra note 22.

[24]105 S.E.2d at 677.

[25]223 S.C. 500, 77 S.E.2d 202 (1953).

[26]Simes & Smith, op. cit. supra note 8, § 1610. The exact words, "heirs" or "next of kin," need not be used, but the language used must be of an equivalent meaning for the rule to be invoked. West Tennessee Co. v. Townes, 52 F.2d 764 (N.D. Miss. 1931) ("right heirs"); Pryor v. Castleman, 9 Ky. L. Rep. 967, 7 S.W. 892 (Ct. App. 1888) ("legal heirs"); City Bank Farmers Trust Co. v. Miller, 278 N.Y. 134, 15 N.E.2d 553 (1938) (to those who would take under the statute of distribution).

[27]If the words used would be descriptio personarum, those answering the description would take as purchasers. Boone v. Baird, 91 Miss. 420, 44 So. 929 (1907); McCreary's Estate v. Pitts, 354 Pa. 347, 47 A.2d 235 (1946); King v. Dunham, 31 Ga. 743

the death of the life tenant without grandchildren, a condition precedent to their right of eventual possession. The limitation therefore created a contingent remainder,[28] and the grandchildren entitled to take under the limitation were not determined until the contingency occurred and the remainder vested.[29] On the other hand, an interest limited to the heirs of the conveyor is in substance a *vested* reversionary interest left in the conveyor himself.[30] In the *Dean* case, the testator had provided the unborn children of the life tenants with a chance to get the fee simple, but this was contingent upon their coming into existence and surviving their parents. Until this time, the reversion would have remained vested in those persons who were declared by the Statute of Distribution to be the testator's heirs and who had succeeded to his interest.[31] The reversion became indefeasibly vested in those same persons or their successors in interest, when the divesting condition became impossible; that is, when the life tenant died without children.

In *Dean v. Lancaster,* it would appear that the word "heirs" was used only in its technical sense, that the testator intended his heirs to take any interest in the property remaining in his estate by descent rather than by devise.[32] Assuming, nevertheless, that the will does contain some inference to support a finding that the testator intended the creation of a contingent remainder in a class to be determined at a future date, any such inference would ordinarily be rebutted by the use of the word "revert" in the limitation.[33] At common law, a re-

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(1861) (dictum); Restatement, Property § 314, comment c (1940). In jurisdictions which have statutes creating a presumption that the words "heirs," when used in a conveyance, means children, a limitation to the heirs of the conveyor has been held to create a contingent remainder in the children of the conveyors. Thompson v. Batts, 168 N.C. 333, 84 S.E. 347 (1915).

[28]"A contingent remainder is, a remainder limited so as to depend on an event or condition which may never happen or be performed ... till after the determination of the preceding estate ...." Ferne, Contingent Remainders *3 (1794).

[29]In re Frost's Will, 192 App. Div. 206, 182 N.Y. Supp. 559 (1st Dep't 1920), aff'd, 230 N.Y. 580, 130 N.E. 901 (1920); 96 C.J.S., Wills § 695(3) (1957).

[30]See notes 13 and 14 supra.

[31]As the reversion is a vested interest, the condition which would divest the estate is a condition subsequent. On the other hand, a condition which must happen before a contingent remainder vests is a condition precedent. For this reason, a contingent remainder is sometimes referred to as a remainder subject to a condition precedent. Restatement, Property § 157, comment d (1936).

[32]Even when the testator has used the word "heirs" in its technical sense, the limitation may nevertheless be construed as creating a remainder in the heirs of the transferor if the transferor clearly so intended. Norman v. Horton, 344 Mo. 290, 126 S.W.2d 187 (1939); Whittemore v. Equitable Trust Co., 250 N.Y. 298, 165 N.E. 454 (1929).

[33]See usage in principal case. 105 S.E.2d at 676.

version was never created by an act of the parties.[34] If the conveyor failed to make a complete disposition of the freehold, the remaining portion continued to be vested in himself.[35] Therefore, an attempt to reinvest this remaining interest in himself or his heirs, being superfluous and unnecessary, was of no effect.[36] It was deemed to be an attempt to effect that which would have occurred by operation of law without the aid of a limitation.[37] However, since the rule of reversion is now generally considered to be a rule of construction rather than a rule of law,[38] the goal being to give effect to the transferor's intention, it would seem clear that the testator, by providing that the property should *revert* to his own heirs, has rebutted any inference of an intention to create a remainder.[39] In a leading case, *Wilcoxen v. Owen*,[40] the court reasoned that the use of the word "revert" clearly indicated that the testator intended a reversion and that the property should pass to his heirs as though no conveyance were made.

Had the court in *Dean* recognized that the limitation involved was a reversion, it would have realized that the persons entitled to eventual possession of the property should necessarily have been determined at the death of the testator, since the reversionary interest would have passed at the instant the testator died and would have become vested immediately in his heirs.

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[34]"Remainders are created by deed or devise, whereas reversions are created by operation of law." Glenn v. Holt, 229 S.W. 684, 685 (Tex. Civ. App. 1921); Williams, The Law of Real Property 324 (19th ed. 1901).

[35]See note 12 supra.

[36]Boyce v. Moseley, 102 S.C. 361, 86 S.E. 771 (1915); Bedford v. Russel, Popham 3, 79 Eng. Rep. 1126 (K.B. 1593); Godolphin v. Abingdon, 2 Atk. 57, 26 Eng. Rep. 432 (Ch. 1740).

[37]Boyce v. Mosely, supra note 36; Read v. Erington, Cro. Eliz. 321, 78 Eng. Rep. 571 (K.B. 1594).

[38]See note 18 supra.

[39]Akers v. Clark, 184 Ill. 136, 56 N.E. 296 (1900); Coomes v. Frey, 141 Ky. 740, 133 S.W. 758 (1911); Shaw v. Arnett, 226 Minn. 425, 33 N.W.2d 609 (1948); Conrad v. Tunnell, 106 Okla. 56, 232 Pac. 950 (1924). But see Norman v. Horton, 344 Mo. 290, 126 S.W.2d 187 (1939).

Even when the rule of reversion has been abolished by statute, the use of the words "revert back" were held to show that the conveyor intended the reservation of a reversion. In re Lawrence Savings & Trust Co., 354 Pa. 6, 46 A.2d 494 (1946).

[40]237 Ala. 169, 185 So. 897 (1938).