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## Deeds -- Reversions -- Conveyance to Heirs General of Grantor

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**Deeds—Reversions—Conveyance to Heirs General of Grantor.**

Grantor conveyed land to her daughter and the daughter's husband, for their joint lives, then to the survivor, remainder after the determination of the life estate to the daughter's children, begotten by her said husband, in fee simple; and in the event she had no children by the said husband, then an estate in fee simple forever, to the right heirs of the grantor. Subsequently the grantor, the daughter and her husband conveyed the land in fee simple to the defendant's grantor. The original grantor died first; then the husband. Finally, the grantor's daughter died leaving no children. Plaintiffs, collateral heirs of the grantor, sued for the land. *Held*, judgment for defendants. A reversion was created in the grantor upon the happening of the contingency, and her heirs take by descent rather than by purchase; therefore, they take nothing, their ancestor having previously granted the reversion.<sup>1</sup>

According to the English common law if an owner of land in fee simple sought to convey a life estate or an estate in tail, with a remainder to the grantor's heirs, the remainder was void and the grantor had a reversion in fee simple<sup>2</sup> which would go to his heirs, if at all, by descent and not by purchase. The reason for the rule was that to allow the heirs to take as purchasers would have deprived the grantor's overlord of the feudal rights of wardship and marriage in the case of a minor heir.<sup>3</sup> This rule was a positive rule of law like the rule in *Shelley's Case*, and was applied in every case where the limitation was to the heirs general of the grantor.<sup>4</sup> England in 1833, by statute, abolished the rule and since that time a grantor's or deviser's heirs take as purchasers.<sup>5</sup> The rule is strictly applied in some American jurisdictions as a positive rule of law,<sup>6</sup> in others it has been entirely ignored,<sup>7</sup> while some states have applied the rule as one of construction, having given consideration to the intent of the grantor as gathered from the whole instrument.<sup>8</sup>

North Carolina has recognized the principle that where the grantor

<sup>1</sup> *Therrell v. Clanton*, 210 N. C. 391, 186 S. E. 483 (1936).

<sup>2</sup> *Godolphin v. Abingdon*, 2 Atk. 57, 26 Eng. Reprint 432 (1740); 1 Simes, *FUTURE INTERESTS* (1936) §144; Comment (1934) 20 *CORN. L. Q.* 116.

<sup>3</sup> 1 Simes, *FUTURE INTERESTS* (1936) §145.

<sup>4</sup> 1 Simes, *FUTURE INTERESTS* (1936) §147.

<sup>5</sup> 3 & 4 *WILL. IV*, C. 106, §3 (1833).

<sup>6</sup> *West Tenn. Co. v. Townes*, 52 F. (2d) 764 (D. C. Miss. 1931); *Hobbie v. Ogden*, 178 Ill. 357, 53 N. E. 104 (1899); *Nickols v. Davis*, 188 Ky. 215, 221 S. W. 507 (1920); *Williams v. Green*, 128 Miss. 446, 91 S. 39 (1922); *Robinson v. Blankenship*, 116 Tenn. 394, 92 S. W. 854 (1906).

<sup>7</sup> *Hall v. Realty and Investment Co.*, 306 Mo. 182, 267 S. W. 407 (1924); *New Jersey Title Co. v. Parker*, 84 N. J. Eq. 351, 93 Atl. 196 (1915), *aff'd*, 85 N. J. Eq. 557, 96 Atl. 574 (1915); (1934) 20 *CORN. L. Q.* 116, 117 n. 10.

<sup>8</sup> *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919), Comment (1919) 4 *CORN. L. Q.* 83; Comment (1920) 28 *YALE L. J.* 713; *Whittemore v. Equitable Trust Co.*, 250 N. Y. 298, 165 N. E. 454 (1929); Comment (1929) 29 *COL. L. REV.* 837; 1 Simes, *FUTURE INTERESTS* (1936) §147.

in a conveyance attempts, after creating a particular estate in favor of another, to limit by the same instrument a fee simple estate in favor of his heirs general who would properly take such an estate by descent from him, the limitation is invalid, and the grantor is regarded as having the reversion in fee simple.<sup>9</sup> The mere fact that the estate is called a remainder does not preclude the holding that it is in effect a reversion.<sup>10</sup> It is said that at common law such a remainder could not divest the grantor of the fee, under the rule that *nemo est haeres viventis*—no one is the heir of a living person.<sup>11</sup> However, the decisions, considered as a whole, are in confusion as to whether North Carolina has the rule and if so whether it is an inexorable rule of property. Some cases have construed a limitation to the heirs of the testator as a remainder;<sup>12</sup> others have said it was a reversion;<sup>13</sup> and still others, without considering the application of the rule under discussion, have digressed on the question as to whether the heirs of the testator should be determined as a group on the death of the life tenant, or in the orthodox manner, at the death of the settlor.<sup>14</sup> The operation of the common law rule may be affected by C. S. §1739 which provides that limitations by deed, will or other writing, to the heirs of a living person, shall be construed to be the children of such person unless a contrary intention appears by the deed or will.<sup>15</sup> The present writer has found but one case in which the statute was applied.<sup>16</sup> There a limitation to the heirs of the grantor was construed to mean children, since it was clear from an examination of the entire deed that the grantor did not contemplate surviving his wife or that there was a possibility of reverter in him. The

<sup>9</sup> King v. Scoggins, 92 N. C. 99 (1885); Thompson v. Batts, 168 N. C. 333, 84 S. E. 347 (1915).

<sup>10</sup> King v. Scoggins, 92 N. C. 99 (1885) (principle recognized that although the limitation is called a remainder, it may be in effect a reversion).

<sup>11</sup> See Thompson v. Batts, 168 N. C. 333, 334, 84 S. E. 347, 347 (1915).

<sup>12</sup> Grantham v. Jinnette, 177 N. C. 229, 98 S. E. 724 (1919). The property was devised to the wife, at whose death the executor was to sell the property left by her and divide the proceeds among testator's legal heirs. There were no heirs to take under the will when wife died. *Held*, the widow is not the husband's heir at common law, and property will not descend to her heirs under the statute making her the heir of the husband if he has not devised the property. A contingent remainder was created here. Allen, J., dissenting, makes the point that the devise to legal heirs was void as a remainder; this left the reversion in fee in the testator at his death and it would pass to widow as his heir under the statute. *Baugham v. Trust Co.*, 181 N. C. 406, 409, 107, S. E. 431, 432 (1921) "It is true that the limitation to the heirs of the testator is referred to in some of the cases as a remainder to the heirs, and in others as a reversion left in the testator."

<sup>13</sup> See Thompson v. Batts, 168 N. C. 333, 335, 84 S. E. 347, 348 (1915) (principle recognized).

<sup>14</sup> Jenkins v. Lambeth, 172 N. C. 466, 90 S. E. 513 (1916).

<sup>15</sup> N. C. CODE ANN. (Michie, 1935) §1739.

<sup>16</sup> Thompson v. Batts, 168 N. C. 333, 84 S. E. 347 (1915) (conveyance in contemplation of marriage to M, the intended wife, to descend to the heirs of the body of the said M in fee simple, the issue of such marriage, and on failure of issue to revert to the heirs of the grantor).

effect, however, of the court's decision was to bring the case within the doctrine, that, if by "heirs" the grantor meant "children" or those who would be his heirs if he died at the death of the life tenant, or if in any other way he indicated a class of remaindermen, which might differ from his heirs general, the rule would have no application.<sup>17</sup>

The principal case lays down the common law rule that when the limitation is to the heirs general of the grantor, such heirs take by descent since the grantor retained the reversion. Here the statute<sup>18</sup> was not regarded as applicable because the court apparently thought the intention of the grantor was otherwise as to the use of the word "heirs,"<sup>19</sup> and the rule under discussion was applied as a rule of property. It is submitted that the court, in so deciding, failed to consider the grantor's intention derived from the instrument as a whole. The conveyance was to the grantor's only child and to the child's husband, and to the survivor of them, then to their children, and if there were none, then to the grantor's own right heirs. It would thus seem that she had given up all interest in the land and her collateral heirs would be entitled to take. Instead of availing itself of the opportunity to change the rule to one of construction, the court preferred to follow its precedents laid down in the wills cases, where similar limitations were under consideration, and in which the rule was applied as one of property.<sup>20</sup> The North Carolina court in other decisions has inaugurated the commendable policy of disregarding the rigid technicalities of the common law<sup>21</sup> and has sought to give effect to the grantor's intention.<sup>22</sup> Since the ancient reasons for the rule no longer exist, the rule itself should be abolished; but if the court is going to apply it, then it should be applied as a rule of construction so as not to defeat the intention of the grantor. This would be in keeping with the trend of modern authority.<sup>23</sup>

J. D. MALLONEE, JR.

<sup>17</sup> 1 Simes, *FUTURE INTERESTS* (1936) §147.

<sup>18</sup> N. C. CODE ANN. (Michie, 1935) §1739.

<sup>19</sup> One could hardly interpret "heirs" as meaning children here, since the daughter was an only child.

<sup>20</sup> *Yelverton v. Yelverton*, 192 N. C. 614, 135 S. E. 632 (1926); Note (1935) 14 N. C. L. REV. 90 (Doctrine of Worthier Title).

<sup>21</sup> *Willis and Regan v. Mutual Loan and Trust Co.*, 183 N. C. 267, 269, 111 S. E. 163, 164 (1922) "The rigid technicalities of the common law have gradually yielded to the demand for a more rational mode of expounding deeds." *Pugh v. Allen*, 179 N. C. 307, 309, 102 S. E. 394 (1920) "It is the recognized position in this state that except when modified by some arbitrary principle of law like the Rule in *Shelly's Case*, this perhaps is the only exception now prevailing, a deed must be construed so as to effect the intention of the parties as expressed in the entire instrument."

<sup>22</sup> *Boyd v. Campbell*, 192 N. C. 398, 135 S. E. 121 (1926).

<sup>23</sup> 1 Simes, *FUTURE INTERESTS* (1936) §147.