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## WORDS OF INHERITANCE IN DEEDS OF LAND IN SOUTH CAROLINA: A TITLE EXAMINER'S GUIDE

DAVID H. MEANS\*

### INTRODUCTION

This article<sup>†</sup> is a discussion of the effect of the omission of the word "heirs" in a deed of land in South Carolina. The purpose is practical, not historical, it being written with the needs of the title examiner and title advocate in mind, rather than from the point of view of the legal antiquarian. As for its practical aspect, fortunate is the South Carolina lawyer who, having examined titles, has never been confronted with a limitation in a deed which raised a question in his mind as to whether or not it was sufficient to convey an estate in fee simple.

Such questions are not daily occurrences, of course, as no competent practicing attorney in South Carolina would attempt a conveyance in fee simple to a natural person by deed without the inclusion of the word "heirs." But not all deeds have been or are drawn by competent practicing attorneys, or on deed forms containing printed words of inheritance, and with annoying frequency the title examiner is confronted with the problem of off-brand limitations in the chain of title. In many instances the question proves to be immaterial. Possibly it is easier to get a corrective deed than to expend time and effort in a lengthy study of the sufficiency of the limitation. Perhaps lapse of time or subsequent descent of the fee to the grantee by intestacy has eliminated all danger. If such an easy solution is found, there is no need for further concern. However, in other situations no simple escape is available, and the unhappy title examiner is squarely confronted with the question, is this limitation sufficient to pass the fee; is it so indisputably good that no subsequent title examiner will raise the question, and thus put my client to the expense of litigation, and me to possible embarrassment? If the limitation is clearly good under our cases, there is no difficulty; it is only the doubtful ones which can cause trouble, if the title is passed. On the other hand, if the deed is defective there still re-

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†The article was planned and in large part written in a seminar under Professor A. James Casner at the Harvard Law School. The writer is indebted to Professor Casner for his help in the organization and development of the subject matter. It was read by Charles B. Elliott, Professor Emeritus, and by Coleman Karesh, Professor of Law, of the Law School of the University of South Carolina, both of whom contributed valuable suggestions.

mains the question of what can be done by way of salvage if representing the "owner" desirous of curing his title, or if representing a buyer insistent upon acquiring the land. This paper seeks to supply answers to these questions from the South Carolina cases in so far as the Court has been confronted with them, and from the cases of other jurisdictions where no South Carolina authority has been found. It is here pointed out that a complete digest of the State's many cases has not been attempted, but it is believed that the selected cases herein cited reflect the present state of the law.

The problem today has become almost peculiarly a South Carolina one, for in England,<sup>1</sup> as in the vast majority of the American jurisdictions,<sup>2</sup> the word "heirs" is no longer necessary in a deed to create an estate in fee simple. Either through inertia or by virtue of a superior insight into the needs of a modern society, however, South Carolina has clung to the faith of the fathers, so that with but few

1. Law of Property Act of 1925 (15 Geo. V, c. 20, § 60, Subsec. 1). The Conveyancing and Law of Property Act of 1881 (44 & 45 Vict., c. 41, § 51) had only provided that the words "in fee simple" were sufficient words of limitation. For a discussion of the effect of the Law of Property Act of 1925 see 1 EMMET ON TITLES 484 (13th ed. 1949).

2. After stating the common law rule as to the requirement of words of inheritance in a deed to a natural person, the Restatement of the Law of Property, 1948 Supplement, § 27, Special Note, thus states the status of the rule in the United States as of January 1, 1947: "The rule stated in this Section as to deeds has been wholly or partly supplanted as to deeds by a prospectively operating statutory rule in all states except Connecticut, Louisiana, Maine, New Hampshire, New Mexico, South Carolina and Vermont. . . . Normally these statutes leave all deeds executed and delivered prior to the enactment of the statute, to be construed under the nonstatutory rule stated in this Section. The rule stated in this Section never existed in Louisiana. In New Hampshire the rule stated in this Section has been eliminated by judicial decision. Dicta in Vermont make it uncertain as to whether that state has, or has not eliminated this rule by judicial decision (see *Blair v. Blair*, 1940, 10 A. 2d 188, 111 Vt. 53)." See also 2 POWELL, REAL PROPERTY §§ 184, 185 (1950).

The *ex cathedra* dogma of the American Law Institute that the common law rule is still law in the United States in the absence of statute does not represent the unanimous view of the Institute's Advisers. See RESTATEMENT PROPERTY TENTATIVE DRAFT NO. 1, EXPLANATORY NOTES. The case of the dissenters is thus stated by Professors Casner and Leach (CASNER AND LEACH, CASES AND TEXT ON PROPERTY, 1950, p. 270, n. 1): "The Restatement of Property, § 27, states the old rule. This has been the subject of no little raillery at American Law Institute meetings, chiefly by Circuit Judge (formerly Dean) Charles E. Clark. The sponsors of this section agree that it is no longer law anywhere except South Carolina, and there is a suspicion that if the issue now arose in South Carolina the courts would reject it."

The American Law of Property states the present applicability of the rule in American jurisdictions as follows: "Since New Hampshire and Vermont have abolished the common law rule requiring words of inheritance in *inter vivos* conveyances by judicial decision, the only states in which the common law rule may still possibly exist are Connecticut, Louisiana, Maine and South Carolina. There are no definitive cases passing on whether or not the rule exists in Connecticut and Louisiana, leaving only two states, Maine and South Carolina, where the courts recognize and apply the rule as present law." 1 AMERICAN LAW OF PROPERTY § 2.4, p. 85 (1952).

exceptions the counsel of Littleton<sup>3</sup> to his fellow conveyancers of the fifteenth century is sound legal advice in the State today.

Further, a quick solution to the problem is extremely improbable. The Court has repeatedly recognized that the requirement of words of inheritance is a rule of law, and as such is to be abolished only by act of the Legislature.<sup>4</sup> Thus no outright repudiation by decision is to be anticipated. Any change by legislation possibly will not attempt a retroactive effect, even assuming such legislation to be constitutional.<sup>5</sup> There seems no likelihood of such a statute being held declarative of the existing law and therefore retroactive, as was done in determining the effect of the Statute of 1824<sup>6</sup> abolishing the

3. See p. 317, *infra*.

4. "This is the rule of the common law from which the Courts can not escape, though its operation nearly always results in the injustice of defeating the intention of the parties. The rule serves generally as a snare to those unlearned in technical law, and it would be difficult to suggest any reason for its continued existence; but it has been so long established in this State that the Courts can not now overrule the cases laying it down without imperilling vested rights. . . . It was made inapplicable to wills by the first section of the Act of 1824 . . . . The General Assembly has not, however, seen fit to extend this statute to deeds, and the Courts are powerless to do so." Mr. Justice Woods in *Sullivan v. Moore*, 84 S. C. 426, 428, 65 S. E. 108, *rehearing denied* 84 S. C. 426, 66 S. E. 561 (1910), quoted with slight changes in *McMillan v. Hughes*, 88 S. C. 296, 299, 70 S. E. 804 (1911); *Holder v. Melvin*, 106 S. C. 245, 248, 91 S. E. 97 (1917).

5. The Florida Act of 1903 was amended in 1925 to give it retroactive effect. The existence of the constitutional question raised by the amendment "was recognized but a decision thereof declared not then necessary in *Reid v. Barry*, 93 Fla. 849, [112 So. 846] (1927). No decision upon these two problems of statutory construction has been given by the Supreme Court of Florida down to January 1, 1936. In Illinois, the Court seemed to assume the validity of this retroactive provision in litigation involving an 1886 deed of Florida land, *Brelie v. Klafter*, 342 Ill. 622 [174 N. E. 882] (1931)." RESTATEMENT, PROPERTY § 39 Spec. n. ¶ 2. For an expression of doubt as to the constitutionality of such a statute, see 2 POWELL, REAL PROPERTY § 184, pp. 28, 29.

The primary purpose of this paper is a discussion of the existing state of the law, rather than a study of the potentialities and mechanics of legislative reform of the land law. However, the query is made whether or not a properly drawn statute might not in some instances be given a retroactive operation to cure the effect of the omission of words of inheritance in deeds executed and delivered prior to the passage of the statute. Would not this be constitutional in those instances where the intention to convey the fee is apparent in the deed, and the rights of innocent third party purchasers for value without notice are not affected? See Bayse, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 1097, 1122 *et seq.* (1947); Note, 57 A. L. R. 1197 (1928). Before legislative reform is undertaken, it will be wise to explore fully the possibilities of curative statutes, as well as the marketable title acts of the mid-western states. See Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185 (1951); Spies, *A Critique of Conveyancing*, 38 VA. L. REV. 245, 259 (1952) and the articles therein cited. Even assuming such a retroactive statute can be made legally valid, however, its practical value is a further factor to be considered.

6. The first section of the Act of 1824 (6 Stat. 237) reads as follows:

" . . . [N]o words of limitation shall hereafter be necessary to convey an estate in fee simple, by devise, but every gift of land by devise shall be considered as a gift in fee simple, unless such a construction be inconsistent with the will of the testator, expressed or implied."

requirement of words of inheritance in a devise. Thus it is quite possible that for the lives of all living title examiners, if not for twenty-one years thereafter, "heirs" will remain the magic word in the validation of paper titles in South Carolina.<sup>7</sup>

The vestigial character of the rule is the writer's explanation for including much that appears—and is—fusty and pedantic. For better or for worse, the South Carolina conveyancer is governed by a rule which antedates the discovery of America, and where the Court has not ruled to the contrary, he must look for the law as

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Subsequent statutory compilations omitted the word "hereafter," and with this omission and immaterial changes in verbiage and punctuation the statute appears as § 19-232, S. C. CODE OF LAWS (1952).

The confused history of the necessity of words of inheritance in a devise of land in South Carolina is thus stated by Johnson, Justice of the then newly formed (December, 1825) Court of Appeals, having jurisdiction of both law and equity appeals, in *Peyton v. Smith*, 4 McC. 476, 477 (S. C. 1828): "In *Hall v. Goodwyn* and *Moore*, 2 Nott and McCord 383 [S. C.], decided in May 1820, the Constitutional Court held, that a devise of lands without words of inheritance or perpetuity, vested only a life estate; and the case of *Jenkins v. Clement* and *Deas*, Harper's Eq. Rep. 73 [S. C.], decided in 1824, the Court of Appeals in Equity, in the construction of a clause in this identical will, expressed in precisely the same terms with that now under consideration, held unanimously, that the devise passed a fee, although there are no words of perpetuity or inheritance, and laid down the rule broadly that a general unqualified devise of lands, vested a fee simple. The two Courts were at variance on several other important points of law, and the right of parties depended more upon the tribunal before which they were investigated, than any settled rule. This was an evil growing out of this double system of jurisprudence, and was too grievous to be long borne by the community, and the legislature as a partial remedy, undertook by the Act of December 1824 to fix a rule and declare the law in most or all of the questions on which the two Courts had differed."

The issue in *Peyton v. Smith*, *supra*, was whether the statute was retrospective in operation so as to govern in a suit at law where the will had been drawn and the testator had died before the passage of the act. By unanimous decision the Court held that the act controlled the construction of the will, although both at the time the will had been drawn and at the time the testator had died the rule of the law courts had been in opposition to that of the statute. In an opinion per Mr. Justice Johnson the Court "... concede[d] fully the principle that in general the legislature cannot prescribe and establish a new rule, and give it retrospective operation. But I apprehend that where the rule is unascertained and unsettled, it belongs to the legislature to ascertain and settle the law, and that from necessity such a law must operate both prospectively and retrospectively . . . . Before the Act of 1824, the rule which prevailed in the Courts of Equity gave him the fee simple, and that which obtained in the Courts of law a life estate only. The respective Courts were equally supreme and independent in their respective departments, and each were [*sic*] governed by their [*sic*] own rules, but there was no common rule. The law of the land was unsettled and unascertained, and the Act of 1824 was notoriously intended for that purpose. It is the fiat of the people acting through their representatives, as umpire between the clashing opinions of the two Courts, and must therefore be permitted to operate not as a new rule, originating in the Act itself, but as a rule of the common law."

7. At pp. 370, 371, *infra*, a solution of the problem of the requirement of words of inheritance is suggested, which if adopted, as a practical matter can end the tyranny of the rule almost immediately.

it existed in the times of Littleton,<sup>8</sup> of Coke,<sup>9</sup> and of Blackstone.<sup>10</sup> Of course, all of the hoary technicalities elaborated in these authorities do not represent the present state of the South Carolina law. *Communis error facit jus*. In estimating the strength of an arbitrary rule today existing wholly without modern justification, the fact that the practice has not in all respects complied with obscure technicalities is a very real influence in determining the decisions of a court. It is hard to conceive of a modern judge, even while in the main observing the rule, paying heed to certain of the more meticulously elaborated distinctions of Littleton and Coke. In its broad application the rule does survive, however, which is a red flag warning the title examiner to tread cautiously when not clearly within the beaten path.

The development of this article is first, the rule and its requirements as it once existed in England, and theoretically exists today in South Carolina; second, the exceptions to the rule, including certain new exemptions which have been developed by the Court of South Carolina; third, the steps that can be taken to correct the title, once it has been determined to be defective because of non-compliance with the rule. The final chapter is a brief consideration of certain remedial steps which may furnish a guide for future action if the State ever elects to abandon the magic word standard.

## CHAPTER I.

### THE RULE AND ITS REQUIREMENTS<sup>10a</sup>

#### *The Magic Words*

The classic statement of the rule is by Littleton,<sup>11</sup> writing in the fifteenth century:

“For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heirs: For these words, his heirs, make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him forever; or by these words, To have and to hold to him and his assigns forever; in these two cases he hath but an estate for term of

8. Thomas Littleton, 1422-1481.

9. Edward Coke, 1552-1633.

10. William Blackstone, 1723-1780.

10a. As to the establishment in the thirteenth century of the rule requiring words of inheritance to convey a fee, see 1 AMERICAN LAW OF PROPERTY § 2.3, p. 82.

11. LITTLETON, TENURES § 1 (Wambaugh ed., 1903).

life, for that there lack these words, his heirs, which words only make an estate of inheritance in all feoffments and grants."

Note well the cabalistic formula which must be complied with—to "A and his heirs."<sup>12</sup> Certain scrivener's errors, frequently found either in original deeds or their records, raise interesting questions.

"To A and his heir [singular] and assigns." Should the title be passed? Not if one heeds the counsel of Coke:<sup>13</sup> ". . . for if a man give land to a man and to his heir in the singular number, he hath but an estate for life, for his heir cannot take a fee simple by descent, because he is but one, and therefore in that case his heir shall take nothing." No South Carolina case has been found, but it is believed that the Court undoubtedly would hold such a conveyance to be one in fee simple.<sup>14</sup>

And what of the frequently found limitation, "to A and ..... heirs and assigns." Such limitation is regularly passed without question in South Carolina, and, in accord with the authorities,<sup>15</sup> would appear to be good. More questions are raised if the limitation is to two or more persons "and ..... heirs and assigns." In Coke's opinion<sup>16</sup> the latter is clearly bad, but in view of the many clerical errors and omissions in our records it is highly improbable that the quantum of an estate would be held to turn on such a common omission.

Suppose that instead of the conjunctive *and*, the disjunctive *or* is used, so that the limitation reads "to A or his heirs." At an earlier period the limitation would have been bad, the grantor taking but an estate for life.<sup>17</sup> As early as the middle of the eighteenth century, however, an English judge<sup>18</sup> was of the opinion that the word "or"

12. "In practice, the additional words, AND ASSIGNS FOREVER, are, and long have been, in common use; but it is beyond doubt that, though harmless, they are, and always were, superfluous." CHALLIS, REAL PROPERTY 221 (3rd ed.). See also 2 PRESTON, ESTATES 3.

13. CO. LITT. 8b.

14. 4 KENT 5, n. (b); AIGLER, CASES ON TITLES 528, n. 2 (3rd ed. 1942); 7 THOMPSON, REAL PROPERTY § 3535; RESTATEMENT, PROPERTY § 27, comment c.

15. CO. LITT. 8b; RESTATEMENT, PROPERTY § 27, comment c. Cf. Johnson v. Barden, 86 Vt. 19, 83 A. 721 (1912).

16. CO. LITT. 8b: "If a man give land unto two, to have and to hold to them two *et haeredibus*, omitting *suis*, they have but an estate for life, for the uncertainty; whereof more hereafter in this section. But it is said, if land be given to one man *et haeredibus*, omitting *suis*, that notwithstanding a fee simple passeth; but it is safe to follow Littleton." Cf. Johnson v. Barden, 86 Vt. 19, 83 A. 721 (1912). But see RESTATEMENT, PROPERTY § 27, comment 1.

17. CO. LITT. 8b: "Also observable is this conjunctive (*et*). For if a man give lands to one, to have and to hold to him *or* his heirs, he hath but an estate for life, for the uncertainty."

18. Lord Hardwicke in Wright v. Wright, 1 Ves. Sr. 409 (1749).

might be construed as a clerical error for "and." Today it seems likely that our Court would adopt the practical view of the Massachusetts Court<sup>19</sup> when confronted with the question: "And as to the construction contended for, although it is supported by a dictum of Lord Coke's, it is a strictness not to be tolerated at the present day. The intention of the parties is to be effectuated; and for that purpose, it is not unusual to construe or as and."<sup>20</sup>

A variation of the above form of limitation would be "to A, his heirs and assigns," with no conjunctive or disjunctive. Since this is the form of limitation used in the State's statutory<sup>21</sup> deed, there can be no question as to its sufficiency.

### *Location of the Words of Inheritance*

The statutory<sup>22</sup> form of deed prescribed for South Carolina provides for the use of words of inheritance in the habendum only, but the law is settled that such words are effective if they appear in either the granting<sup>23</sup> or habendum<sup>24</sup> clause.

Suppose, however, that there are no words of inheritance in either the granting clause or habendum, but the warranty is in favor of the grantee and his heirs against the grantor and his heirs. Can the warranty clause be used to enlarge the estate granted? The question has been presented repeatedly to the Court of South Carolina,<sup>25</sup>

19. *White v. Crawford*, 10 Mass. 183, 188 (1813).

20. The American Law Institute takes the position that a limitation to one "or his heirs" is sufficient to convey the fee simple if the limitation is of a present estate. If, however, it is of a future estate, it is a matter of construction whether "heirs" was used as a word of limitation or as indicative of an intention to make an alternative gift to the grantee's heirs as purchasers, in which latter event the required words of limitation with respect to the grantee being absent, he takes but an estate for life. In the absence of evidence of a contrary intent, heirs is a word of limitation, and the grantee takes a fee simple. *RESTATEMENT, PROPERTY* § 27, comments *d* and *e*.

21. S. C. CODE OF LAWS § 57-251 (1952): "... to have and to hold . . . unto said C D, his heirs and assigns, forever."

22. S. C. CODE OF LAWS § 57-251 (1952).

23. *Shealy v. Shealy*, 120 S. C. 276, 113 S. E. 131 (1922).

24. *McLeod v. Tarrant*, 39 S. C. 271, 17 S. E. 773 (1893); *Chavis v. Chavis*, 57 S. C. 173, 35 S. E. 507 (1900). See *Cresswell v. Bank of Greenwood*, 210 S. C. 47, 52, 41 S. E. 2d 393 (1947).

25. *Jordan v. Neese*, 36 S. C. 295, 15 S. E. 202, 31 Am. St. Rep. 869 (1892); *Wilson v. Watkins*, 48 S. C. 341, 26 S. E. 663 (1897); *McMichael v. McMichael*, 51 S. C. 555, 29 S. E. 403 (1898); *Wilson v. Garland*, 77 S. C. 171, 57 S. E. 728 (1907); *Windham v. Howell*, 78 S. C. 187, 59 S. E. 852 (1907); *Austin v. Hunter*, 85 S. C. 472, 67 S. E. 734 (1910); *Sullivan v. Moore*, 92 S. C. 305, 75 S. E. 497 (1912); *Fore v. Marion Lumber Co.*, 114 S. C. 501, 104 S. E. 179 (1920); *Elliott v. Bristow*, 186 S. C. 544, 196 S. E. 378 (1938). See Note, 47 A. L. R. 870 (1927).



and the answer, in accord with the common law view,<sup>26</sup> is that it cannot. Confronted with the ingenious argument that even though the warranty clause cannot enlarge the estate granted, yet it should be construed as creating an estoppel against the grantor and his heirs to deny that the parties intended the passage of the fee, the Court thus disposed of the heresy: "We cannot accept this view, for if it should be adopted, it would fritter away and practically destroy the well settled and conceded rule that the warranty clause cannot operate so as to enlarge the estate granted. Indeed, in most cases where deeds drawn by unskillful draughtsmen, fail to carry the fee by reason of the omission of the requisite words of inheritance, the real intention of the parties is defeated, and we do not think the use of the word 'heirs' in the warranty clause can be used to establish such intention, especially where found in a deed so inartificially drawn as this is."<sup>27</sup>

However, while the inclusion of words of inheritance in the warranty will not *ipso facto* supply their omission in the granting clause or the habendum, nor raise an estoppel against the grantor or his heirs to deny the conveyance of the fee, yet the warranty may be used as evidence of the intention of the parties in a suit for reformation of the deed on the ground of mistake. Thus, where the evidence was undisputed that the grantee had paid full value for a conveyance in fee, the Court, in affirming a decree of reformation of the deed to supply omitted words of inheritance, commented as follows on the evidentiary value of a warranty to the grantee and his heirs: "The warranty clause could not, of course, have the effect of enlarging the estate granted, but the fact that the grantor expressed the intention to warrant the title to the grantee and his heirs, is itself a circumstance indicating that the omission of the words 'heirs' from other portions of the deed was due to inadvertence or mistake."<sup>28</sup>

#### *Incorporation by Reference of Words of Inheritance*

Suppose there are no words of inheritance in either the granting clause or the habendum, but the deed provides that the land con-

26. Co. Litt. 385b: "But a<sup>3</sup> warrantie of it selfe cannot enlarge an estate; as if the lessor by deed release to his lessee for life, and warrant the land to the lessee and his heirs, yet doth not this enlarge his estate."

The Restatement takes the position that words of inheritance in the warranty are sufficient to supply their omission in other parts of the deed. RESTATEMENT, PROPERTY § 27, comment *h*, illustration 13.

27. Chief Justice McIver in *Jordan v. Neese*, 36 S. C. 295, 301, 15 S. E. 202, 31 Am. St. Rep. 869 (1892).

28. *Austin v. Hunter*, 85 S. C. 472, 475, 67 S. E. 734 (1910). See also *Sullivan v. Moore*, 92 S. C. 305, 75 S. E. 497 (1912); *Byrd v. O'Neal*, 106 S. C. 346, 91 S. E. 293 (1917); *Mathis v. Hair*, 112 S. C. 320, 99 S. E. 810 (1919).

veyed is to be held "upon the terms stated in the deed from A to B."

There is authority,<sup>29</sup> both ancient and modern, that such incorporation by reference of the terms of another writing can be made, and if the latter instrument contains words of inheritance,<sup>30</sup> the deed will convey an estate in fee simple. Thus, where a deed purported to convey all the grantor's right, title and interest in the property, but lacked words of inheritance, it was held that a derivation clause reciting the source of the grantor's title by volume and page of the record was a sufficient incorporation of the words of inheritance in the deed to the grantor so that the fee simple estate passed under the subsequent deed lacking such words.<sup>31</sup>

No South Carolina case making mention of the principle of incorporation of words of inheritance by reference has been found. However, in a proper case the Court may well elect to recognize a rule which can muster in its favor so much authority and reason.

### *Heirs as Purchasers*

Suppose that in a deed the limitation is "to A for life, remainder to the heirs of B." If B is dead at the time of the conveyance, those persons who constitute his heirs under the Statute of Descent and Distribution take a vested remainder as purchasers by virtue of the

29. CO. LITT. 9b; SHEP. TOUCH. 101; 2 PRESTON, ESTATES 2; LEAKE, PROPERTY 156; 4 KENT 5; RESTATEMENT, PROPERTY § 28 (see Tentative Draft No. 1, Explanatory Note to § 32); 1 TIFFANY, REAL PROPERTY § 28 (3rd ed.); Lytle v. Lytle, 10 Watts 259 (Pa. 1840); Gould v. Lamb, 11 Met. 84, 45 Am. Dec. 187 (Mass. 1846); Wickersham v. Bills, 8 Ind. 387 (1856); Mercier v. Ry., 54 Mo. 506 (1874); Lemon v. Graham, 131 Pa. 447, 19 A. 48 (1890); Brady v. Evans, 79 Md. 142, 28 A. 1061 (1894).

30. In Lytle v. Lytle, 10 Watts 259 (Pa. 1840), where the incorporation by reference was of a will lacking words of inheritance, it was held that this did not supply the omission in the deed, even though the limitation referred to was sufficient to pass the fee by way of devise. RESTATEMENT, PROPERTY, Tentative Draft No. 1, Explanatory Note to § 32, states: "The Advisers divided about evenly on the correctness of the decision." As a result, the following appears in RESTATEMENT, PROPERTY § 28:

"*Caveat:* The Institute takes no position as to whether an estate in fee simple absolute is created by an otherwise effective conveyance inter vivos of land which indicates the estate created thereby by reference to the effect of another instrument by which an estate in fee simple absolute is created where the instrument to which reference is made does not itself contain words of inheritance."

31. Brady v. Evans, 79 Md. 142, 28 A. 1061 (1894). This case is Illustration 2 in § 32, RESTATEMENT, PROPERTY (Tentative Draft No. 1). It does not appear in Section 28 of the final Restatement, but the Explanatory Note to the Tentative Draft shows that Brady v. Evans "is agreed by all the Advisers to be correctly decided." The decision may be subject to criticism on the ground that it does not come within the scope of the exception as outlined in the authorities, it being doubtful whether there is sufficient expression of an intent to incorporate the words of inheritance in the prior deed.

limitation to them.<sup>32</sup> If, however, B is living at the time of the conveyance, the remainder to his heirs is necessarily contingent, since those persons who will answer the description cannot be determined until the death of B.<sup>33</sup> If B dies during the lifetime of A, the remainder will then vest in those persons who are his heirs.<sup>34</sup> If A dies during the lifetime of B, the contingent remainder to the heirs of B fails at common law for want of a precedent life estate to support it.<sup>35</sup>

Assuming, however, that the remainder to the heirs of B vests by reason of B predeceasing A, is the remainder in his heirs for life or in fee? In other words, where "heirs" is used as a word of purchase must there be a limitation to the heirs "and their heirs" to create an estate in fee simple in the heirs taking as purchasers?

The common law rule is settled that where the word "heirs" has legal effect as a word of purchase, it operates also as a word of limitation describing the nature of the estate taken by the "heirs," who therefore take an estate in fee simple.<sup>36</sup>

Two common law doctrines must be borne in mind in connection with this principle. If the limitation is to the heirs of the grantor, the application of the common law dogma, *nemo est haeres viventis*, will make such a limitation ineffectual to create a remainder in the

32. 2 TIFFANY, REAL PROPERTY § 321 (3rd ed.). See 1 SIMES, FUTURE INTERESTS § 83.

33. 1 SIMES, FUTURE INTERESTS § 83; 2 TIFFANY, REAL PROPERTY § 321 (3rd ed.). See, as to the distinction between vested and contingent remainders, *Faber v. Police*, 10 S. C. 376 (1878); *Walker v. Alverson*, 87 S. C. 55, 68 S. E. 966 (1910).

34. 2 TIFFANY, REAL PROPERTY § 321 (3rd ed.).

35. 1 SIMES, FUTURE INTERESTS § 99; 2 TIFFANY, REAL PROPERTY § 327 (3rd ed.). For an example of the destruction of a contingent remainder by a premature termination of the supporting life estate (life estate to illegitimate daughter of testator avoided by testator's lawful son), see *Bouknight v. Brown*, 16 S. C. 155 (1881). Section 57-4, S. C. CODE OF LAWS (1952), enacted in 1883, only purports to preserve a contingent remainder from destruction by a tortious feoffment by a life tenant, and apparently has no other efficacy in altering the common law. See *McCreary v. Coggeshall*, 74 S. C. 42, 53 S. E. 978 (1906). But see the dicta of Mr. Justice Cothran in his concurring opinion in *Spann v. Carson*, 123 S. C. 371, 386, 116 S. E. 7 (1923).

36. "Also in a limitation to the heirs, or the *right heirs* of a person: in those instances in which the *heirs* are to take by purchase, the word *heirs*, at the same time that it operates as a word of purchase, has the effect of a word of limitation; describing, *uno flatu*, the persons who are to take, and the quantity of the interest or time they are to have." 2 PRESTON, ESTATES 28. See also 4 CRUISE, DIGEST 438, tit. 32, c. 23, § 69 (1st Amer. ed. 1808); CO. LITT. 10a; RESTATEMENT, PROPERTY § 30. The rule is inapplicable when the limitation is to grantor's "next of kin." *Boyce v. Mosely*, 102 S. C. 361, 86 S. E. 771 (1915).

heirs, the grantor by operation of law retaining the reversion in himself.<sup>37</sup>

Also, if the remainder to the heirs of B is preceded by a life estate given in the same instrument to the ancestor, in circumstances where the Rule in Shelley's Case is applicable, the remainder to the heirs becomes a remainder to the ancestor in fee simple.<sup>38</sup>

By statute,<sup>39</sup> the Rule in Shelley's Case has been abolished in South Carolina as to all instruments executed since September 30, 1924, and therefore a deed executed since that date "to A for life, remainder to his heirs" by the express terms of the statute will create a life estate in A, and a remainder<sup>40</sup> in fee simple in his heirs.

In construing the word "heirs" in a limitation, however, a constructional tendency of the courts in certain contexts to consider the word "heirs" as used in a non-technical sense as synonymous with "children" must be noted.<sup>41</sup> While "heirs" normally is given its technical meaning as indicative of an indefinite line of descent, in a justifiable desire to avoid the application of the Rule in Shelley's Case, the courts have frequently seized upon the circumstance of other qualifying language in a deed or will, to avoid the technical meaning of the word. If "heirs" is construed as the equivalent of "children," the common law principle that "heirs" when used as a word of purchase is also a word of limitation has no application.<sup>42</sup>

In connection with this principle that where there is a legally

37. 1 Simes, *FUTURE INTERESTS*, § 144. While at an earlier day this was a rule of law operating irrespective of the intention of the grantor, recent cases have treated it as a rule of construction. *Doctor v. Hughes*, 225 N. Y. 305, 122 N. E. 221 (1919), and cases discussed in Simes, *FUTURE INTERESTS* § 147; see Note, 125 A. L. R. 548 (1940), s. 16 A. L. R. 2d 693 (1951). A dictum in *Wilson v. Poston*, 129 S. C. 345, 356, 123 S. E. 849 (1924), treats the dogma as a rule of law.

38. *Jarecky v. Jarecky*, 194 S. C. 456, 9 S. E. 2d 922 (1940).

39. "The rule of law known as the rule in Shelley's Case is hereby abolished in the following particulars, to-wit: when, by deed or will or by any instrument in writing, a remainder in lands, tenements, hereditaments or other real estate shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs or heirs of the body of such tenant for life shall take as purchasers in fee simple, by virtue of the remainder so limited to them. The provisions of this section shall not affect wills, deeds and other instruments in writing executed prior to October 1, 1924 or the construction of such wills, deeds and other instruments in writing." S. C. CODE OF LAWS § 57-2 (1952).

40. Which remainder is probably contingent, rather than vested subject to being divested. 1 Simes, *FUTURE INTERESTS* §§ 83-92; Simes, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* 34 (1951); *RESTATEMENT, PROPERTY* § 249, comment e.

41. *Duckett v. Butler*, 67 S. C. 130, 45 S. E. 137 (1903). 1 Simes, *FUTURE INTERESTS* § 122.

42. See *Dickert v. Dickert*, 12 Rich. 396 (S. C. 1859). *RESTATEMENT, PROPERTY* § 30, comment a.

effective remainder to the heirs of a designated person, they take in fee simple rather than for life, one South Carolina case is worthy of comment. In the leading case, *Wilson v. Poston*,<sup>43</sup> a deed by husband and wife to a daughter provided that if the daughter should die without children (so the limitation was construed), the property should "return to our estate and be equally divided among our heirs." The Court, per Mr. Justice Cothran, held that the executory limitation after an estate in fee simple was valid, and that the heirs took as purchasers under the limitation, *nemo est haeres viventis* being inapplicable because the language "to be equally divided among our heirs" altered the shares the heirs would have taken by operation of law. It was further held that the heirs took but estates for life as purchasers, since, in the language of the Court, "there being no words of inheritance attached to 'our heirs', it follows that the heirs would take a life estate per capita, and the descended fee, not disposed of, per stirpes."

Assuming, as the Court did, that the quoted language meant more than that a moiety of the property was to go to the heirs of each of the grantors, the holding that *nemo est haeres viventis* is inapplicable seems correct, since the limitation is not to the heirs as they would have taken by descent.<sup>44</sup> The further ruling that the heirs took only a life estate is more debatable, but in theory can probably be justified.<sup>45</sup> The point of the present discussion is that the case can readily be distinguished from the normal situation calling for the application of the common law rule that where "heirs" take as purchasers they take an estate in fee simple unless expressly limited to a lesser estate.

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43. 129 S. C. 345, 123 S. E. 849 (1924).

44. RESTATEMENT, PROPERTY § 314, comment c. This would appear to be by analogy to the testamentary transfer, or "worthier title" doctrine. See 1 SIMES, FUTURE INTERESTS § 144; 4 TIFFANY, REAL PROPERTY § 1118 n. 20 (3rd ed.).

45. Under the rule as stated in Section 30 of the Restatement of Property, it would seem that the heirs take in fee simple, even though they do not take in the same proportions as they would have taken by descent. But if an analogy is drawn to the worthier title doctrine, note 44, *supra*, the decision of the South Carolina Court is correct. However, if an analogy is drawn to certain South Carolina cases involving the Rule in Shelley's Case, the decision would appear erroneous. See *Davis v. Dalrymple*, 163 S. C. 490, 161 S. E. 738 (1931), and the cases therein cited, to the effect that the Rule is applicable despite the fact that the remainder to the heirs is in equal shares. See also, *Green v. Green*, 210 S. C. 391, 395, 396, 42 S. E. 2d 884 (1947). 2 TIFFANY, REAL PROPERTY § 350 (3rd ed.). But see RESTATEMENT, PROPERTY § 312, comment g.

## CHAPTER II.

### EXCEPTIONS TO THE RULE

#### *Devises*

The word "heirs" has never been necessary to effect a devise of land in fee simple; all that was necessary at common law was that the language employed clearly indicate that an estate in fee simple rather than a life estate was to be created.<sup>46</sup> The discord between the decisions of the courts of equity and of law in South Carolina in the first quarter of the nineteenth century<sup>47</sup> was not occasioned by any disagreement as to this general principle, but by a difference as to what language constituted sufficient evidence that an estate in fee simple was intended. The whole matter was settled by the Act of 1824,<sup>48</sup> which established a constructional preference in favor of the creation of an estate in fee simple in the absence of an intention to the contrary expressed or implied in the will.

#### *Deeds to Corporations*

"To the X Corporation and assigns." Should the title be passed? Obviously the word "heirs" is unnecessary and ineffectual in a conveyance to a corporation. But is the word "successors" essential to the passage of the fee? No South Carolina decision has been found, but there is no reason to doubt that the Court would follow the well settled rule<sup>49</sup> that neither "heirs" nor "successors" is necessary in a deed to a corporation aggregate. This is on the theory that a corporation never dies, and a grant of an estate for its life is a grant forever, and therefore in fee simple. But what of a corporation sole? Again the question has not been presented in South Caro-

46. CO. LITT. 9b; 2 BLACKSTONE 108; 4 KENT 7; 1 TIFFANY, REAL PROPERTY § 31 (3rd ed.); 2 POWELL, REAL PROPERTY § 183; RESTATEMENT, PROPERTY § 37.

47. See note 6, *supra*.

48. S. C. CODE OF LAWS § 19-232 (1952) quoted in note 6, *supra*.

49. CO. LITT. 9b; 2 BLACKSTONE 109; 4 KENT 7; 1 TIFFANY § 29 (3rd ed.); 7 THOMPSON, REAL PROPERTY § 3556; RESTATEMENT, PROPERTY § 34. A corporation may acquire a fee simple title to land, even though the period of its existence be limited to a number of years. 6A FLETCHER, CORPORATIONS § 2817 (1950). In *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63, 24 L. Ed. 651, 652 (1878) the United States Supreme Court stated that "a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, would only create an estate for the life of the corporation." *Contra*: *Asheville Division No. 15, Sons of Temperance v. Aston*, 92 N. C. 578 (1878). RESTATEMENT, PROPERTY § 34 comment b. Business corporations organized pursuant to the present general statute law of South Carolina have perpetual duration "unless limited by the terms of the petition." S. C. CODE OF LAWS § 12-63 (1952). See however, Code § 12-401, and § 2, Art. 9, S. C. Constitution (1895), reserving to the State the power to amend or repeal the charters of domestic corporations.

lina, but it is clear that at common law a fee simple estate cannot be created in a corporation sole by deed without the use of the word "successors."<sup>50</sup>

### *Deeds to a Government*

Words of inheritance or succession are unnecessary in the conveyance by deed of a fee simple estate to the United States, or to a State or subdivision thereof.<sup>51</sup>

### *Releases Between Joint Tenants*<sup>52</sup>

It is well settled at common law that one joint tenant can release his interest to the other without the use of words of inheritance.<sup>53</sup> "The reason for this," says the Restatement,<sup>54</sup> "is that each joint tenant was historically regarded as having an estate in fee simple absolute in all the land in which the joint tenancy exists and consequently the conveyance does not enlarge the estate of the conveyee." The same rule is not applicable to a conveyance by one tenant in common to another, since in theory of law tenants in common have separate and distinct estates in the land, even though physically undivided.<sup>55</sup>

Mention is made of this exception since it is conceivable that in some future case an astute title advocate by a bit of legal legerdemain may sustain a deed otherwise defective because of omission of words of inheritance. The South Carolina statute<sup>56</sup> provides:

"When any person shall be, at the time of his death, seized or possessed of any estate in joint tenancy the same shall be

50. Co. Litt. 8b, 94b; 2 BLACKSTONE 109; 1 TIFFANY § 29 (3rd ed.); 7 THOMPSON, REAL PROPERTY § 3555; RESTATEMENT, PROPERTY § 33.

51. *Sylvester v. State*, 46 Wash. 585, 91 P. 15 (1907), *aff'd* 215 U. S. 80, 30 S. Ct. 25, 54 L. Ed. 101 (1909); *Dyer v. Siano*, 298 Mass. 537, 11 N. E. 2d 451 (1937). RESTATEMENT, PROPERTY § 35.

52. The term "release" as here used must be distinguished from a partition by deed, the former being a conveyance by one tenant of all his interest in the land to another tenant, while a partition by deed involves a physical division of the land. As to the validity of a voluntary partition in South Carolina, even when parol, see *Goodhue v. Barnwell*, Rice Eq. 198 (S. C. 1839); *Kenmore v. Kenmore*, 26 S. C. 251, 1 S. E. 881 (1887); *Rountree v. Lane*, 32 S. C. 160, 10 S. E. 941 (1890); *Mims v. Hair*, 80 S. C. 460, 61 S. E. 968 (1908); *Dantzler v. Riley*, 109 S. C. 44, 95 S. E. 132 (1918).

53. "First, where an estate of inheritance passeth and continueth; as if there be three coparceners or joyntenants, and one of them release to the other two, or to one of them generally without this word (heirs), by Littleton's own opinion they have a fee simple, as appeareth hereafter." Co. Litt. 9b. See also 4 KENT 7; RESTATEMENT, PROPERTY § 29.

54. RESTATEMENT, PROPERTY § 29, comment e.

55. 2 POWELL, REAL PROPERTY § 181 n. 44. RESTATEMENT, PROPERTY § 29, comment f.

56. S. C. CODE OF LAWS § 19-55 (1952).

adjudged to be severed by the death of the joint tenant and shall be distributable as if the same were a tenancy in common."

Several South Carolina cases<sup>57</sup> have indicated, in accordance with the language of the statute, that joint tenancies have not been wholly abolished, but only the feature of survivorship. If this be true, it would appear that an estate in joint tenancy retains all of its common law characteristics until the death of one of the joint tenants, and that a release without words of inheritance made by a tenant during his lifetime would operate as it did at common law, since the severance by the statute does not occur unless the tenant dies "seised or possessed" of the property.

Even assuming that such reasoning would be sustained by the Court, however, its application is necessarily limited, being dependent upon the circumstance of a release by one tenant to the other without words of inheritance, and upon a finding by the Court that a joint tenancy rather than a tenancy in common existed.

### *Mortgages*

It has been held<sup>58</sup> that since the Act of 1791,<sup>59</sup> which transformed the mortgage of land in South Carolina from a conveyance on condition into a legal lien, words of inheritance are no longer necessary, and that a foreclosure of a mortgage lacking such words will transfer the fee simple estate of the mortgagor.

### *Conveyances by An Officer*

In South Carolina it has been held<sup>60</sup> that a conveyance of the interest in land of a party by an officer pursuant to statutory authority or a court order, passes the entire estate of the party, even though words of inheritance are inadvertently omitted from the conveyance.

57. "The cases indicate that joint tenancies are not abolished as such, only the feature of survivorship. *Herbemont v. Thomas*, Cheves' Equity 21 (S. C. 1839); *Ball v. Deas*, 2 Strobhart's Equity 24 (S. C. 1848); *Telfair v. Howe*, 3 Richardson's Equity 235, 55 Am. Dec. 637 (S. C. 1851). The first two of these cases hold that the statute applies only to vested interests: and where in a will there is simply a gift to A and B, without such intent-manifesting words as 'in equal shares' or like terms indicating division into equal or other specified portions, and one of the donees dies before the testator, the survivor takes the entire estate. To the same effect is *Free v. Sandifer*, 131 S. C. 232, 126 S. E. 521 (1924)." Karesh, *Devolution of Interests in Trust Estates*, 1 S. C. L. Q. 367, 380 note 37 (1949).

58. *Bredenburg v. Landrum*, 32 S. C. 215, 10 S. E. 956 (1890).

59. S. C. CODE OF LAWS § 45-51 (1952).

60. *Carolina Savings Bank v. McMahon*, 37 S. C. 309, 16 S. E. 31 (1892) (sheriff's deed pursuant to sale under judgment execution); *Sumter Fertilizer Company v. Baker*, 206 S. C. 446, 34 S. E. 2d 681 (1945) (master's deed in mortgage foreclosure).



*Conveyance to Partnership in Firm Name*

Since the enactment in South Carolina of the Uniform Partnership Act,<sup>61</sup> words of inheritance are no longer necessary in a conveyance to the partnership in its firm name.<sup>62</sup> However, the Act does not purport to alter the rule where the conveyance is to the partners, and presumably the general rule requiring words of inheritance in deeds of land in South Carolina is still applicable.<sup>63</sup>

## CHAPTER III.

## TRUST DEEDS

A well recognized exception to the requirement of words of inheritance for the conveyance of a fee simple estate by deed is that made in favor of trust deeds. The exception, of course, is not peculiar to South Carolina law, having been recognized to a greater or lesser extent in England and other American jurisdictions during the days when they also required the magic words in inter vivos conveyances.<sup>64</sup>

61. S. C. Acts 1950, No. 742; 46 Stat. 1841; S. C. CODE OF LAWS §§ 52-1 to 52-79 (1952).

62. S. C. CODE OF LAWS § 52-13(4) (1952), (Uniform Partnership Act, § 8, subsec. (4) ): "A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears." See 1 AMERICAN LAW OF PROPERTY § 2.5, p. 92.

63. Karesh, *Partnership Law and the Uniform Partnership Act in South Carolina*, 3 S. C. L. Q. 193, 251 (1951).

64. The English rule as to deeds of trust executed prior to the legislative abolishment of the requirement of words of inheritance (note 1, *supra*) would seem to be that unless such words are annexed to the name of the trustee, no interest greater than a life estate passes by the deed, even though the purposes of the trust necessitate that the trustee take the fee. Doe *ex dem* Pottow v. Fricker, 6 Exch. 510, 155 Eng. Rep. 645 (1851); *In re Irwin*, [1904] 2 Ch. 752. Scott, TRUSTS § 88 n. 3. If the deed conveys to the trustee and his heirs, but omits words of inheritance after the name of the beneficiary, the beneficiary takes but an estate for life, even though the intention that he take in fee is apparent, if the trust is an executed one. *In re Bostock's Settlement*, [1921] 2 Ch. 469. However, a court of equity may reform the deed by supplying words of inheritance after the beneficiary's name, if it appears that a conveyance in fee was intended. Banks v. Ripley, [1940] Ch. 719. See Scott, TRUSTS § 128.1 (Supp. 1952). If the trust is executory, words of inheritance after the name of the beneficiary are not essential. *In re Oliver's Settlement*, [1905] 1 Ch. 191. See *In re Bostock's Settlement*, [1921] 2 Ch. 469, 486; LEWIN, TRUSTS 64 (14th ed. 1939). As used in the English cases the term "executory trust" does not include all trusts not executed by the Statute of Uses. See LEWIN, TRUSTS 66 (14th ed. 1939).

While certain of the American Courts followed the English rule as to the necessity of words of inheritance in trust deeds, others have held that the trustee takes an estate in fee simple despite the omission of technical words of limitation, if such an estate is necessary for the performance of the trust, and that an equitable estate in fee simple can be given the beneficiary, even though words of inheritance are not annexed to his name. Scott, TRUSTS §§ 88, 128.1; Note, 2 L. R. A. (N. S.) 172 (1906). See, in accord with the view of the more liberal American courts, 1A BOGERT, TRUSTS AND TRUSTEES §§ 144, 182 (1951); Scott, TRUSTS §§ 88, 128.1; RESTATEMENT, PROPERTY § 32; RESTATEMENT, TRUSTS §§ 88, comment d, 128 comment a.

*Origin and Historical Background*

The exemption of the trust deed from the technicality of common law conveyancing is founded upon historical reasons. Prior to the Statute of Uses<sup>65</sup> the law courts had long since formulated the dogma that an estate of inheritance would not pass by deed unless the word "heirs" was annexed to the name of the grantee. The courts of chancery were bound by no such ritualism, and if a bargain and sale of the use of land in fee had been intended by the parties, the chancellor would enforce such use, even though words of inheritance had been omitted from the conveyance. After the Statute converted certain passive uses into legal interests, these erstwhile "uses" became legal estates, and were assimilated to the rule governing conveyances at law. Thus, if before the Statute A bargained and sold the use of land "to B in fee," under the limitation B took an equitable fee simple. After the Statute converted the interest of B under such a conveyance into a legal estate, however, the court of chancery had no jurisdiction in enforcing the legal interest created in B, and followed the law in holding that B took only a life interest in the absence of words of inheritance.<sup>66</sup>

It is familiar law that when it is necessary for the purposes of a trust of land that legal title be in the trustee, the use will not be executed by the Statute of Uses.<sup>67</sup> As before the Statute, this un-

65. 27 Hen. VIII, c. 10 (1535); S. C. CODE OF LAWS §§ 67-8, 67-9, 67-10 (1952).

66. "It is settled, that the same words, which are necessary to create an estate in fee upon a conveyance at common law, are equally necessary upon a conveyance to uses since the statute. It is true, that if before the statute, a man had bargained and sold his lands for a valuable consideration, without having limited the use to the heirs of the bargainee, Chancery, which considered the intention of the parties, would have decreed an estate in fee. But as the statute now executes the use, and the bargainee has a legal estate, the same construction must be had upon his legal estate by the statute, as upon estates by the common law; and, therefore, in the case put, the bargainee, since the statute, can only have an estate for life." 1 SANDERS, USES AND TRUSTS 122 (2d Amer. ed.). See also 4 KENT 6, quoted in note 100, *infra*.

While conceding that this is the rule followed by the courts, Preston had difficulty in justifying the law court's arrogation of the construction of legal interests created under the Statute.

"It has been said, that as the statute now executes the use, and the bargainee has a legal estate, the same construction must be made, as to this legal estate, under the statute, as was made on gifts of estates at the common-law.

"For this conclusion no well-founded reason can be urged. The construction of law on the bargain and sale ought to have been precisely the same, after the statute, as the construction of the Court of Chancery would have been when uses were fiduciary, and under the immediate and peculiar jurisdiction of that Court. That construction seems to have been expressly directed by the very letter of the Statute of Uses." 2 PRESTON, ESTATES 66.

67. Among the many South Carolina cases to this effect, see *Posey v. Cook*, 1 Hill 413 (S. C. 1833); *Spann v. Carson*, 123 S. C. 371, 384, 116 S. E. 7 (1923) (concurring opinion of Mr. Justice Cothran). *SCOTT, TRUSTS* §§ 69,

executed use is peculiarly within the jurisdiction of a court of equity, and that court will enforce it according to the intention of the parties, unfettered by the common law rule that words of inheritance are essential to pass the fee at law.<sup>68</sup>

This in brief is the theory of the exemption of the trust deed from the common law requirement of words of inheritance. The difficulty lies in determining what is a trust deed and how far the exception in its favor is to be extended. With the abolition of the requirement of words of inheritance in England and practically all American jurisdictions,<sup>69</sup> learning on the subject has become obsolete for the practitioner. Thus, modern American texts on trusts make but passing mention of the matter instead of including whole sections as in the older works. This in part may account for the continued popularity in South Carolina of Perry on *Trusts and Trustees* (first edition 1872), which, together with Washburn on *Real Property*, and Kent's *Commentaries*, has been the standard authority of the Court, in questions involving the requirement or non-requirement of words of inheritance in trust deeds.

It is well that the subject has become obsolete, since at best it was a dubious mélange of conflicting opinions and interpretations of the earlier text writers. An unreasonable fiat of obscure origin must inevitably produce contradictions and multiply distinctions without difference. As late as 1921 the Court of Appeal, Chancery Division,<sup>70</sup> found it necessary to overrule an earlier decision which, after considerable wavering in the English cases, had been thought to settle the law in favor of a liberal construction of the exemption. For present purposes a general review of the tenuous distinctions which have been made is not profitable, and the balance of this section will

69.1. An additional situation in which a use in land will not be executed by the Statute is in the case of a use on a use. *Danner v. Trescott*, 5 Rich. Eq. 356, 363 (S. C. 1853). See *Ramsay v. Marsh*, 2 McCord 252, 254 (S. C. 1822); *Wilson v. Cheshire*, 1 McCord Eq. 233, 239 (S. C. 1826); *Blount v. Walker*, 31 S. C. 13, 26 (1889). *Scott, Trusts* § 71. Also, the Statute will not be operative in the case of a trust of a term of years, which is treated as personal property. See *Ramsay v. Marsh*, 2 McCord 252, 255 (S. C. 1822); *Wilson v. Cheshire*, 1 McCord Eq. 233, 239 (S. C. 1826). *Scott, Trusts* § 70.

68. This seems to be the rationale of the American Courts which have exempted trust deeds from the common law requirement of words of inheritance. See *Fisher v. Fields*, 10 Johns. 494, 506 (N. Y. 1813) (opinion by Chancellor Kent); *Bratton v. Massey*, 15 S. C. 277, 285 (1881); *McMichael v. McMichael*, 51 S. C. 555, 558, 29 S. E. 403 (1898); *Duncan v. Clarke*, 106 S. C. 17, 19, 90 S. E. 180 (1916). See note 64, *supra*, as to the view of the English and some American Courts that an executed trust must be construed in accord with the rules governing legal limitations.

69. See notes 1, 2, *supra*.

70. *In re Bostock's Settlement*, [1921] 2 Ch. 469, over-ruling *In re Tringham's Trusts*, [1904] 2 Ch. 487. Both cases review the English cases and texts, but differ as to the conclusion to be drawn therefrom.

be devoted to a discussion of what instruments the South Carolina Court has construed to be deeds of trust, and what have been declared to be mere common law deeds which require the word "heirs" to pass the fee.

For the purposes of analysis the cases can best be studied by simplifying them into A and B situations, and this treatment has been adopted in the subsequent classification and discussion. It is elementary that in considering the sufficiency of any attempted transfer of property, either legal or equitable, real or personal, two questions are presented. The first is whether or not an intention to make a transfer of the interest has been manifested. Assuming an affirmative answer, the problem remaining is whether or not the intention has been expressed in a manner to which the law will give legal effect. If this second question must be answered in the negative, the attempted transfer necessarily fails, no matter how clearly the intention to make the transfer has been expressed. Thus, an attempted devise "to my son John in fee simple" perfectly expresses the decedent's intention, but if the instrument has not been executed in compliance with the requirements of the Statute of Wills the expressed intention is a nullity. Likewise, a deed of land from A "to B in fee simple" fails of its purpose in South Carolina, not because of an imperfect manifestation of intention, but because of a rule of law which says that a fee simple estate cannot pass by such an instrument unless certain formal language has been used.

In all the simplified situations herein discussed, we are concerned only with their legal sufficiency and not with the query whether or not an intention to transfer an estate in fee simple is present. The finding of such an intention is a problem of construction to be solved by a consideration of the language used, the relationship between the parties, whether or not a consideration was paid for the transfer, etc.<sup>71</sup>

71. In *Bratton v. Massey*, 15 S. C. 277 (1881), the instrument involved, which had been executed prior to the removal of married women's property disabilities by the Constitution of 1868, was an inter vivos settlement of land in trust for the support of the estranged wife of the grantor. It was held that a power to consume during lifetime, coupled with a general testamentary power of appointment, in conjunction with other circumstances, evidenced an intention to give the beneficiary an interest in fee simple. Ordinarily a general power of appointment coupled with a life estate in the donee of the power does not enlarge the estate into a fee simple one. See, among many other cases, *Blakely v. Blakely*, 155 S. C. 123, 152 S. E. 24 (1930); *Lynch v. Lynch*, 161 S. C. 170, 159 S. E. 26 (1931); *Rogers v. Rogers*, 221 S. C. 360, 70 S. E. 2d 637 (1952).

The use of the word "absolutely" in such phrases as "to vest absolutely" in the beneficiary was held indicative of an intention to give the fee in *Fuller v. Missroon*, 35 S. C. 314, 14 S. E. 714 (1892); *Hunt v. Nolen*, 46 S. C. 356, 24 S. E. 310, *rehearing denied*, 46 S. C. 551, 24 S. E. 543 (1896).

The recital of payment of a nominal monetary consideration was held to

In the discussion which follows it is assumed that an intention to make a transfer in fee simple has been found, and the only problem is whether the law recognizes the manner in which the intention has been expressed. Bearing these preliminary considerations in mind, the South Carolina cases may be analysed as follows.<sup>72</sup>

### *Active Trusts*

#### 1. Deed from A to B and his heirs in trust to convey to C.

The limitation here considered is one where the use is not executed by the Statute of Uses because of some purpose of the trust which necessitates the retention of the legal title by the trustee.<sup>73</sup> Words of inheritance have been annexed to the name of the trustee, but there are no technical words defining the estate of the beneficiary, though an intention that he shall take an estate in fee simple is apparent. Under these circumstances, does the beneficiary take an interest in fee or only an interest for life, with a resulting trust<sup>74</sup> of the remainder for the grantor or his heirs?

In South Carolina it is clear that under such a limitation the beneficiary takes an estate in fee simple.<sup>75</sup> The rationale of the holding is that the fee has been conveyed to the trustee, thus divesting the grantor of the entire legal interest in the property. The manifest

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rebut the presumption that a resulting trust for the grantor or his heirs was intended in *Fuller v. Missroon*, *supra*; *Foster v. Glover*, 46 S. C. 522, 24 S. E. 370 (1896); *Holder v. Melvin*, 106 S. C. 245, 91 S. E. 97 (1917); *Hogg v. Clemmons*, 126 S. C. 469, 483, 120 S. E. 96 (1923) (concurring opinion of Mr. Justice Cothran). *A fortiori*, a substantial consideration was held to have the same effect in *Bratton v. Massey*, 15 S. C. 277 (1881); *Hunt v. Nolen*, *supra*; *Welborn v. Holder*, 143 S. C. 277, 141 S. E. 448 (1928).

72. Former students of Professor Coleman Karesh at the University of South Carolina Law School will recognize the classification of the South Carolina cases as that used by him in his course in Trusts. For this, as well as for other valuable suggestions in the chapter on trust deeds, the writer is indebted to Professor Karesh.

73. In South Carolina a direction to convey to the beneficiary is an active duty imposed upon the trustee which prevents the Statute from executing the use in the beneficiary. *Steele v. Smith*, 84 S. C. 464, 66 S. E. 200 (1910). See *Linder v. Nicholson Bank and Trust Company*, 170 S. C. 373, 379, 170 S. E. 429 (1933), and the cases therein cited. But where by the terms of the trust the trustee is to reconvey to the settlor at the termination of the trust, it seems that a re-conveyance by the trustee is not necessary to revest the settlor with the legal title. See *Linder v. Nicholson Bank and Trust Company*, *supra*.

74. Instead of a resulting trust for the grantor, it may be argued that even though the conveyance is to the trustee and his heirs, the trustee takes only a life estate and the reversion is in the grantor, if an intention to convey only a beneficial interest for life is manifested by the deed. See *SCOTT, TRUSTS* § 88; *RESTATEMENT, TRUSTS* § 88. However, the South Carolina cases have spoken in terms of a resulting trust for the grantor. See *Bratton v. Massey*, 15 S. C. 277 (1881); *Foster v. Glover*, 46 S. C. 522, 24 S. E. 370 (1896).

75. *Bratton v. Massey*, 15 S. C. 277 (1881); *Fuller v. Missroon*, 35 S. C. 314, 14 S. E. 714 (1892).

intention is that the beneficiary is to take the equitable interest, thus rebutting the presumption that any resulting trust for the grantor or his heirs was intended.

2. Deed from A to B in trust to convey to C and his heirs.

This type of limitation has no words of inheritance defining the estate of the trustee, but the equitable interest is to C and his heirs. It is settled that the beneficiary takes an equitable estate in fee simple despite the omission of words of inheritance after the trustee's name.<sup>76</sup> This is on the theory that in its administration of trusts the court of equity is not bound by the technicality of the common law, and in equity the trustee will be deemed to have whatever estate is necessary to fulfill the purposes of the trust.<sup>77</sup> Here it is obvious that the trustee must have a legal estate in fee simple to perform the duties imposed upon him by the terms of the trust, and a court of equity therefore will imply such an estate in him.

The same has been held true even though no words of inheritance are used to define the quantum of the estate of the beneficiary if the intention is manifested that he is to take an estate in fee simple. Thus, a deed from A to B in trust to convey to C will necessitate the finding of a legal fee simple estate in B to fulfill the purposes of the trust.<sup>78</sup>

3. Deed from A to B in trust to pay the income to C for life, and then to go to D.

This form of limitation is characterized by the fact that no words of inheritance define the estate of the trustee, and further, though the trust is active toward the life beneficiary, the use for the remainderman is a passive one executed by the Statute of Uses. Under such circumstances is the remainder so executed in fee, or for life only, if no words of inheritance are annexed to the name of the remainderman?

The question has confronted the Court, and the answer is that the interest executed by the Statute is in fee, if such was intended by

76. *Hunt v. Nolen*, 46 S. C. 356, 24 S. E. 310, *rehearing denied* 46 S. C. 551, 24 S. E. 543 (1896); *Holder v. Melvin*, 106 S. C. 245, 91 S. E. 97 (1917).

77. See *Middleton v. Taber*, 46 S. C. 337, 351, 24 S. E. 282 (1896).

78. *Hunt v. Nolen*, 46 S. C. 356, 24 S. E. 310, *rehearing denied* 46 S. C. 551, 24 S. E. 543 (1896); *Holder v. Melvin*, 106 S. C. 245, 91 S. E. 97 (1917); *Rembert v. Evans*, 86 S. C. 445, 68 S. E. 659 (1910) (the report of the case does not disclose whether words of inheritance were annexed to the name of the trustee); *Lee v. Miles*, 56 S. C. 428, 35 S. E. 2 (1900). See *Kennedy v. Gramling*, 33 S. C. 367, 379, 11 S. E. 1081 (1890).

the grantor.<sup>79</sup> The rationale seems to be that since the deed is in part a trust deed, its construction is to be governed by the equity rule even as to those interests created by the deed which are not in trust but are purely legal interests.

### *Passive Trusts*

#### 4. Deed from A to B and his heirs in trust for C.

Despite the language "in trust" such a conveyance does not create a trust enforceable in equity. From its inception, the conveyance is merely one on a passive use which by operation of law is immediately executed by the Statute of Uses to vest a legal estate in *cestui que use*. The law is settled in South Carolina that the estate vested in *cestui que use* is in fee simple if that was the intention of the grantor, despite the fact that no words of inheritance are annexed to his name.<sup>80</sup> The estate given the conduit to uses is one in fee simple, and the Statute operates to vest the granted estate in *cestui que use*.<sup>81</sup>

#### 5. Deed from A to B in trust for C and his heirs.

This presents the problem of a passive trust of land where the conduit to uses has not been limited an estate in fee simple, but words of inheritance have been annexed to the name of *cestui que use*. In such a case,<sup>82</sup> the Court has deviated from the doctrine of its mentor<sup>83</sup> and held that *cestui que use* takes a legal estate in fee simple in accordance with the intention of the grantor.

In theory the holding seems subject to question.<sup>84</sup> The deed creates

79. *Hunt v. Nolen*, 46 S. C. 356, 24 S. E. 310, *rehearing denied* 46 S. C. 551, 24 S. E. 543 (1896); *Holder v. Melvin*, 106 S. C. 245, 91 S. E. 97 (1917); *Hogg v. Clemmons*, 126 S. C. 469, 120 S. E. 96 (1923). *A fortiori*, the remaindermen were held to take in fee simple where the conveyance was to the trustee and his heirs. *Brown v. McCall*, 44 S. C. 503, 22 S. E. 823 (1895); *Buist v. Williams*, 88 S. C. 252, 70 S. E. 817 (1911).

80. *Foster v. Glover*, 46 S. C. 522, 24 S. E. 370 (1896).

81. *But cf.* the statement of Warrington, L. J., in *In re Bostock's Settlement*, [1921] 2 Ch. 469, 484: "According to technical rules, a limitation to A. and his heirs to the use of or in trust for B. confers on B. a legal estate for life only."

82. *Welborn v. Holder*, 143 S. C. 277, 141 S. E. 448 (1928).

83. "But if A. gives an estate to B. for the use of C. and his heirs, the statute will execute only an estate for the life of A. in C.; for that is the extent of the estate conveyed to B. by a deed in that form; that is, by a deed that has no words of inheritance in B." 1 PERRY, TRUSTS AND TRUSTEES (7th ed.) § 312.

84. See cases cited in 1 PERRY, TRUSTS AND TRUSTEES 547 n. 91 (7th ed.), which by dicta or decision appear to support Mr. Perry's text statement. See *Doe ex dem Pottow v. Fricker*, 6 Exch. 510, 155 Eng. Rep. 645 (1851). But see *Melick v. Pidcock*, 44 N. J. E. 525, 15 A. 3 (1888), which is in accord with the South Carolina holding in *Welborn v. Holder*, note 82 *supra*. The decision in the *Melick* case in part may be based upon an unusual phrasing of the New Jersey Statute of Uses. Also in accord with the holding in the *Welborn* case is RESTATEMENT, TRUSTS § 88, illustration 8.

no equitable interest, and as a matter of logic it appears that it should be governed by the rules of the common law. The conveyance has not been made to C and his heirs, but to B without words of inheritance. The decision possibly may be justifiable only as a relaxation of the common law dogma in favor of a more common sense rule.

#### 6. Deed from A to B in trust for C.

This situation may not have been considered by the Court as yet,<sup>85</sup> though at least one case<sup>85a</sup> has foreshadowed the question. The trust

85. Although the proposition is highly debatable, it would seem that the point was not decided in *McMillan v. Hughes*, 88 S. C. 296, 70 S. E. 804 (1911). The deed there involved was construed as a common law deed, apparently not on the theory that a conveyance on a passive trust was made, but on the theory that no trust, either active or passive was created. Writing the opinion for the court, Mr. Chief Justice Jones states (at p. 298) that the limitation involved is "substantially similar" to that in *McMichael v. McMichael*, 51 S. C. 555, 29 S. E. 403 (1898). A study of the limitation in the *McMichael* case shows that in no manner could it be construed as creating any trust, either active or passive. Yet the *McMichael* case is the primary authority relied on in the *McMillan* case, being quoted at length. Undoubtedly a strong argument could have been made in the *McMillan* case that a trust for the life of the life tenant was created for her use and that of her children. See *Hunter v. Hunter*, 58 S. C. 382, 36 S. E. 734 (1900); *Folk v. Hughes*, 100 S. C. 220, 84 S. E. 713 (1915); *Black v. Harmon*, 127 S. C. 359, 120 S. E. 705 (1923), in which cases language very similar to that used in the *McMillan* case was held to create trusts. The *Hunter* case was decided some eleven years prior to the *McMillan* case, yet the opinion in the later case makes no mention of it. This would seem to further evidence the conclusion that the proper justification of the deed as a trust instrument was neither urged upon the court nor considered by it.

On appeal, while the Circuit Judge's ruling that the deed was a trust deed and, therefore, exempt from the requirement of words of inheritance to pass the fee was declared erroneous, yet the decree was affirmed on the grounds of an *estoppel in pais* against the grantor to deny the passage of the fee, due to his subsequent representations regarding the title. This sustaining ground seems to have been the chiefly contested point on appeal. The unsatisfactory rationale of Mr. Chief Justice Jones' opinion seems indicated by the fact that Mr. Justice (later Chief Justice) Gary concurred only in the result. It would seem, therefore, that the *McMillan* case is not authority for the proposition that a passive trust must be construed as a legal limitation in questions involving the effect of the omission of words of inheritance.

85a. In *Hogg v. Clemmons*, 126 S. C. 469, 120 S. E. 96 (1923), the deed was to A, "trustee for his children" (without words of inheritance), A to manage and control the property during his life and at his death to vest in the children. As against the contention that the deed was not a trust deed but created only a beneficial estate in A for his life, the Court held that the life estate given A was an active trust for his children, and that the deed being a trust deed, words of inheritance were unnecessary to carry the remainder in fee to the children. Nevertheless, the opinion of the Court, per Mr. Justice Fraser, indicates that the fee would have been held to have passed even though the trust was executed by the Statute of Uses. Thus (at p. 478), "[a]ppellants claim that, as there was nothing for the Trustee to do, the Statute executed the use. If that be true, the Statute executes the use in the *cestui que* trust and not in the Trustee. . . . It is entirely clear that the deed was a trust deed, and words of inheritance are not necessary."

In a concurring opinion Mr. Justice Cothran thus raises the question of a "type six" limitation: "A serious question might be presented if it should be held that [A] took only a life estate under the deed with remainder to



is passive and words of inheritance appear nowhere in the deed, but the intention of the grantor to convey an estate in fee simple is clear. While a strong argument may be made that the grantee takes only a life estate, it is to be hoped that he will be held to take in fee simple. The reasonable rule would appear to be that whenever a deed is made to a person as "trustee" on a passive use, by a benign fiction the conveyance will be construed as a trust deed in accord with the equity rule in order to escape the requirement of words of inheritance. However, the answer to the question of the effect of such a limitation must be regarded as doubtful in South Carolina.

In all the above situations, it would seem that the conveyance of the legal title necessarily must have been made to a trustee rather than to the party entitled to the beneficial interest, or else it may not be construed as a trust deed. Thus, where the grant was made directly to the beneficiary without words of inheritance, it was construed as a common law deed despite a clause at the end of the deed, "I do hereby appoint and constitute D as trustee to manage the tract of land . . . for the purposes set forth in said deed of trust."<sup>86</sup>

#### *Deeds to Fiduciaries Other than Strict Trustees*

In South Carolina it would seem that a deed which discloses that the conveyance is made to a person other than a strict trustee for fiduciary purposes will be held to convey the fee without words of inheritance, if such a conveyance was intended by the parties. Apparently, the conveyance is treated as one creating a trust of the property for the third party beneficially entitled, and the word "heirs," therefore, is unnecessary.<sup>87</sup>

#### *Assignments of Equitable Interests in Land*

Are words of inheritance essential to the transfer of an equitable interest in land? Suppose there is a devise to A and his heirs in trust to pay the income to B for life, and then to convey to C and

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the children. In that event, there being no duties imposed upon him as trustee, the Statute would execute the trust, giving to him immediately a legal life estate, and to the children a legal fee in the remainder. *Under these circumstances would words of inheritance be necessary to carry the fee to the remainderman?* I have not considered this phase of the case for the reason that, having concluded that the trust was not executed, the question suggested becomes academic." (Emphasis added.)

86. *Lanham v. Haynes*, 101 S. C. 424, 85 S. E. 966 (1915). Cf. *Burnett v. Burnett*, 17 S. C. 545 (1882); *Lee v. Miles*, 56 S. C. 428, 35 S. E. 2 (1900).

87. This statement may be too inclusive, but is intended to cover situations where it is manifest that the conveyance is made to the grantee, not for his individual benefit, but to serve other purposes. Probably included would be transfers to executors and administrators, guardians, committees, assignees

his heirs. During the life of B, C makes a gratuitous deed of his interest "to X in fee simple." At B's death, is X entitled to a conveyance from the trustee in fee, or only for life, with remainder to C and his heirs?

No South Carolina case raising the question has been found, but in view of the Court's holding that words of inheritance are unnecessary for the creation of an equitable estate in fee simple, it would appear that such words are unnecessary for the transfer thereof if the intention to make such a transfer is shown by the deed. Both transactions are within the purview of a court of equity, which traditionally looks to the substance rather than to the form of the limitation.<sup>88</sup>

#### CHAPTER IV.

##### THE COVENANT TO STAND SEISED TO USES

An interesting development in South Carolina law is the State's peculiarly indigenous version of the covenant to stand seized to uses. In one aspect this ancient assurance has been extended in a manner apparently unwarranted by precedent, with the happy result of salvaging a considerable number of otherwise inadequate deeds. This extension is found in the doctrine that a deed which can be construed as a covenant to stand seized to uses requires no words of inheritance to convey an estate in fee.<sup>89</sup>

On the other hand, the Court has drastically curtailed the usefulness of its innovation by a declaration that no deed can be so construed unless there has been a "reservation of a life or similar estate or equivalent to the grantor."<sup>90</sup> Again, this second modification finds no justification in precedent or the historical origin and pur-

for benefit of creditors, and the like. See *Middleton v. Tabor*, 46 S. C. 337, 351, 24 S. E. 282 (1896) (conveyance to assignee for benefit of creditors); *Sumter Fertilizer Co. v. Baker*, 206 S. C. 446, 451, 34 S. E. 2d 681 (1945) (conveyance to A, trustee, his successors and assigns, but neither the purpose of the trust nor the name of the beneficiary stated in the deed). A somewhat analogous situation was presented in *Jeffery v. Ehrhardt*, 210 S. C. 519, 43 S. E. 2d 483 (1947), wherein it was held that the then present members of a church whose charter of incorporation had expired held title in fee simple to land conveyed after the expiration of the corporate charter to the church, "its successors and assigns." The opinion does not comment upon the omission from the deed of words of inheritance.

88. *Hayward v. Ormsbee*, 11 Wis. 3 (1860). *SCOTT, TRUSTS* § 132.

89. *Bank of Prosperity v. Dominick*, 116 S. C. 228, 107 S. E. 914 (1921); *Gaines v. Sullivan*, 117 S. C. 475, 109 S. E. 276 (1921); *First Carolinas Joint Stock Land Bank of Columbia v. Ford*, 177 S. C. 40, 180 S. E. 562 (1935). See *Campbell v. Williams*, 171 S. C. 279, 172 S. E. 142 (1933); *Elliott v. Bristow*, 186 S. C. 544, 196 S. E. 378 (1938); *James v. James*, 189 S. C. 414, 1 S. E. 2d 494 (1939); *Cresswell v. Bank of Greenwood*, 210 S. C. 47, 41 S. E. 2d 393 (1947).

90. *Cresswell v. Bank of Greenwood*, 210 S. C. 47, 55, 41 S. E. 2d 393 (1947).

poses of the covenant to stand seised to uses, it being a requisite unique in South Carolina law.

Before considering our cases, a brief review of the origin of this antique conveyancing device, and its purposes and limitations in English law, will be helpful in determining how the South Carolina "sport" has mutated from its parentage.

### *Origin and Historical Background*<sup>91</sup>

After the enactment in 1535 of the Statute of Uses,<sup>92</sup> which operated to transform certain "uses," i. e., equitable interests, into legal estates, conveyancers were quick to seize upon the possibilities afforded by the Statute of effecting conveyances of legal freehold estates without the necessity of the formal transfer of possession known as feoffment with livery of seisin. As a result of the Statute three new methods of conveying legal freehold estates were developed: the bargain and sale (which before the Statute had given the bargainee only an equitable interest), the covenant to stand seised to uses, and the lease and release. All of these modes of conveyance are valid today in South Carolina, with only the added requirements that they must be under seal and attested by two witnesses.<sup>93</sup>

The bargain and sale is dependent for its effectiveness upon the payment or recital of a valuable consideration, and, under the English law, the further requirement that it be enrolled in accordance

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91. Authorities have not been cited in the general discussion of conveyancing before and after the Statute of Uses. For good general surveys see BIGELOW, AN INTRODUCTION TO THE LAW OF REAL PROPERTY; MOYNIHAN, PRELIMINARY SURVEY OF THE LAW OF REAL PROPERTY; CASNER AND LEACH, CASES AND TEXT ON PROPERTY (1950).

92. 27 Hen. VIII, c. 10 (1535); S. C. CODE OF LAWS §§ 67-8, 67-9, 67-10 (1952).

93. After the Statute of Frauds (29 Car. II, c. 3, 1676), freehold estates or terms for more than three years could not be created by parol, either by livery of seisin or by conveyances operating under the Statute of Uses. S. C. CODE OF LAWS §§ 57-306, 67-1 (1952) embody the equivalent South Carolina sections of the Statute of Frauds, which are in effect the same, except that the exempted leasehold interest is reduced from three years to one year. As to the recording of a memorandum of livery of seisin, see CODE § 60-58.

In *Craig v. Pinson*, 1 Cheves 272 (S. C. 1840), it was held that the Act of 1795 [S. C. CODE OF LAWS § 57-251 (1952)] prescribing a statutory form of deed, did not invalidate the forms theretofore in use in the State, but that the Act does require attestation by two witnesses, no matter what the form of the deed. For a case recognizing the validity of a bargain and sale prior to the Act, see *Lessee of Rugge v. Ellis*, 1 Bay 107 (S. C. 1790). For cases subsequent to the Act, see *Sanders v. Hartzog*, 6 S. C. 479 (1876); *Lorick and Lowrance v. McCreery*, 20 S. C. 424 (1884).

with the Statute of Enrollments.<sup>94</sup> This requirement of enrollment was disliked, both because of its expense and because of the publicity of the recording, and as a consequence, when the lease and release was perfected a few years later, it became the most popular method of conveyance in England, as it is reported<sup>95</sup> to have been in South Carolina prior to the Act of 1795 prescribing a statutory form of deed.

The covenant to stand seised to uses apparently received its first sanction thirty years after the Statute of Uses, when it was held that a use was raised by a covenant to stand seised to the use of a blood relation of the covenantor.<sup>96</sup> The use thus raised was executed by the Statute,<sup>97</sup> and conveyed the legal estate to the covenantee in precisely the same manner that a use raised by a bargain and sale conveyed title to the bargainee. Thus it is the equivalent of the bargain and sale, the essential difference in the two, aside from the non-applicability of the Statute of Enrollments to the former, being that a bargain and sale is based upon a valuable consideration, while a covenant to stand seised to uses is based upon a consideration of blood or marriage.<sup>98</sup> There was no requirement that there be a

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94. The same session of Parliament that passed the Statute of Uses passed also the Statute of Enrollments (27 Hen. VIII, c. 16, 1536), providing that no bargain and sale of a freehold should be effective unless by indenture enrolled, *i. e.*, recorded. The Statute applied only to bargains and sales, and had no application to the later developed lease and release under the Statute of Uses, nor to the covenant to stand seised to uses. The Statute of Enrollments has never been in force in South Carolina. *Craig v. Pinson*, 1 Cheves 272 (S. C. 1840). See also Reporter's Note to *Chancellor v. Windham*, 1 Rich. 161 (S. C. 1844); *Kinsler v. Clark*, 1 Rich. 170 (S. C. 1844).

95. "It is very certain that lease and release was the usual conveyance of land in South Carolina, previous to 1795, notwithstanding other conveyances were regarded as legally valid." *Butler, J.*, in *Craig v. Pinson*, 1 Cheves 272, 275 (1840).

96. *Sharington v. Strotton*, Plowd. 298 (1565). In *Callard v. Callard*, Moore 687 (1593), it was held that the use could be raised only by deed, a parol covenant being insufficient.

97. "A twelfth species of conveyance, called a *covenant to stand seized to uses*: by which a man, seized of lands, covenants in consideration of blood or marriage that he will stand seized of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee. Here the statute executes at once the estate; for the party intended to be benefitted, having thus acquired the use, is thereby put at once into corporal possession of the land, without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations as those of blood or marriage." 2 BLACKSTONE 338.

98. "This conveyance has the same force and effect as a common deed of bargain and sale; but the great distinction between them is, that the former can only be made use of among near domestic relations, for it must be founded on the consideration of blood or marriage." 4 KENT 493.

reservation of a life estate in the grantor,<sup>99</sup> nor, it seems, did the covenant to stand seised to uses as such enjoy any exemption from the common law requirement of words of inheritance to convey an estate in fee simple.<sup>100</sup>

The covenant to stand seised to uses fell into disuse in England since, because of the prerequisite consideration of blood or marriage, it could not be used for commercial transfers, or for family settlements involving conveyances to trustees not related to the covenantor.<sup>101</sup> However, by the middle of the eighteenth century it was settled in England that when the requisite consideration was present, great liberality was to be exercised in construing a deed intended to operate in another manner as a covenant to stand seised to uses, when necessary to do so in order to effectuate the intention of the grantor.<sup>102</sup> Thus gratuitous deeds to relatives which were intended

99. In *Crossing v. Scudamore*, 2 Levinz 9 (1671), a gratuitous deed by a father to his daughter was sustained as a covenant to stand seised to uses. There was no life estate reserved to the father, nor is any mention made in the opinion of any such supposed requirement. See also *Vanhorn's Lessee v. Harrison*, 1 Dallas 137, 1 L. Ed. 70 (Pa. 1785); *Adams v. Ross*, 1 Vroom 505, 82 Am. Dec. 237 (N. J. 1860).

100. "The general rule is applicable to all conveyances governed by the rule of the common law; for though prior to the statute of uses, the fee, in the view of a court of chancery, passed by reason of the consideration, in a bargain and sale, or covenant to stand seised to uses, without any express limitation to the heirs; yet, when uses were by statute transferred into possession, and became legal estates, they were subjected to the scrupulous and technical rules of the courts of law. The example at law was followed by the courts of equity, and the same legal construction applied by them to a conveyance to uses." 4 KENT 6. See 1 SANDERS, USES AND TRUSTS 122 (2d Amer. ed.), quoted in note 66, *supra*; 4 CRUISE, DIGEST 440, tit. 32, c. 24, § 4 (1st Amer. ed. 1808). See *Vanhorn's Lessee v. Harrison*, 1 Dallas 137, 1 L. Ed. 70 (Pa. 1785) (which contains a detailed review of the authorities on this point); *Adams v. Ross*, 1 Vroom 505, 82 Am. Dec. 237 (N. J. 1860).

101. 4 KENT 493. See 7 HOLDSWORTH, HISTORY OF ENGLISH LAW 360 (1926).

102. The leading case is *Roe ex dem Wilkinson v. Tranmer*, 2 Wils. 75 (1757), wherein Willes, C. J., said: "Although formerly, according to some of the old cases, the mode or form of a conveyance was held material, yet in later times, where the intent appears that the land shall pass, it has been ruled otherwise, and certainly it is more considerable to make the intent good in passing the estate, if by any legal means it may be done, than by considering the manner of passing it, to disappoint the intent and principal thing, which was to pass the land." This case is cited in *Dinkins v. Samuel*, 10 Rich. 66, 68 (S. C. 1856), and in *Sanders v. Hartzog*, 6 S. C. 479, 485 (1876).

In South Carolina a more familiar statement of the same principle is that of Justice Wardlaw in *Chancellor v. Windham*, 1 Rich. 161, 167 (S. C. 1844): "Large and more sensible rules of construction require that the whole deed should be considered together, and effect be given to every part, if all can stand together consistently with law; that an exposition favorable to the intention should be made, if not contrary to law; that the intention should be regarded as looking rather to the effect to be produced than the mode of producing it; that too minute a stress should not be laid on particular words, if the intention be clear—and that, if the deed cannot operate in the mode contemplated by the parties, it should be construed in such manner as to operate, if possible, in some other way."

to operate by way of common law conveyance, or as leases and releases, were construed as covenants to stand seised to uses when necessary to do so because possessory interests had been reserved in the grantors.<sup>103</sup>

This, then, is the covenant to stand seised to uses as it originated in England. Now let us consider how it has figured in the South Carolina Cases.

### *South Carolina Cases*

In accord with the English authorities, the Court in the earlier South Carolina cases liberally construed deeds made to persons within the required "consideration" as covenants to stand seised to uses when necessary to do so in instances where grantors had reserved life estates in themselves.<sup>104, 105</sup> Since there was no reason to so interpret deeds except in such cases, every early South Carolina case involving a deed construed as a covenant to stand seised to uses exhibits the characteristic of a reservation of a life estate in the grantor.

103. Prior to the Statute of Uses there could be no conveyance of a freehold estate to commence *in futuro*, due to the feudal requirement of livery of seisin, which is a present and not a future act. GRAY, *RULE AGAINST PERPETUITIES* § 6 (4th ed.). See Note, 11 A. L. R. 23, 25 (1921), s. 76 A. L. R. 636 (1932). After the Statute a conveyance operating thereunder required no livery of seisin, and therefore freehold estates to commence *in futuro* might be created by way of springing use. Thus, such interests may be created by a bargain and sale or a covenant to stand seised to uses. GRAY, *op. cit. supra* § 56 (1). Such an estate cannot be created by a lease and release, however, since a release can be made only to a tenant already in possession. For a very fine discussion of the subject of this note, see the opinion of Mr. Justice Wardlaw in *Chancellor v. Windham*, 1 Rich. 161, 42 Am. Dec. 411 (S. C. 1844).

104. *Pledger v. Adm'rs. of David*, 4 Desaus. Eq. 264 (S. C. 1812); *Milledge v. Lamar*, 4 Desaus. Eq. 617 (S. C. 1816); *Chancellor v. Windham*, 1 Rich. 161 (S. C. 1844); *Kinsler v. Clark*, 1 Rich. 170 (S. C. 1844); *Dinkins v. Samuel*, 10 Rich. 66 (S. C. 1856); *Bowman v. Lobe*, 14 Rich. Eq. 271 (S. C. 1868); *Watson v. Watson*, 24 S. C. 228, 58 Am. Rep. 247 (1886); *Jacobs v. Mutual Ins. Co. of Greenville*, 52 S. C. 110, 29 S. E. 533 (1898); *Rembert v. Veto*, 89 S. C. 198, 71 S. E. 959, 2 A. L. R. 918 (1911); *Bethea v. Allen*, 101 S. C. 350, 85 S. E. 903 (1915).

105. In a number of cases the South Carolina Court has sustained the validity of deeds reserving possessory interests in the grantors without resorting to the concept of the covenant to stand seised to uses, or the bargain and sale. See, among other cases, *Jenkins v. Jenkins*, 1 Mill C. R. 48 (S. C. 1817); *Dawson v. Dawson*, Rice Eq. 243 (S. C. 1839); *Cribb v. Rogers*, 12 S. C. 564 (1879); *Sumner v. Harrison*, 54 S. C. 353, 32 S. E. 572 (1899); *Cook v. Cooper*, 59 S. C. 560, 38 S. E. 218 (1901); *Senterfeit v. Shealy*, 71 S. C. 259, 51 S. E. 142 (1905); *Merck v. Merck*, 83 S. C. 329, 65 S. E. 347 (1909); *Steele v. Smith*, 84 S. C. 464, 66 S. E. 200 (1910); *Watson v. Cox*, 117 S. C. 24, 108 S. E. 168 (1921); *McDaniel v. Connor*, 206 S. C. 96, 33 S. E. 2d 75 (1945).

The rationale of these cases, first expressed in *Jenkins v. Jenkins*, *supra*, seems to be that if the mere use of the property for the life of the grantor is reserved, rather than a life estate, the deed need not be construed as a

In 1923, the covenant to stand seised to uses was given a new vitality in South Carolina by the Court's ruling in *Bank of Pros-*

covenant to stand seised to uses, since the entire fee immediately passes, subject only to the reservation of the use for the life of the grantor. Presumably the use reserved is then executed by the Statute of Uses to vest a legal life estate in the grantor. In *Cribb v. Rogers*, *supra*, the Court did not find it necessary to determine whether the use reserved was executed by the Statute. If the reserved use is executed by the Statute, it would appear that the conveyance of the legal estate to the grantee must be construed as effectuated by virtue of the statutory form of conveyance rather than by virtue of the Statute of Uses, or else there would be a use upon a use, and the use to the grantor for life would not be executed as a legal estate. See note 67, *supra*. The theoretical result of the distinction made by the Court between the reservation of the use and the reservation of a life estate would seem to be that in the former the use for the grantor arises out of the estate conveyed the grantee, while in the case of the reservation of a life estate, the estate conveyed the grantee results from an executed use arising out of the estate of the grantor (a covenant to stand seised to uses or a bargain and sale).

The deeds in issue in *Ellen v. Ellen*, 16 S. C. 132 (1881), and *Steele v. Smith*, *supra*, involved reservations of the use of the property rather than reservations of express life estates. In both cases it was held that the deeds could not be construed as covenants to stand seised to uses, since the fee *in presenti* was conveyed to the grantee, charged only with the use for life in favor of the grantor. See also *Sumner v. Harrison*, *supra*.

However, this subtle distinction has not been observed in all the cases. Thus, in *Gaines v. Sullivan*, 117 S. C. 475, 109 S. E. 276 (1921), the deed was construed as a covenant to stand seised to uses despite the objection of counsel (see summary of appellants' brief at p. 476 of the South Carolina Report) that since only the use of the property was reserved, the deed could not be construed as a covenant to stand seised to uses.

Where the expressly declared intention has been that "this deed shall not take effect until my death," or other words of futurity, the cases in the main have construed such deeds as covenants to stand seised to uses. See *Chancellor v. Windham*, 1 Rich. 161 (S. C. 1844); *Kinsler v. Clark*, 1 Rich. 170 (S. C. 1844); *Dinkins v. Samuel*, 10 Rich. 66 (S. C. 1856) (where also the use for life was expressly reserved); *Bowman v. Lobe*, 14 Rich. Eq. 271 (S. C. 1868) (where also the use for life was expressly reserved); *Rembert v. Veto*, 89 S. C. 193, 71 S. E. 959 (1911); *Bethea v. Allen*, 101 S. C. 350, 85 S. E. 903 (1915).

In *Merck v. Merck*, 83 S. C. 329, 65 S. E. 347 (1909); a clause in the deed provided, "this deed is not to go into effect until after my death." The validity of the deed was sustained, apparently on the ground that there was a present passage of the fee, rather than on the theory of a covenant to stand seised to uses. In *Watson v. Watson*, 24 S. C. 228 (1886), the deed stated, "[t]his paper not to be in force until I desire to act." The quoted language was construed as a reservation of a life estate, and the validity of the deed sustained as a covenant to stand seised to uses.

The distinction as drawn in the South Carolina cases between a covenant to stand seised to uses and a present passage of the fee charged with a use in favor of the grantor in most instances is immaterial, since under either construction the deed is valid. The differentiation becomes crucial only when it is necessary to construe the deed as a covenant to stand seised to uses in order to evade the requirements of words of inheritance. In this context it seems the distinction will be ignored and the deed construed as a covenant to stand seised to uses, regardless of the language of the reservation. *Gaines v. Sullivan*, *supra*. This seems to be conceded in *Cresswell v. Bank of Greenwood*, 210 S. C. 47, 55, 41 S. E. 2d 393 (1947), wherein the Court recognizes that the South Carolina cases have construed as covenants to stand seised to uses deeds reserving "a life or similar estate or equivalent to the grantor."

*perity v. Dominick*,<sup>106</sup> that words of inheritance are unnecessary in this form of conveyance. The gratuitous pronouncement to this effect by Mr. Justice Cothran—the opinion admits that the circuit decree could be sustained on more orthodox grounds—is the more noteworthy in that all of the authorities cited by him<sup>107</sup> in support of the proposition are South Carolina cases involving or stating the rule as to the construction of trust deeds creating equitable interests. In such cases words of inheritance are unnecessary to convey the fee.<sup>108</sup> But is a covenant to stand seized to uses a trust deed creating an equitable interest? Upon prior authority<sup>109, 110</sup> the answer would appear to be that it is not, unless some trust has been declared in the deed other than the mere declaration of the grantor to the use of the grantee. However, regardless of the soundness of

106. 116 S. C. 228, 107 S. E. 914 (1921).

107. *Foster v. Glover*, 46 S. C. 522, 24 S. E. 370 (1896); *Hunt v. Nolen*, 46 S. C. 356, 24 S. E. 310 (1896); *McMichael v. McMichael*, 51 S. C. 555, 29 S. E. 403 (1898); *Holder v. Melvin*, 106 S. C. 245, 91 S. E. 97 (1917).

108. See Chapter III, p. 328, *supra*.

109. *Chancellor v. Windham*, 1 Rich. 161 (S. C. 1844); *Kinsler v. Clark*, 1 Rich. 170 (S. C. 1844); *Watson v. Watson*, 24 S. C. 228 (1885). See notes 97, 100, *supra*. But see the comment of Chancellor Desaussure in *Milledge v. Lamar*, 4 Des. Eq. 617, 638 (S. C. 1816), wherein he states that a widow would not be dowable in lands conveyed to her husband by a deed in form a covenant to stand seized to uses, since a widow is not dowable of a trust estate. Presumably the learned Chancellor overlooked the fact that the Statute would execute the use to vest a legal estate in the husband. In at least one earlier South Carolina case both the Circuit Judge and the Supreme Court expressed the opinion that a covenant to stand seized to uses requires words of inheritance, and further, that a deed not reserving a possessory interest in the grantor may be so construed. See *Bradford v. Griffin*, 40 S. C. 468, 19 S. E. 76 (1894).

110. The explanation of Mr. Justice Cothran's treatment of a covenant to stand seized to uses reserving a life estate to the grantor as a trust deed would seem to be as follows. The deed is construed as creating a springing use in favor of the grantee, which use is not executed by the Statute of Uses until the death of the grantor, who in the meantime retains the legal title. See 1 SIMES, FUTURE INTERESTS, § 30; 2 CRUISE, DIGEST 355, tit. 16, c. 5, § 23. However, there is authority that the declared uses are immediately executed by the Statute to vest a legal life estate in the grantor, and a legal remainder in the grantee. *Kinsler v. Clark*, 1 Rich. 170 (S. C. 1844); *Brewer v. Hardy*, 22 Pick. 376, 33 Am. Dec. 747 (Mass. 1839).

If the second construction is adopted, it would seem that no equitable interests are created by the deed, the fee passing *in presenti*, and, therefore, that words of inheritance are necessary to convey the fee to the grantee. That such words are essential in the case of a bargain and sale operating under the Statute of Uses was held in *Lorick and Lowrance v. McCreery*, 20 S. C. 424 (1884).

However, if it be considered that the grantor retains the legal title until his death, subject to the unexecuted use in the grantee, in a sense it may be said that he is trustee for the grantee on an unexecuted use, and therefore, that the deed comes within the South Carolina exception in favor of trust deeds. See Chapter III, *supra*. This would seem to be the basis of Justice Cothran's characterization of a covenant to stand seized to uses with a life estate reserved to the grantor as a trust deed.



the doctrine as founded in precedent, subsequent cases<sup>111</sup> have by dicta and decision firmly rooted it in South Carolina law.

Quite aside from any academic quibbling as to the want of precedent supporting the exception, no one can deny its beneficial effect in the State's law.<sup>112</sup> The South Carolina version of the covenant to stand seized to uses serves its purpose where there is the greatest danger of a lawful intent of a grantor being thwarted by an anachronistic rule of law. For of all the inter vivos land transfers most likely to run afoul of the jargon of the rule requiring words of inheritance to convey a fee, the gratuitous conveyance to relatives of the grantor is most vulnerable. There are two reasons for this.

First, while in a commercial transaction one of the parties most likely will be represented by an attorney cognizant of the necessity of embodying words of inheritance in the deed, quite often the grantor is his own conveyancer in a donative transaction. The type of layman who draws his own deed is the unsophisticate who, like Mr. Bumble, cannot realize that the law is such "a ass, a idiot," as to say that land given to his daughter "absolutely," "forever," or "in fee simple" is not the same thing as land given to his daughter "and her heirs."

The second reason for the happy consequence of the South Carolina holding that words of inheritance are unnecessary in a covenant to stand seized to uses is that, as is discussed in a subsequent section,<sup>113</sup> while the Court has been quick to recognize the bill in equity of a grantee for value for a reformation of a deed so as to embody omitted words of inheritance, no comparable enthusiasm has been displayed for the son or daughter who has paid no money for a transfer by his or her parent as against other heirs of the donor. Although a suit for reformation is costly and time consuming, at least by following the procedure a purchaser for value is assured of getting that for which he bargained. However, the donee who has been given land by a kinsman may find the chancellor's door barred, and thus in large measure lose the value of the gift.

After the introduction of the doctrine that words of inheritance are unnecessary in a covenant to stand seized to uses, it might well

111. See cases, note 89, *supra*.

112. "The doctrine of covenant to stand seized to uses has been a veritable haven of refuge for many whose estates were about to be lost by reason of the strict application of the common law doctrine requiring words of inheritance to convey a fee, especially because of the exceedingly able and discriminating opinions by Mr. Justice Cothran commencing with the *Bank of Prosperity v. Dominick*, . . . ." Lide, Circuit Judge, *James v. James*, 189 S. C. 414, 419, 1 S. E. 2d 494 (1939).

113. See p. 359, *infra*.

have been reasoned that these cases, in conjunction with the decisions sanctioning equitable reformation in favor of a grantee for value, in South Carolina at last had undermined the archaic common law rule without benefit of statutory enactment. For why cannot every gratuitous conveyance made to the grantor's wife or blood relation be construed as a covenant to stand seised to uses when necessary to do so in order to obviate the requirement of words of inheritance?

The answer to this question must be that in South Carolina not every deed in form a covenant to stand seised to uses will be recognized as within the scope of the announced exemption of the covenant to stand seised to uses from the requirement of words of inheritance. This is shown by the fact that in two fairly recent cases<sup>114</sup> the Court refused to construe deeds without reservations of life estates as covenants to stand seised to uses not requiring words of inheritance to convey the fee. The reason for the Court's refusal to so construe the deeds is not spelled out in these cases, but in a subsequent case it was declared that no deed can be construed as a covenant to stand seised to uses unless there has been a reservation of a "life or similar estate or equivalent to the grantor."<sup>115</sup> Stated in this manner, the requirement seems an unnecessarily restrictive one which is not logically required by the South Carolina precedents.<sup>116</sup> It is to be hoped

114. *Gowdy v. Kelley*, 185 S. C. 415, 194 S. E. 156 (1937); *Elliott v. Bristow*, 186 S. C. 544, 196 S. E. 378 (1938).

115. *Cresswell v. Bank of Greenwood*, 210 S. C. 47, 55, 41 S. E. 2d 393 (1947). In *Watson v. Watson*, 24 S. C. 228 (1886), the Court (per Mr. Chief Justice Simpson) had stated (at p. 235) that a covenant to stand seised to uses "may create a freehold *in futuro*," not that it *must* create a freehold *in futuro*. However, certain other language in the opinion, unless read in context, is subject to possible interpretation that the creation of an estate *in futuro* is an essential element of a covenant to stand seised to uses. Susceptible of the same interpretation is the following passage from Mr. Justice Cothran's opinion in *Bank of Prosperity v. Dominick*, 116 S. C. 228, 235, 107 S. E. 914 (1921): "That it has all the elements of such a covenant as laid down in the case of *Watson v. Watson* . . . and the cases there cited is apparent: (1) Consideration of natural love and affection; (2) blood relationship; (3) enjoyment of fee simple in future."

If in the *Watson* and *Dominick* cases the Court meant to state that a deed which does not create a freehold estate *in futuro* cannot be construed as a covenant to stand seised to uses, the statement is not supported by the authorities. See note 99, *supra*. However, even assuming that this is the Court's meaning, such a requirement does not necessarily entail "the reservation of a life or similar estate or equivalent to the grantor." See note 116, *infra*.

116. The explanation of these later cases would appear to be that the rule as earlier announced, that a deed in form a covenant to stand seised to uses conveys the fee without words of inheritance, was too broadly stated. The South Carolina view seems to be that it is not every covenant to stand seised to uses (defining the term in its historical sense) which so operates, but only those where the declared uses are not immediately executed by the Statute of Uses. Thus, a deed conveying the fee after a reservation of a life estate is construed as a springing use to the grantee, which use is not immediately

that in subsequent cases the stated requirement of a reservation of a life estate in the grantor will be modified to accord with the rationale of the exception as laid down by Mr. Justice Cothran in the *Dominick* case.

executed by the Statute; *ergo*, the deed is a trust deed. See Note 110, *supra*.

It would seem that the same result should follow, if the grant of the fee is to a person or persons not *in esse*. For example, *A* covenants to stand seised for the use of his son, *B* (a bachelor), for life, and then for the use of the children of his son, *B*, in fee. Here it would seem that the Statute of Uses cannot execute the declared use in remainder until *cestui qui use is in esse*, *i. e.*, until the children of *B* are born, and that the legal title must remain in *A* pending its execution by the Statute upon the birth of the children of *B*. 1 CRUISE, DIGEST 429, tit. 11, c. 3, § 29; 2 WASHBURN, REAL PROPERTY 115, 278. See *Young v. McNeill*, 78 S. C. 143, 153, 59 S. E. 980 (1907). In such case legal title would be in *A* upon a declared use for another, thus making *A*—under the South Carolina view—a “trustee” for the unborn children of *B*. Therefore, it would seem that no words of inheritance would be necessary to convey the fee to the children, despite the fact that the deed reserved no life estate to the grantor, *A*.

That this was the view of Mr. Justice Cothran seems clear from the following passage in his concurring opinion in *Wallace v. Taylor*, 127 S. C. 121, 140, 120 S. E. 838 (1924): “Another view of the matter: The deed contains all the elements of a covenant to stand seised: (1) Consideration of love and affection . . . (2) Blood relationship (3) Enjoyment of the fee simple in the future. (*Both of the facts that the children were to be born, and that the interest was subject to a life estate in the grantor, establish this element.*)” (Emphasis added.)

Further, this interpretation of the exception will explain the Supreme Court's unqualified approval of Circuit Judge Townsend's decree in *Campbell v. Williams*, 171 S. C. 279, 172 S. E. 142 (1933). An alternative ground of the decision of Judge Townsend was that the deed in issue (from a father to his daughter for life, and then to her surviving issue), which reserved no life estate to the grantor, could be construed as a covenant to stand seised to uses requiring no words of inheritance to convey the fee.

Certain cases decided prior to *Bank of Prosperity v. Dominick*, 116 S. C. 228, 107 S. E. 914 (1921), would seem at variance with the construction of such deeds as covenants to stand seised to uses. See *Dickert v. Dickert*, 12 Rich. 396 (S. C. 1859); *McMichael v. McMichael*, 51 S. C. 555, 29 S. E. 403 (1898); *McMillan v. Hughes*, 88 S. C. 296, 70 S. E. 804 (1911); *Lanham v. Haynes*, 101 S. C. 424, 85 S. E. 966 (1914). However, these cases would appear not to be controlling. In none of them did the court consider the proposition that the deeds in issue might be construed as covenants to stand seised to uses not requiring words of inheritance, all of them having been decided prior to the first announcement of the exception in the *Dominick* case. It should be noted, however, that in the *McMichael* case counsel for the appellant contended that the deed was not a covenant to stand seised to uses (see summary of briefs in 51 S. C. at p. 556), though this contention was not commented upon by the Court.

*Bradford v. Griffin*, 40 S. C. 468, 19 S. E. 76 (1894), might be considered a case holding by implication that a deed in form a covenant to stand seised to uses not reserving a life estate to the grantor needs words of inheritance to convey the fee. However, the basis of the decision is on other grounds. Moreover, it would seem that the opinion therein at best is dubious authority for any proposition. See the comment upon this case in GRAY, RULE AGAINST PERPETUITIES § 398.1 (4th ed.).

It would seem that the deed involved in *Groce v. Benson*, 168 S. C. 145, 167 S. E. 151 (1933), was one which properly should have been construed as a covenant to stand seised to uses requiring no words of inheritance. See *Mellichamp v. Mellichamp*, 28 S. C. 125, 130, 5 S. E. 333 (1888). Although the Master in Equity and the Circuit Judge rejected plaintiff's contention

In summary, the following prerequisites appear to be necessary before a deed can be construed as a covenant to stand seised to uses not requiring words of inheritance to convey a legal fee simple estate in South Carolina:

1. The covenantor must have a legal estate in fee simple, either qualified or absolute. It seems that the estate of the covenantor need not be one in possession, but may be in reversion or remainder.<sup>117</sup>
2. The covenant to stand seised to uses must be in form a deed, under seal and with two witnesses.<sup>118</sup>
3. It seems that the covenantee must be either the spouse or a blood relation of the covenantor.<sup>119</sup>

that the deed might be so construed, the opinion of the Supreme Court notes that the plaintiff expressly waived this issue on appeal, and the point, therefore, was not decided.

The decisions in *Gowdy v. Kelley*, 185 S. C. 415, 194 S. E. 156 (1937), and *Elliott v. Bristow*, 186 S. C. 544, 196 S. E. 378 (1938), in no way conflict with this view since in both cases there were neither reservations of life estates to the grantors, nor gifts of the fee to a person or class of persons not *in esse*. In both the *Gowdy* case and the *Bristow* case the remainders in fee were to ascertained persons, and there being no reservations of life estates in the grantors, the Statute immediately executed the declared uses.

The only case the writer has found in which it is stated that the reservation of a life estate to the grantor is necessary before a deed may be construed as a covenant to stand seised to uses not requiring words of inheritance is *Cresswell v. Bank of Greenwood*, 210 S. C. 47, 55, 41 S. E. 2d 393 (1947). See note 115, *supra*. However, a reading of the opinion therein will at once disclose that the case was properly decided on other grounds, and that the remarks anent the construction of a deed as a covenant to stand seised to uses are in the nature of *obiter dictum*. It is to be hoped that this will be recognized by the Court when the matter is squarely presented for adjudication.

In summation, it seems that the logic of the South Carolina doctrine exempting certain deeds in form covenants to stand seised to uses from the requirement of words of inheritance should apply, not only when there is a reservation of a possessory interest in the grantor, but also when the gift of the fee is to a person or class of persons not *in esse* at the execution and delivery of the deed. In the latter, as well as in the former case, the declared use in fee is not immediately executed by the Statute, and, legal title remaining in the grantor, it would seem that the deed should be construed as a trust deed under the South Carolina view as expressed in *Bank of Prosperity v. Dominick*, *supra*.

117. The Statute of Uses, Note 92, *supra*, by express language contemplates "seisin" of reversions and remainders. See also 2 WASHBURN, REAL PROPERTY 114 (4th ed.); 1 CRUISE, DIGEST 428, tit. 11, c. 3, § 25 (1st Amer. ed. 1808); 4 CRUISE, DIGEST 188, tit. 32, c. 12, § 9.

118. See notes 93, 96, *supra*.

119. See the cases cited in note 104, *supra*. In *Singleton v. Bremar*, 4 McC. 12 (S. C. 1826), it was held that a deed by a man to his mistress could not be sustained as a covenant to stand seised to uses. Even though the weight of authority is to the contrary, it seems that in South Carolina a covenant by a father for his illegitimate child will raise a use. *Milledge v. Lamar*, 4 Des. Eq. 617 (S. C. 1816). Cf. *Dinkins v. Samuel*, 10 Rich. 66 (S. C. 1856), where the grantee, a cousin of the grantor, was alleged to be illegitimate. See S. C. CODE OF LAWS § 19-53 (1952) providing that an illegitimate child may

4. It seems that the deed must be upon an express consideration of love and affection, or, if upon a monetary consideration, must also state the relationship between the parties. If no consideration or relationship is expressed in the deed, the fact that the consideration was one of love and affection may be proved.<sup>120</sup>
5. The latest declaration of the rule is that there must be a "reservation of a life or similar estate or equivalent to the grantor."<sup>121</sup> By the term "similar estate or equivalent" it seems that the Court is referring to the situation where the use of the land is reserved by the grantor, rather than an express life estate.<sup>122</sup> Since the South Carolina theory apparently is that the exemption from the requirement of words of inheritance results from the creation by the deed of a springing use which is not immediately executed by the Statute of Uses,<sup>123</sup> it would seem that the

inherit from his or her mother. The relationship of cousin is sufficient consideration. *Dinkins v. Samuel*, 10 Rich. 66 (S. C. 1856).

Where the relationship is by affinity, *e. g.*, a son-in-law, the cases are in conflict as to whether a use will be raised. See the authorities discussed in 19 Am. Jur. 569 § 111. In *Jordan v. Neese*, 36 S. C. 295, 15 S. E. 202 (1892) the Circuit Judge construed a deed from a woman to her son-in-law as a covenant to stand seised to uses. The Supreme Court held on other grounds that the deed could not be so construed, but did not comment on the sufficiency of the consideration.

It has been stated that a covenant to stand seised to uses cannot be made for the benefit of persons not *in esse*, since they have not contributed to the consideration when the covenant is made. 4 KENT 496. See *Bradford v. Griffin*, 40 S. C. 468, 471, 19 S. E. 76 (1894). However, it seems that the law is to the contrary. GRAY, *RULE AGAINST PERPETUITIES* § 62 (4th ed.). Among other South Carolina cases, see the concurring opinion of Mr. Justice Cothran in *Wallace v. Taylor*, 127 S. C. 121, 141, 120 S. E. 838 (1924).

120. "It seems to have been considered, that if a money consideration be expressed in a deed, which has the form of a covenant to stand seised, no use will arise, even although the covenantee be shown to be the son of the covenantor, unless the deed be enrolled, so as to be effectual as a bargain and sale . . . but it is clearly otherwise if the deed be expressed to be in consideration of money, and that the covenantee is the son, or be without any consideration expressed, and a proper one be averred and proved." *Chancellor v. Windham*, 1 Rich. 161, 165 (S. C. 1844). See 7 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 359 (1926).

In Massachusetts it has been held that a deed expressing only a pecuniary consideration may be construed as a covenant to stand seised to uses if consanguinity between the parties can be proved. *Brewer v. Hardy*, 22 Pick. 376, 33 Am. Dec. 747 (Mass. 1839). The same court has further held that a deed for a valuable consideration between strangers may be so construed. *Trafton v. Hawes*, 102 Mass. 533, 3 Am. Rep. 494 (1869); *Ricker v. Brown*, 183 Mass. 424, 67 N. E. 353 (1903). See GRAY, *RULE AGAINST PERPETUITIES* § 57 (4th ed.). Cf. dictum in *Singleton v. Bremar*, 4 McC. 12, 15 (S. C. 1826), to the effect that a valuable consideration will support a covenant to stand seised to uses. No other South Carolina case expressing this view has been found.

121. *Cresswell v. Bank of Greenwood*, 210 S. C. 47, 55, 41 S. E. 2d 393 (1947).

122. See note 105, *supra*.

123. See note 110, *supra*.

same result should follow if the covenantor retained seisin for any perceptible interval of time—be it a term of years<sup>124</sup> or even the period of an hour. Moreover, the logic of the exemption would appear equally to apply even though the grantor reserved no possessory interest in himself, if the declared use in fee was for the benefit of a person or persons not *in esse*.<sup>125</sup>

6. Even though words of inheritance are not necessary to convey an estate in fee simple if the deed is construed as a covenant to stand seized to uses, yet it must appear from the deed that the intention of the grantor was to convey such an estate.<sup>126</sup>

## CHAPTER V.

### "ISSUE" AND "CHILDREN" AS WORDS OF LIMITATION

While adhering to the common law rule that the word "heirs" is necessary for the creation of a fee simple estate by deed, the South Carolina Court has abandoned all precedent in determining what language is sufficient to create the State's fabulous fee simple conditional.<sup>127</sup> This estate was abolished in England in 1285 by the Statute *De Donis*,<sup>128</sup> which supplanted the fee simple conditional with the fee tail. *De Donis* has never been adopted in South Carolina<sup>129</sup> and therefore the State purports to follow what is believed to have been the law as it existed in feudal England before the year 1285. Since no comprehensive authority of such respectable antiquity is available today, the precedents in the main have been found in the third hand

124. "As to a covenant to stand seized, there has never been a doubt since it was recognized as an effectual form of conveyance, that by it, when made upon proper consideration, and properly drawn, the covenantor might covenant to stand seized to his own use *for a term*, or for his life, and afterwards to the use of the covenantee; and that the uses which would arise from the covenant would be executed by the Statute of Uses." (Emphasis added.) Wardlaw, J., in *Chancellor v. Windham*, 1 Rich. 161, 165 (S. C. 1844).

125. See note 116, *supra*.

126. See *James v. James*, 189 S. C. 414, 420, 1 S. E. 2d 494 (1939).

127. For a discussion of certain characteristics of the fee simple conditional as it exists in South Carolina, see note 146, *infra*. The estate also exists in Iowa, may exist in Oregon, and may have existed in Nebraska prior to a statute in 1941. See 2 POWELL, REAL PROPERTY § 195; 1 AMERICAN LAW OF PROPERTY § 2.11.

128. 13 Edw. I c. 1. The Statute had no application to the creation of fee simple conditional estates in annuities and in certain copyholds. See Note, 114 A. L. R. 602, 626, 627 (1938).

129. See, among other cases, *Murrell v. Mathews*, 2 Bay 397 (S. C. 1802); *Cruiger v. Heyward*, 2 Des. 94, 112 (S. C. 1802); *Warnock v. Wightman*, 1 Brevard 331, 363 (S. C. 1804); *Cresswell v. Bank of Greenwood*, 210 S. C. 47, 53, 41 S. E. 2d 393 (1947).

conjectures of Coke and Blackstone written centuries after the event.<sup>130</sup>

Both the fee simple conditional and its statutory counterpart, the fee tail, are estates of inheritance, and at common law it was clear that neither could be created by deed unless "heirs" had been used in the limitation to the grantee.<sup>131</sup> The word "heirs" has never been required to create an estate of inheritance by way of devise,<sup>132</sup> however, and a devise to "A and his issue", in the absence of other qualifying language, creates an estate tail if *De Donis* is in force,<sup>133</sup> and in South Carolina a fee simple conditional.<sup>134</sup>

By a fortunate blunting of the rigorous distinction traditionally made between inter vivos conveyances and devises, the South Carolina Court in one situation has held that language which in a will is sufficient to create a fee simple conditional, when used in a deed is sufficient to create the same estate, even though the word "heirs" has not been used. Thus in South Carolina a deed of land "to A and his issue" creates a fee simple conditional<sup>135</sup> in the absence of

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130. "The terms used . . . are precisely those which Lord Coke, and on his authority, Sir William Blackstone, define, as creating, at common law, a qualified or conditional fee. But there is much difficulty in ascertaining at this day all the properties of this estate; for, although its outlines are preserved, the estate itself having been entirely annihilated by the statute de donis, few traces of its peculiarities are to be found in the English books. . . . We are, therefore, driven to the necessity of adopting a rule applicable to this abstruse subject, without any other aid than the glimmering lights furnished by the antiquated English authorities; and I feel all the responsibility of such an undertaking." Mr. Justice Johnson in *Jones v. Postell*, Harper 92, 93 (S. C. 1824).

See the characterization of the treatment in the Restatement of the Law of Property of certain aspects of the fee simple conditional estate as "a restatement of purely fanciful law, not supported by any cases whatever, in many situations which might arise but which never have been passed upon by the courts." 1 AMERICAN LAW OF PROPERTY § 2.12 (1952). For an example of the confused state of the authorities, both ancient and modern, see the query whether the issue to whom an estate in fee simple conditional has descended can convey in fee simple before they themselves have had children, discussed in note 146(2), *infra*.

131. CO. LITT. 20b; 2 BLACKSTONE 114; 1 TIFFANY, REAL PROPERTY § 38 (3rd ed.).

132. CO. LITT. 9b; 2 BLACKSTONE 108; 1 TIFFANY, REAL PROPERTY § 31 (3rd ed.).

133. 2 JARMAN, WILLS (6th ed. 1930); 1 TIFFANY, REAL PROPERTY § 43 (3rd ed.).

134. *Whitworth v. Stuckey*, 1 Rich. Eq. 404 (S. C. 1845); *Baxter v. Early*, 131 S. C. 374, 127 S. E. 607 (1925); *Lucas v. Schumpert*, 192 S. C. 208, 6 S. E. 2d 17 (1939).

135. *Holman v. Wesner*, 67 S. C. 307, 45 S. E. 206 (1903); *Williams v. Gause*, 83 S. C. 265, 65 S. E. 241 (1909); *Arledge v. Arledge*, 86 S. C. 237, 68 S. E. 549 (1910); *Sligh v. Sligh*, 99 S. C. 307, 83 S. E. 260 (1914); *Antley v. Antley*, 132 S. C. 306, 128 S. E. 31 (1925); *Davis v. Strauss*, 173 S. C. 99, 174 S. E. 908 (1934); *Blume v. Percy*, 204 S. C. 409, 29 S. E. 2d 673 (1944).

other language indicating that "issue" was intended as a word of purchase.<sup>136</sup>

Parenthetically it may be remarked that no satisfactory reason has been advanced why, if words of inheritance are unnecessary in the creation of a fee simple conditional by deed, they are not equally superfluous in the inter vivos creation of a fee simple. The assigned reason for the resultant fee simple conditional is that to effectuate the intention of the grantor, "issue" is construed as a word of limitation when used in a deed, analogous to the construction given it when used in a devise. If we are to apply the testamentary test of the sufficiency of words of limitation, it is clear that at common law "in fee simple," or "forever" are sufficient words of limitation to create a fee simple by way of devise.<sup>137</sup> Carried to its logical conclusion, the South Carolina heresy inescapably reaches the result that a deed to A "in fee simple" means what it says, rather than meaning "to A for life". However, the cases have not so held.

A further assimilation of limitations in deeds to the rules governing devises is found in the Court's application of the Rule in Wild's Case to inter vivos conveyances. The constructional rule established by that celebrated case<sup>138</sup> has thus been stated:<sup>139</sup> "First, if there is an immediate devise to A and his children and A has no children, the will is construed as creating an estate tail in A; second, if A has children, A and his children take equally as joint tenants for life." In South Carolina the application of the rule to a devise gives the devisee an estate in fee simple conditional if he has no children at the death of the testator.<sup>140</sup> If the devisee has children, since the Act of 1824<sup>141</sup> establishing that a devise is in fee unless an intention

136. In the following cases it was held that other language prevented "issue" from being construed as a word of limitation: *McCorkle v. Black*, 7 Rich. Eq. 407 (S. C. 1855) (devise); *McIntyre v. McIntyre*, 16 S. C. 290 (1881) (devise); *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706 (1893) (devise); *Porter v. Lancaster*, 91 S. C. 300, 74 S. E. 374 (1912) (deed); *Thomson v. Russell*, 131 S. C. 529, 128 S. E. 421 (1925) (devise); *Campbell v. Williams*, 171 S. C. 279, 172 S. E. 142 (1933) (deed).

137. See note 46, *supra*.

138. 6 Co. Rep. 16b (1599).

139. 2 Simes, *FUTURE INTERESTS* § 401. See Note, 161 A. L. R. 612, 615 (1946). The rule is a rule of construction. See *James v. James*, 139 S. C. 414, 420, 1 S. E. 2d 494 (1939).

140. *Simpson v. Antley*, 137 S. C. 380, 135 S. E. 469 (1926). See among other cases, *Reeder v. Spearman*, 6 Rich. Eq. 88 (S. C. 1853); *Renwick v. Smith*, 11 S. C. 294 (1879). The rule as applied to a bequest gives the legatee an absolute interest. *Shearman v. Angel*, Bailey Eq. 351 (S. C. 1831); *Renwick v. Smith*, *supra*.

141. S. C. CODE OF LAWS § 19-232 (1952).



to create a lesser estate is apparent, the parent and the children born at the death of the testator take as cotenants in fee simple.<sup>142</sup>

In two cases<sup>143</sup> the Court has applied this rule to limitations in deeds "to A and his children." In both cases the grantees had no children at the time of the conveyances. It was held that estates in fee simple conditional were created, "children" being construed as equivalent to "heirs of the body," and, therefore, a word of limitation. However, this construction was not applied when the limitation was "to A and his children, their heirs and assigns." The super-added words of limitation were apparently treated as establishing that "children" was intended as a word of purchase, and there being no children, the grantee was held to take in fee simple.<sup>144</sup>

In applying the Rule in Wild's Case to the construction of a deed, it appears that if the grantee has children at the time of the conveyance, "children" is a word of purchase and, therefore, only concurrent life estates are created by the deed for want of words of limitation.<sup>145</sup> For purposes of the title advocate, therefore, the Rule can be used to evade the requirement of words of inheritance in a deed only when the grantee has no children at the time of the conveyance to him. And even where the rule can be applied, it must be borne in mind that the estate created is a fee simple conditional rather than a fee simple.

The practical benefit of the abandonment of the requirement of the word "heirs" in the creation by deed of a fee simple conditional is readily apparent. It has made possible the salvage of otherwise defective deeds in which draftsmen have confused "issue" or "children" with "heirs" or "heirs of the body." While a fee simple

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142. *Coogler v. Crosby*, 89 S. C. 508, 72 S. E. 149 (1911). *SIMES, FUTURE INTERESTS* §§ 404, 409. See, among other cases, *Feemster v. Good*, 12 S. C. 573 (1880); *Robinson v. Harris*, 73 S. C. 469, 53 S. E. 755 (1906). If expressly provided for, after-born children will be included, even though the conveyance be by deed. *Mellichamp v. Mellichamp*, 28 S. C. 125, 5 S. E. 333 (1888). Conversely, children born after the execution of the will but before the death of the testator will be excluded if the will so provides. *Beckwith v. McAlister*, 165 S. C. 1, 162 S. E. 623 (1932).

143. *Dillard v. Yarboro*, 77 S. C. 227, 57 S. E. 841 (1907); *James v. James*, 189 S. C. 414, 1 S. E. 2d 494 (1939).

144. *Wallace v. Taylor*, 127 S. C. 121, 120 S. E. 838 (1924).

145. "Of course if children had been in existence when the deed was made they would have taken with [A] as tenants in common (but not in fee because there would have been no words of inheritance)." *Lide*, Circuit Judge, in *James v. James*, 189 S. C. 414, 417, 1 S. E. 2d 494 (1939). In *McIntosh v. Kolb*, 112 S. C. 1, 99 S. E. 356 (1919), the Court apparently found it unnecessary to determine whether the grantees under such a limitation took in fee simple, or only for life.

conditional<sup>146</sup> is not an estate in fee simple, yet after the birth of children the grantee can obtain an absolute estate by conveying to a

146. For a consideration of the characteristics of the estate in fee simple conditional see the annotation in 114 A. L. R. 602 (1938); RESTATEMENT, PROPERTY §§ 68-77. As it pertains to the present discussion, the relevant law can be summarized as follows:

(1) If no issue is ever born to the grantee in fee simple conditional, the land will revert to the grantor or his heirs at the death of the grantee. *James v. James*, 189 S. C. 414, 1 S. E. 2d 494 (1939); *Burnett v. Snoddy*, 199 S. C. 399, 19 S. E. 2d 904 (1942); *United States v. 15,883.55 Acres of land*, 54 F. Supp. 849 (W. D. S. C. 1944). Moreover, the land will revert even though the grantee is survived by issue if the grantee's descendants die out at any time in the future, unless a conveyance in fee simple has been made by deed by the grantee after the birth of issue, or by the issue after him. *Withers v. Jenkins*, 14 S. C. 597 (1831). RESTATEMENT, PROPERTY § 76, comment c. *But see Blume v. Percy*, 204 S. C. 409, 29 S. E. 2d 673 (1944), which may be a holding that the estate descends to the issue as a fee simple absolute. See discussion of this case in 9 Year Book of the Selden Society 63 (1947); 2 POWELL, REAL PROPERTY § 195.

(2) After the estate in fee simple conditional has descended to the issue of the grantee there is authority that such issue have power by deed to convey in fee simple before any issue is born to them, though if no such conveyance is made the estate continues as a fee simple conditional. *CHALLIS, REAL PROPERTY* 266 (3rd ed.); 1 CRUISE, DIGEST 29, tit. 2, c. 1, § 7; *Co. Litt.* 19a *semble*; 2 BLACKSTONE 110 *semble*. See the Court's statement of argument of counsel in *Adams v. Chaplin*, 1 Hill Eq. 265, 267 (S. C. 1833). This principle may be the explanation of the decision in *Blume v. Percy*, 204 S. C. 409, 29 S. E. 2d 673 (1944), though there seems to be no express South Carolina authority on the point. The Restatement of Property apparently does not consider the question. *But see* 2 POWELL, REAL PROPERTY § 195, taking the position that until the issue have children they cannot convey in fee simple.

(3) Even after the birth of issue the land cannot be devised, but descends to the issue *per formam doni*. *Jones v. Postell*, Harper 92 (S. C. 1824); *Burnett v. Burnett*, 17 S. C. 545 (1882).

(4) After the birth of issue the grantee can convey by deed in fee simple and bar both the claim of the issue and the possibility of reverter to the grantor and his heirs. *Barksdale v. Gamage*, 3 Rich. Eq. 271 (S. C. 1851); *Holley v. Still*, 91 S. C. 487, 74 S. E. 1065 (1912); *Branyan v. Tribble*, 109 S. C. 58, 95 S. E. 137 (1918); *Antley v. Antley*, 132 S. C. 306, 128 S. E. 31 (1925). This is true even though the issue do not survive until the time of the conveyance by the grantee, provided that they were living at the time of the creation of the estate in fee simple conditional, or were born subsequent thereto and prior to the conveyance by the grantee. *Barksdale v. Gamage*, 3 Rich. Eq. 271 (S. C. 1851); *Holley v. Still*, 91 S. C. 487, 74 S. E. 1065 (1912). See *Smith v. Hanna*, 215 S. C. 520, 56 S. E. 2d 339 (1949); RESTATEMENT, PROPERTY § 69, comment c. Similarly, after the birth of issue the grantee can mortgage the land. *Bonds v. Hutchison*, 199 S. C. 197, 18 S. E. 2d 661 (1942). Further, it is liable for his debts, even if not reduced to judgment during his life. *Burnett v. Burnett*, 17 S. C. 545 (1882).

(5) If the conveyance by the grantee in fee simple conditional is made before the birth of issue the conveyance bars the claim of the issue subsequently born, but if the issue dies in the life of the parent the land reverts to the grantor or his heirs. See *Barksdale v. Gamage*, 3 Rich. Eq. 271, 279 (S. C. 1851); *Dillard v. Yarboro*, 77 S. C. 227, 231, 57 S. E. 841 (1907).

(6) If the issue is born subsequent to the conveyance by the grantee in fee simple conditional and the issue survive the parent, dicta in certain South Carolina cases would seem to indicate that the prior conveyance bars the possibility of reverter to the grantor or his heirs as well as the claim of the issue. See, among other cases, *Barksdale v. Gamage*, 3 Rich. Eq. 271, 279 (S. C. 1851); *Dillard v. Yarboro*, 77 S. C. 227, 231, 57 S. E. 841 (1907). This

third party and then taking a reconveyance, thus destroying the condition attached to the original estate.<sup>147</sup>

## CHAPTER VI.

### SO THE TITLE IS BAD!

Thus far we have been concerned with the common law requirement of words of inheritance for an inter vivos conveyance of an estate in fee simple, and what language constitutes a sufficient compliance with the requirement in South Carolina. This chapter is concerned with the problem of a title either admittedly bad, or so doubtful that the title examiner does not feel justified in passing it. In the discussion that follows, it is assumed that the title is defective, and that corrective action is necessary before a purchase can be advised. It is further assumed that no corrective deed can be obtained, either because the necessary parties cannot be found, or because they are unwilling to make such a conveyance. Under these circumstances, what can be done to cure the title?

#### *Adverse Possession and Presumption of a Grant*

If the defective deed is some distance back in the chain of title, there is always the possibility that time has rectified the error. In South Carolina the statute of limitations prescribed for the acquisition of title to land by adverse possession is ten years.<sup>148</sup> Before seizing upon the statute as a panacea curing all omissions of words of inheritance in deeds more than ten years old, however, a number of factors must be considered.

The first problem is the adverse character of the possession for the statutory period. Suppose that in 1942, A made a deed of a lot and dwelling "to B forever." Suppose further that B immediately went into possession and has been occupying and claiming it con-

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would seem to be an alternative ground for the decision in *Powers v. Bullwinkle*, 33 S. C. 293, 11 S. E. 971 (1890). However, the point is not free from doubt since the orthodox view is that where the conveyance by the grantee is made before the birth of issue, the land reverts to the creator of the estate in fee simple conditional or his heirs upon any subsequent failure of the lineal descendants of the grantee, even though the issue survive the parent. CO. LIT. 19a; RESTATEMENT, PROPERTY § 70, comment b.

(7) The possibility of reverter may be released to the tenant in fee simple conditional by the grantor or his heirs, thus making the estate a fee simple absolute. *Dillard v. Yarboro*, 77 S. C. 227, 57 S. E. 841 (1907). See *Adams v. Chaplin*, 1 Hill Eq. 265, 278 (S. C. 1833); *Pearse v. Killian*, McM. Eq. 231, 234 (S. C. 1841); *Vaughan v. Langford*, 81 S. C. 282, 285, 62 S. E. 316 (1908).

147. See note 146 (4), *supra*.

148. S. C. CODE OF LAWS §§ 10-124, 10-126, 10-127, 10-2421 (1952). See also § 10-129, the forty year statute.

tinuously as his absolute property. In 1952, has B acquired title by adverse possession? Under the facts as given he has if during the ten year period A has had a cause of action in ejectment to recover possession of the land. But during the ten year period has A had any cause of action against B? While not conveying an estate in fee simple, yet the deed clearly gave B a life estate, and A as the reversioner has no right to possession until after the death of B. Thus it would seem that there can be no adverse possession by B against A.<sup>149</sup> Nor, it seems, can the statute run against A in favor of a grantee from B during B's life, even though the conveyance by B purports to be in fee simple.<sup>150</sup>

Further, it must be borne in mind that in South Carolina adverse possessions may not be tacked except by ancestor and heir to make out the statutory period, even though there is privity between the successive adverse holders.<sup>151</sup> For example, suppose that B is in adverse possession of land for nine years, and then conveys by either deed or devise<sup>152</sup> to C, who holds for two more years. Even though

149. 3 SICES, FUTURE INTERESTS § 779; 1 AMERICAN LAW OF PROPERTY § 4.113; RESTATEMENT, PROPERTY § 222, comments *f*, *g*. But in *Breland v. O'Neal*, 88 Miss. 449, 40 So. 865 (1906), it apparently was held that adverse possession immediately commenced to run in favor of a grantee under a deed intended to convey in fee, but which as a matter of law conveyed only a life estate. The decision seems questionable.

150. "The law is well settled in this State that the statute of limitations does not commence to run against a remainderman until the death of the life tenant, and neither a conveyance by the life tenant, purporting to be in fee, nor a proceeding in Court to which the remainderman is not a party, can effect the rights of the remainderman." Mr. Justice Gary in *Rice v. Bamberg*, 59 S. C. 498, 507, 38 S. E. 209 (1901), quoted (with punctuation changes) in *Bolt v. Sullivan*, 173 S. C. 24, 32, 174 S. E. 491 (1934). See also *Rowell v. Hyatt*, 108 S. C. 300, 94 S. E. 113 (1917). See Note, 112 A. L. R. 1042 (1938); RESTATEMENT, PROPERTY § 222, comment *g*. The same reasoning is equally applicable to a presumption of a grant after twenty years adverse possession, as well as to a claim under the forty year statute, S. C. CODE OF LAWS § 10-129 (1952).

151. *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3 (1896); *Epperson v. Stansill*, 64 S. C. 485, 42 S. E. 426 (1902); *Weston v. Morgan*, 162 S. C. 177, 160 S. E. 436 (1931); *Terwilliger v. Daniels*, 222 S. C. 191, 72 S. E. 2d 167 (1952). See the South Carolina cases collected in 2 C. J. 86, n. 46; 2 C. J. S. 688 n. 75, n. 76. The rationale is that while the heir is in of the ancestor's possession by operation of law, the new entry of a purchaser by deed or devise interrupts the continuity of the adverse possession.

152. A qualification of this statement may be necessary where the devise is to the heir of the testator, in which event the doctrine of worthier title would apply, the heir taking by descent rather than purchase. *Seabrook v. Seabrook*, McM. Eq. 201 (S. C. 1841); *Seabrook v. Seabrook*, 10 Rich. Eq. 495 (S. C. 1859). 1 SICES, FUTURE INTERESTS §§ 144-146. In this situation it appears that tacking would be permitted, despite the purported devise by the ancestor to the heir. The American Law Institute takes the position that the doctrine of worthier title as applied to testamentary dispositions is no longer of any significance in the solution of modern legal problems. RESTATEMENT, PROPERTY § 314, comment *j*. In this peculiar context the doctrine may still have significance in South Carolina law, however.

the owner has been disseised for a total of eleven years, yet his right of action will not be barred against C until the latter or his heir has held the land for a further period of eight years. Thus, if the land has been conveyed before any one holder has held the land for ten years, it is possible for twenty or more years to have elapsed without any one acquiring title by adverse possession.

The South Carolina cases<sup>153</sup> are clear that even in the absence of statute prescribing a limitation on actions for the recovery of real property, an adverse possession for twenty years will, analogous to the prescription of an easement, give title to the land adversely possessed on the fiction of a presumed lost grant. Where a claimant of land is proceeding on the theory of the presumption of a grant rather than adverse possession under the statute, the cases do permit tacking from grantor to grantee to make out the twenty year period.<sup>154</sup> However, before concluding that any adverse possession of twenty years results in the presumption of a grant to the adverse claimant, another factor in the South Carolina law must be considered.

It is clear that a disability of the record title holder or his successor in title occurring subsequent to the disseisin does not toll the running of the statute in favor of the adverse possessor.<sup>155</sup> If at the time the adverse possession is begun the owner is under no disability, a subsequent disability existing in him, his heir, devisee, or grantee, does not extend the ten year period of the statute of limitations. However, when claiming under the twenty year presumption of a grant, the cases<sup>156</sup> are equally clear that the periods of intervening disabilities must be deducted in summing up the period necessary for the presumption of a grant. Thus the mere lapse of twenty years after an entry upon an owner under no disability does not assure that title by presumption of a grant has been obtained, since subsequent disabilities may have occurred, the periods of which must be deducted in determining whether or not the required space of twenty years has elapsed.

From the above discussion, it is readily apparent that in determining whether or not lapse of time has cured the omission of words

153. *Trustees v. Jennings*, 40 S. C. 168, 18 S. E. 257 (1893). See *Smith v. Asbell*, 2 Stro. 141 (S. C. 1847); *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727 (1923).

154. *Thomson v. Peake*, 7 Rich. 353 (S. C. 1854); *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150 (1901). See *Haithcock v. Haithcock*, 123 S. C. 61, 68, 115 S. E. 727 (1923).

155. *Satcher v. Grice*, 53 S. C. 126, 31 S. E. 3 (1898); *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150 (1901); *Fore v. Berry*, 94 S. C. 71, 78 S. E. 706 (1913); *Frady v. Ivester*, 129 S. C. 536, 125 S. E. 134 (1924).

156. *Lamb v. Crosland*, 4 Rich. 536 (S. C. 1851); *Massey v. Adams*, 3 S. C. 254 (1872).

of inheritance in a deed many facts not of record must be investigated. If it be determined that the necessary evidence can be obtained, it is clear that in South Carolina both adverse possession and the presumption of a grant can be asserted affirmatively, and that an action may be brought by the adverse claimant against the owner of the paper title for an adjudication that title is now in the claimant.<sup>157</sup>

Once it is determined that the evidence assures the success of the action, its prompt institution may be advisable due to the fact that death or removal of witnesses may later make the establishment of the necessary facts difficult. Until there is a court decree adjudicating title to be in the adverse claimant, his title is not one of record, and its marketability is doubtful.

### *Estoppel*

When the owner of land stands idly by, knowing that another is making substantial expenditures upon the land in the mistaken belief that he is the owner thereof, the true owner will be estopped to assert his title if he has not seasonably given notice of his right. This doctrine has been repeatedly recognized in the South Carolina cases.<sup>158</sup> Possible applications of this principle to situations involving claimants under deeds omitting words of inheritance are readily apparent.<sup>159</sup>

Suppose the reversioner, knowing of his claim under a deed (either gratuitous or for value) which fails to convey the fee only because words of inheritance are omitted, sees the grantee making improvements of such an extensive nature that they would not be made except under the belief of ownership in fee. Under such circumstances it appears that the reversioner will be estopped to deny the passage of the fee if he has failed to warn the grantee of his claim.<sup>160</sup> However, the making by the grantee of improvements which are consistent with the ownership of a life estate can have no such effect.<sup>161</sup>

157. *Harrelson v. Sarvis*, 39 S. C. 14, 17 S. E. 368 (1893); *Busby v. Railroad*, 45 S. C. 312, 23 S. E. 50 (1895); *Duren v. Kee*, 50 S. C. 444, 27 S. E. 875 (1897); *Brevard v. Fortune*, 221 S. C. 117, 69 S. E. 2d 355 (1952). See Note, 78 A. L. R. 24, 110 (1932).

158. See, among other cases, *Tarrant v. Terry*, 1 Bay 239 (S. C. 1792); *Marines v. Goblet*, 31 S. C. 153, 9 S. E. 803 (1889); *Latimer v. Marchbanks*, 57 S. C. 267, 35 S. E. 481 (1900); *Southern Ry. v. Day*, 140 S. C. 388, 138 S. E. 870 (1926); *Piedmont and Northern Ry. v. Henderson*, 216 S. C. 98, 56 S. E. 2d 740 (1949).

159. See generally, Notes, 76 A. L. R. 304 (1932), 50 A. L. R. 668 (1927).

160. See *Sullivan v. Moore*, 84 S. C. 426, 65 S. E. 108 (1910).

161. *Sullivan v. Moore*, note 160, *supra*.

It would seem that an estoppel should result even though the reversioner was ignorant of his claim at the time that the improvements were made by the grantee. It is true the general rule is stated to be that a party is not estopped by mere silence and inaction unless he knew or had reason to know of his right at the time of his silence and inaction.<sup>162</sup> However, the situation at hand would appear to be analogous to a parol gift or sale of land, in which case the fact that the donor or vendor was ignorant of the legal invalidity of the gift or sale will not prevent the enforcement of the transaction in equity.<sup>163</sup>

Where the reversioner participated in negotiations leading to a purported sale in fee of the interest of a life tenant, it was held that the reversioner was estopped to assert his title.<sup>164</sup> The fact that the reversioner was ignorant of his interest at the time of his affirmative representations to the purchaser will not prevent the finding of an estoppel.<sup>165</sup> Whether such an estoppel could result if the reversioner had actual knowledge of the contemplated sale in fee but did not participate in the negotiations consummating it is questionable. If the deed from the reversioner clearly expressed an intention to convey a life estate only, it would seem that no such estoppel could arise. Under such circumstances, the notice afforded the purchaser by the deed or record of the deed to his grantor would in most conceivable situations prevent the finding of an estoppel.<sup>166</sup> If, however, the deed manifests an intention to convey in fee and failed to do so only because of the omission of words of inheritance a court well might hold that the reversioner was estopped if he neglected to give a purchaser from the grantee seasonable notice of his claim.<sup>167</sup>

162. See *Chambers v. Bookman*, 67 S. C. 432, 454, 46 S. E. 39 (1903); *Scarborough v. Woodley*, 81 S. C. 329, 331, 62 S. E. 405 (1908).

163. As to parol gifts of land, see *Knight v. Stroud*, 214 S. C. 437, 53 S. E. 2d 72 (1949); Note, 2 S. C. L. Q. 185 (1949). As to parol sales of land see Note, 101 A. L. R. 923 (1936); Note, 8 Yearbook of the Selden Society 65 (1947).

164. *McMillan v. Hughes*, 88 S. C. 296, 70 S. E. 804 (1911). See *Jennings v. Harrison*, 33 S. C. 206, 11 S. E. 695 (1890); *Chambers v. Bookman*, 67 S. C. 432, 46 S. E. 39 (1903).

165. "Our conclusion from the foregoing authorities is, that *positive* acts on the part of the true owner of land, which induce an innocent party to deal with it as if the title was in another, will estop him, even if he was ignorant of his title, and no fraud was *actually* intended." (Emphasis by the Court.) Mr. Justice Gary in *Chambers v. Bookman*, 67 S. C. 432, 454, 46 S. E. 39 (1903), quoted with slight changes in *McMillan v. Hughes*, 88 S. C. 296, 301, 70 S. E. 804 (1911).

166. *Clark v. Parsons*, 69 N. H. 147, 39 A. 898 (1897). See *Adams v. Adams*, 220 S. C. 131, 140, 141, 66 S. E. 2d 809 (1951).

167. "Plaintiff's deed to Mrs. Greer being on record, the law imposed no duty on the plaintiff to give additional notice to the public of its terms. She

### *Reformation*<sup>168</sup>

Can a deed be reformed in equity to supply omitted words of inheritance? The usual opinion held by South Carolina lawyers is that though a deed for value can be reformed, the reformation of a gratuitous deed cannot be had. While this opinion probably reflects the present state of the law in general, in certain contexts it does not fit the pattern of the adjudicated cases. In one instance<sup>169</sup> the Court has sanctioned the reformation of a gratuitous deed while in another<sup>170</sup> it has refused to add words of inheritance to a deed for which value had been paid. The answer to the question of reformation, therefore, is somewhat more complex than the customary rule of thumb indicates.

In the absence of fraud, the ground for the reformation of a deed omitting words of inheritance is that the parties intended a conveyance in fee simple, but due to a mutual mistake failed to accomplish the intended conveyance. The following passage several times has been quoted in the cases as declarative of the rule in South Carolina:<sup>171</sup> "But before a court of equity will re-form a solemn instrument it must be shown by evidence which is the most clear and convincing not simply it was a mistake on the part of one of the parties, but that it was a mutual mistake, that both parties intended a certain thing, and that by mistake in the drafting of the paper they did not get what both parties intended."

That a deed founded upon a valuable consideration can be reformed is settled law in South Carolina.<sup>172</sup> The rule in the State as to the reformation of voluntary deeds is not so well recognized. The writer has found but two South Carolina cases<sup>173</sup> in which the Court has supplied the omission of words of inheritance in gratuitous deeds.

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could rest on the notice afforded by record, unless she knew the defendant or his grantor was about to purchase the land in good faith in the belief that he would get a fee simple title. Silence in the face of such knowledge would be evidence of estoppel." Mr. Justice Woods in *Sullivan v. Moore*, 84 S. C. 426, 430, 65 S. E. 108 (1910).

168. See generally, Note, 141 A. L. R. 826, 833 (1942); RESTATEMENT, PROPERTY § 36, comment b.

169. *Lawrence v. Clark*, 115 S. C. 67, 104 S. E. 330 (1920).

170. *Jones v. Kelly*, 94 S. C. 349, 78 S. E. 17 (1913).

171. Featherstone, Special Judge, in *Sullivan v. Moore*, 92 S. C. 305, 307, 75 S. E. 497 (1912); quoted with slight changes in *Groce v. Benson*, 168 S. C. 145, 151, 167 S. E. 151 (1933); *Gowdy v. Kelley*, 185 S. C. 415, 422, 194 S. E. 156 (1937).

172. *Austin v. Hunter*, 85 S. C. 472, 67 S. E. 734 (1910); *Sullivan v. Moore*, 92 S. C. 305, 75 S. E. 497 (1912); *Byrd v. O'Neal*, 106 S. C. 346, 91 S. E. 293 (1917); *Mathis v. Hair*, 112 S. C. 320, 99 S. E. 810 (1919).

173. *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976 (1895); *Lawrence v. Clark*, 115 S. C. 67, 104 S. E. 330 (1920).



The first<sup>174</sup> can not be regarded as authority, however, as the Supreme Court refused to consider the question, since the objection that a court of equity will not reform a gratuitous deed was first raised on appeal.

The second case<sup>175</sup> involved a deed from father to son in consideration of love and affection and five dollars. A reformation was ordered in favor of a devisee from the son against the heirs of the grantor. The issue as to the reformation of a voluntary deed was squarely raised, and the decision was justified on two grounds. First, the recital of a nominal consideration of five dollars was held to constitute value so as to bring the conveyance within the principle governing the reformation of deeds executed pursuant to the payment of a valuable consideration.<sup>176</sup> Second, the Court held that treating the transfer as voluntary, the deed was subject to reformation against the heirs of the grantor, even though a reformation of a voluntary deed could not have been decreed against the grantor himself.<sup>177</sup> In a subsequent case<sup>178</sup> involving a deed reciting a consideration of one dollar and love and affection, the holding that the recital of a nominal consideration is basis for reformation was expressly reaffirmed, though in the particular case a reformation was refused on the ground that the evidence did not justify such relief.

As to voluntary deeds, therefore, the precedents in South Carolina establish that the Court has power to order a reformation as against the heirs or devisees of the grantor even though there is no recital of any nominal consideration in the deed. If there is a recital of any monetary consideration, no matter how small, the Court's assimilation of such a conveyance to the principle governing the reformation of deeds for value in theory will warrant the reformation of such a deed against the grantor himself, though this result has not yet been reached in the cases.

174. Brock v. O'Dell, note 173, *supra*.

175. Lawrence v. Clark, note 173, *supra*.

176. The precedents cited by the Court for this holding are South Carolina cases involving the principle that the recital of a consideration evidences that a resulting use to the grantor was not intended. Similarly, the recital of a nominal consideration is sufficient to support a deed operating as a bargain and sale. Jackson *ex dem.* Hudson v. Alexander, 3 Johns. 484 (N. Y. 1808), 3 Am. Dec. 517. For cases from other jurisdictions holding that a deed upon a nominal consideration may be reformed at the instance of the grantee, see Note, 69 A. L. R. 423, 435 (1930), s. 128 A. L. R. 1299, 1303 (1940).

177. For cases to the same effect from other jurisdictions, see Note, 69 A. L. R. 423, 427 (1930), s. 128 A. L. R. 1299, 1301 (1940). As to the right of reformation in favor of a subsequent purchaser for value from the donee, see Note, 89 A. L. R. 1444, 1449 (1934). In Mathis v. Hair, 112 S. C. 320, 99 S. E. 810 (1919), the donee from a grantee for value was allowed a reformation of the deed to her donor.

178. Groce v. Benson, 168 S. C. 145, 167 S. E. 151 (1933).

As mentioned above,<sup>179</sup> before a reformation can be decreed, clear and convincing proof must be had that the deed as drawn does not accomplish the conveyance which was intended by the parties. Just how is this agreement between the parties to be evidenced?

If the contract of sale is in writing, proof of it is readily available. Such a contract need not contain the word "heirs," and any language manifesting that a conveyance in fee simple was intended is sufficient.<sup>180</sup>

Suppose, however, as is so often the case, the contract was an oral one, and the defective deed is the only written evidence of the transaction. In such a case, parol evidence may be introduced as to the estate intended to be conveyed.<sup>181</sup> However, if the grantor is dead or insane such testimony by the grantee in behalf of himself or his successor in interest is inadmissible over objection in an action by or against the heir, devisee, assignee, personal representative or committee of the grantor.<sup>182</sup> This disability does not extend to the testimony of third parties, and the conveyancer employed by a grantor was allowed to testify as to his mistake in the drafting of the instrument in a suit for reformation against the grantor's heirs.<sup>183</sup>

Even though the contract of sale was not in writing and testimony is not available as to the negotiations between the parties, the deed itself may evidence an intention to convey in fee, depending upon the draftsman's haphazard choice of language. In a number of cases<sup>184</sup> it has been held that the inclusion of a warranty to the grantee and his heirs is a circumstance indicating that a conveyance in fee was

179. Note 171, *supra*.

180. *Phillips v. Swank*, 120 Pa. 76, 13A. 712 (1888). 4 KENT 7.

181. Parol evidence as to the estate intended to be conveyed was admitted in *Austin v. Hunter*, 85 S. C. 472, 67 S. E. 734 (1910); *Sullivan v. Moore*, 92 S. C. 305, 75 S. E. 497 (1912); *Byrd v. O'Neal*, 106 S. C. 346, 91 S. E. 293 (1917). In *Jones v. Swearingen*, 42 S. C. 58, 19 S. E. 947 (1894), the Supreme Court affirmed the refusal of the circuit judge to permit the grantee of a deed for value to introduce testimony to show that the parties intended a conveyance in fee. Apparently this was on the ground that mistake had not been pleaded, nor reformation sought in the lower court.

182. S. C. CODE OF LAWS § 26-402 (1952); *Jones v. Kelly*, 94 S. C. 349, 78 S. E. 17 (1913). The word "assignee" in the statute includes a grantee of the decedent. *Palachucola Club v. Withington*, 159 S. C. 446, 157 S. E. 621 (1931). In *Cantey v. Whitaker*, 17 S. C. 527 (1882), it was held that the protection of the statute does not extend to a subsequent grantee from the immediate grantee of the decedent. For a recent case reaching the same result, see *Taylor v. Cox*, 218 S. C. 488, 63 S. E. 2d 470 (1951).

183. *Lawrence v. Clark*, 115 S. C. 67, 104 S. E. 330 (1920). The opinion discloses no objection to this testimony, but it would appear competent despite objection. See *McLaurin v. Newton*, 183 S. C. 379, 191 S. E. 59 (1937).

184. *Austin v. Hunter*, 85 S. C. 472, 67 S. E. 734 (1910); *Sullivan v. Moore*, 92 S. C. 305, 75 S. E. 497 (1912); *Byrd v. O'Neal*, 106 S. C. 346, 91 S. E. 293 (1917); *Mathis v. Hair*, 112 S. C. 320, 99 S. E. 810 (1919).

intended. A relatively early case<sup>185</sup> extended this principle even further in holding that a warranty to the grantee *forever* instead of to the grantee and his heirs was sufficient evidence of an executory contract for the sale of the land in fee, and that the heirs of the grantor therefore had no interest.

Certain dicta in the cases in the first years of the present century indicate that under the leadership of an aggressive and practical minded judge the Court very nearly broke free from the shackling requirement of words of inheritance without benefit of legislative dispensation. It is an interesting conjecture that had Mr. Justice Woods continued on the Supreme Court of South Carolina instead of proceeding to the Circuit Court of Appeals, the former Court under his intellectual dominance might have adopted the escape several times suggested by him.

In an opinion affirming the reformation of a deed, Mr. Justice Woods points out the facts of life which a too legalistic approach to the question overlooks:<sup>186</sup> "Unless the Courts must look away from the obvious, they know that it is probable almost to the point of certainty that in writing a deed no layman would express the conveyance of a life estate by the mere omission of the word 'heirs' in the premises and the *habendum* when using it in the warranty, and that no lawyer would do so except one wholly possessed with the spirit of priggishness." In a later case<sup>187</sup> where his brethren could find no intrinsic evidence in the deed of an intention to convey the fee, Justice Woods attacked the common law rule with even more devastating logic: "In construing deeds as in the performance of all other judicial functions, the Court must take judicial notice of the manners and customs of the people whose writings they try to understand; and clear conviction arising from taking into account such manners and customs surely is as good as any other conviction. Having in view the manners of the plain people of the country, it is inconceivable that any man without legal training would write such a deed as is now before us when his intention was to convey a life estate . . . So universal is the custom to use the words 'for life' or similar words when the intention is to convey a life estate and not a fee, that I venture to think that there will be no dissent from the statement that the attempt to limit to a life estate is never attempted without the use of such words either by lawyers or laymen, unless the purpose be to entrap or deceive. In view of these facts, can there

185. *Johnson v. Gilbert*, 13 Rich. Eq. 42 (S. C. 1866).

186. *Sullivan v. Moore*, 92 S. C. 305, 308, 75 S. E. 497 (1912).

187. *Jones v. Kelly*, 94 S. C. 349, 357, 78 S. E. 17 (1913).

be a doubt that courts of equity should relieve against the injustice which arises from the absurd rule of common law that the use of the word 'heirs' is necessary to create a fee whenever they can possibly do so without interfering with the rights of innocent purchasers or creditors?"

In the writer's opinion the reasoning of Mr. Justice Woods is unassailable. The reformation of a deed to embody omitted words of inheritance stands on entirely different grounds from the common law requirement of such words to convey a fee. The reformation of a deed is a problem of construction in arriving at what is intended by the language employed in the conveyance, as opposed to the rule of law which arbitrarily defeats intention. While a rule of law is absolute unless abrogated by statute or directly disavowed by decision, as pointed out by Mr. Justice Woods, a rule of construction quite properly can and should change with the "manners and customs of the people,"<sup>188</sup> since such a rule seeks to determine what the parties intended. In determining what the language employed in a deed actually meant to the parties, it would seem that the passage of forty years has further confirmed the accuracy of Mr. Justice Woods' observation that when the intention is to convey less than an estate in fee, that intention is unequivocally expressed rather than indirectly indicated by the omission of words of inheritance.

Since the Act of 1824<sup>189</sup> the rule of construction as to wills has been that a devise of land is presumed to be in fee simple unless the language employed indicates either expressly or impliedly that a lesser estate was intended. It is submitted that in determining whether or not reformation of a deed should be granted, the application of the same rule *as a rule of construction in determining the intention of the parties* should be made, since, as pointed out by Justice Woods, the universal practice both among laymen and lawyers bears out the justice of the presumption. If this course suggested by Justice Woods had been adopted, for all practical purposes the common law requirement of words of inheritance in inter vivos conveyances would today be a dead letter in South Carolina. Such rule unequivocally applied in several cases would have settled the law that a deed omitting words of inheritance in equity conveys an estate in fee simple, and with certainty of decision assured litigation on the subject would no longer be necessary for the clearing of titles. Such a rule would validate all deeds omitting words of inheritance except the almost non-existent case where a reformation is sought against the grantor him-

188. *Jones v. Kelly*, 94 S. C. 349, 357, 78 S. E. 17 (1913).

189. S. C. CODE OF LAWS § 19-232 (1952); note 6, *supra*.

self rather than against his heirs or devisee, *and* the deed contains no recital of a nominal consideration.

That the Court has not yet embraced the above solution is readily apparent in subsequent decisions. Where a grantor declared in a deed to his son for one dollar and love and affection, "I do hereby settle and permanently fix the right and title . . . in and upon the said B and his children . . . and I do hereby bind myself, my heirs . . . to warrant and forever defend . . . unto the said B and children . . .," the unanimous Court was unable to find conviction that the grantor really intended to convey the fee rather than a life estate.<sup>190</sup> Judged solely by this case it would appear that in South Carolina the "clear and convincing" evidence which will warrant the reformation of a deed is an even higher standard than the persuasion "beyond a reasonable doubt" in criminal cases, for men have been hanged on far less moral certainty of proof.

One of the latest cases<sup>191</sup> involved a deed in consideration of one dollar and love and affection, conveying the property to the grantor's daughter "during her natural life and at her death . . . to become the absolute property of my grandson K." The Court apparently conceded the obvious fact that the deed disclosed an intention to convey in fee. However, reformation was refused on the ground that there was no evidence of an antecedent agreement between the parties which the deed as written failed to effectuate because of a mutual mistake. Considering the Court's rationale, it is of course true that there can be no reformation on grounds of mutual mistake unless there has been a mistake, and unless the instrument can be related to some mutual intention of the parties, it can not be said that there has been a mistake which will warrant the intervention of a court of equity. Recognition of this principle seems no solution of the case, however, since it is difficult to see why the deed itself is not sufficient evidence of the agreement between the parties.

The execution and delivery of the deed certainly evidenced the intention of the grantor to convey in fee, as apparently the Court conceded. Why does not the acceptance of the deed by the grantee evidence his intention to accept a conveyance in fee, thus furnishing the required mutuality of agreement? Even though extraneous proof of the antecedent agreement be lacking, as pointed out by Mr.

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190. *Groce v. Benson*, 168 S. C. 145, 167 S. E. 151 (1933).

191. *Gowdy v. Kelley*, 185 S. C. 415, 194 S. E. 156 (1937).

Justice Woods,<sup>192</sup> the terms of the deed furnish convincing proof of the intention of the parties. There is no rule of law which says that the agreement must antedate the deed a day or even an hour, and delivery and acceptance of a deed evidencing an intention to convey in fee certainly shows that at the moment of the conveyance the parties had agreed on a common objective which through mutual mistake they failed to effectuate.<sup>193</sup>

No South Carolina case adopting this view has been found,<sup>193a</sup> and in the cases<sup>194</sup> where reformation has been decreed there has been at least a nominal tender of extraneous "proof" of the antecedent agreement, though at times such proof has been tenuous to the point of evanescence. Possibly the real dividing line between reformation without "clear and convincing" extraneous evidence of the antecedent agreement, and the refusal of such reformation, lies in the profession's folklore that the Court will reform a conveyance for value where it will not reform one for a nominal consideration. As previously mentioned, the Court has in one case<sup>195</sup> squarely faced the issue in granting reformation of a deed supported by a purely nominal consideration. Yet there the extraneous proof of the antecedent agreement was unusually strong, the draftsman of the deed testifying as to the instructions given him by the deceased grantor, and as to his own mistake in the drafting of the limitation. In other cases<sup>196</sup> involving gratuitous conveyances the Court has, even while reaffirming its power of reformation in such cases, refused relief for the ostensible reason that the evidence of mistake did not attain the required degree of certainty. Where value has been paid for the conveyance, the Court has been quick to reach the judicial conviction necessary before a reformation will be ordered. The explanation may lie in a tacit assumption that while a reformation should be granted

192. "But leaving out of view all other testimony, it seems to me that the deed furnishes on its face evidence clear and convincing that the intention was to convey a fee simple and not a life estate." Mr. Justice Woods, dissenting, in *Jones v. Kelly*, 94 S. C. 349, 357, 78 S. E. 17 (1913).

193. A deed omitting words of inheritance may be reformed to conform with the intention of the parties to convey in fee simple, even though the only evidence of such intention appears from the deed itself. *Sampson v. Mudge*, 13 Fed. 260 (C. C., Mass. 1882); *Banks v. Ripley*, [1940] Ch. 719. Cf. *Sullivan v. Latimer*, 38 S. C. 417, 420, 17 S. E. 221 (1893), where a deed was reformed by adding a seal, solely upon the intrinsic evidence of the instrument. The Circuit Judge had denied reformation because there was no extrinsic evidence of the intention of the parties.

193a. Possibly the relatively early case, *Johnson v. Gilbert*, note 185, *supra*, should be excepted from this statement.

194. See notes 169, 172, *supra*.

195. *Lawrence v. Clark*, note 169, *supra*.

196. *Groce v. Benson*, 168 S. C. 145, 167 S. E. 151 (1933); *Gowdy v. Kelley*, 185 S. C. 415, 194 S. E. 156 (1937).

in favor of a grantee for value, such reformation in favor of a donee as against the donor's heirs is at least unkind if not unjust. No matter how clearly the donor has indicated his desire, he has not complied with common law technicalities, and a court of equity is chary of evading legal precedents in favor of a mere volunteer. A far cry from the impatient dislike with which Mr. Justice Woods viewed the requirement of words of inheritance some thirty years earlier,<sup>197</sup> but later decisions have tended to retreat to the faith of the fathers.

As to the valuable consideration which in general has been the sole incantation invoking equitable relief in South Carolina, the Court has declared that "[f]ull price standing alone has never been held to be conclusive that it was the intention to convey a fee."<sup>198</sup> However, the fact that reasonable value has been paid has been treated by the Court as a factor strongly indicating that a fee was intended,<sup>199</sup> and this fact, in conjunction with other extraneous evidence of the agreement, almost invariably<sup>200</sup> has been held conclusive on the issue of the propriety of a reformation. Conversely, where the grantee had never paid the full consideration, and had successfully pleaded the statute of limitations in a prior action for the balance of the purchase price, it was held that no reformation could be had.<sup>201</sup>

A suit for the reformation of a deed is one in equity, and neither party is entitled to a jury trial as a matter of right.<sup>202</sup> While laches is available as a defense, if the grantee or his successor has acted promptly upon discovery of the mistake, there is no bar in equity.<sup>203</sup> In two cases<sup>204</sup> reformations were ordered in suits brought more than fifty years after execution and delivery of the deeds, the Court finding no evidence of laches.

Reformation of a deed cannot be had if such action will impair the

197. See p. 362, *supra*.

198. *Jones v. Kelly*, 94 S. C. 349, 353, 78 S. E. 17 (1913).

199. *Austin v. Hunter*, 85 S. C. 472, 67 S. E. 734 (1910); *Sullivan v. Moore*, 92 S. C. 305, 75 S. E. 497 (1912); *Byrd v. O'Neal*, 106 S. C. 346, 91 S. E. 293 (1917); *Mathis v. Hair*, 112 S. C. 320, 99 S. E. 810 (1919).

200. In *Jones v. Kelly*, note 198, *supra*, the fact that value had been paid was held insufficient evidence of an intention to convey in fee.

201. *Burroughs v. Floyd*, 112 S. C. 106, 98 S. E. 850 (1919).

202. *Wolf v. Hayes*, 161 S. C. 293, 159 S. E. 620 (1931).

203. *Byrd v. O'Neal*, 106 S. C. 346, 91 S. E. 293 (1917); *Mathis v. Hair*, 112 S. C. 320, 99 S. E. 810 (1919). In the first cited case the Court quoted with approval (106 S. C. at p. 351) the following passage from *Babb v. Sullivan*, 43 S. C. 436, 441, 21 S. E. 277 (1895): "Laches connotes not only undue lapse of time, but also negligence, and opportunity to have acted sooner; and all three factors must be satisfactorily shown before the bar in equity is complete." See Note, 106 A. L. R. 1338 (1937).

204. *Byrd v. O'Neal*, note 203, *supra*; *Mathis v. Hair*, note 203, *supra*.

rights of subsequent bona fide purchasers or encumbrancers for value without notice. However, if the subsequent purchaser or encumbrancer for value had notice of the equity of reformation, he occupies no better position than his vendor or mortgagor.<sup>205</sup>

What circumstances are sufficient to charge with notice a subsequent purchaser or encumbrancer for value is a question of fact to be determined in each case. Suppose that A, for valuable consideration, by duly recorded deed conveys land to B "in fee simple." At law the deed conveys B only a life estate, and yet it seems clear that a subsequent purchaser of the legal reversion from A would be unable to establish that he took without notice of B's equity of reformation. It would further seem that even where the intention is not so expressly spelled out, yet if the deed affords intrinsic evidence of an intention to convey in fee sufficient to warrant a reformation of the deed as against the grantor, a subsequent purchaser from him with actual or constructive notice of the terms of the deed will not be protected.<sup>206</sup>

In summary, while the precedents give the Court ample justification for reforming gratuitous deeds as well as deeds for value, the granting of such relief has been limited almost exclusively to cases where value has been paid. Since the device of reformation affords the most practicable escape from an admittedly outworn rule of law, it is to be hoped that future cases will evince a less tender regard for the fiction that unless a grantor has used the word "heirs," it is a violent assumption to presume that he really intended a conveyance in fee simple rather than a life estate.

## CHAPTER VII.

### CONCLUSION

As pointed out in the introduction, the primary aim of this article is to furnish a practical guide for title examiners on questions involving the effect of the omission of words of inheritance in inter vivos conveyances of land. If in addition it has served the further purpose of engendering a suspicion that such learning in modern South Carolina law is an anachronism bordering on the nonsensical, the writer will experience no chagrin.

If the function of land conveyancing in a modern society is to

205. See Note, 44 A. L. R. 78 (1926), s. 102 A. L. R. 825 (1936).

206. See *Sampson v. Mudge*, 13 Fed. 260 (C. C. Mass. 1882). *But cf. Atlantic Coast Lumber Co. v. Langston Lumber Co.*, 128 S. C. 7, 122 S. E. 395 (1924), holding that a deed erroneously recorded without words of inheritance is constructive notice only of a life estate.



facilitate the transfer of the basic wealth of the community in a simple and certain manner, free from petty questions causing time-consuming and expensive litigation, the overwhelming majority of the English speaking world is right in abolishing the requirement of words of inheritance.<sup>207</sup> On the other hand, if its function is at all cost to preserve legal museum pieces antedating the discovery of America, thought of any change is a heresy to be eschewed. To be strictly consistent, however, the whole fabric of Coke's time should be restored to its pristine purity, and some legal Cato the Censor should introduce bills repealing the acts which abolish the requirement of words of inheritance in devises,<sup>208</sup> the indefinite failure of issue construction,<sup>209</sup> the destruction of contingent remainders by tortious feoffment,<sup>210</sup> the Rule in Shelley's Case,<sup>211</sup> and many other acts which have committed the State to heresy.

While conservatism and aversion to change are the hereditary virtues of the conveyancing craft, no one consciously argues that the State's present conveyancing practices should be maintained merely out of deference to the shades of Littleton, Coke, and Blackstone. The accepted rationalization is that since the law is well settled and known to everyone, why bother to change it; that to do so will only unsettle the precedents and breed confusion and litigation where all is now certainty and tranquility.<sup>212</sup> This is not a new argument, as witness the eulogy of the rule by Preston, the great English conveyancer, writing in the late eighteenth century:<sup>213</sup> "Every person who has had an opportunity of observing the salutary effects flowing from a rule, which prescribes, that certain technical words only should have a particular signification and import, will congratulate the profession and those in whose interest and peace he takes any concern, that the rule is adopted."

The only answer that can be made to such a beautifully phrased encomium is the prosaic one that experience has not justified the hypothesis. In South Carolina prior to the Act of 1824<sup>214</sup> establishing the construction that a devise of land is presumed to be in fee unless an express or implied intention to create a lesser interest is

207. See notes 1, 2, *supra*.

208. S. C. CODE OF LAWS § 19-232 (1952).

209. S. C. CODE OF LAWS § 57-3 (1952).

210. S. C. CODE OF LAWS § 57-4 (1952).

211. S. C. CODE OF LAWS § 57-2 (1952).

212. See the minority opinion of the Committee on Jurisprudence and Law Reform of the South Carolina Bar Association, on a recommendation that legislation be enacted abolishing the requirement of words of inheritance in deeds of land. 1 S. C. L. Q. 329, 330 (1949).

213. 2 PRESTON, ESTATES 67.

214. S. C. CODE OF LAWS § 19-232 (1952); note 6, *supra*.

found, a frequent question was whether or not the language of a devise was sufficient to create an estate in fee. A study of the reports will show that the passage of the Act has effectively ended the problem, rather than caused the flood of litigation which such a common sense rule is reputed to engender. No explanation as to why this result would not follow the adoption of the same rule for *inter vivos* conveyances has been advanced.

Of course, the belief that the law is at present clear and settled is a myth akin to the fabled activities of the stork as an accoucheur. If this article has not furnished sufficient examples of doubtful questions, any experienced title examiner can supply offhand a half dozen limitations which will defy any lawyer in South Carolina to give an authoritative answer as to whether they pass a fee or only a life estate. Only the Supreme Court knows the answers, and almost every case necessarily involves an expensive and time-consuming appeal to that tribunal.

The reason for the uncertainty of the law is readily apparent. Inherently, the rule requiring words of inheritance is a harsh and senseless thing, and any modern judge with a spark of feeling desires to escape it when confronted with cases where common sense and ordinary human feeling do not jibe with mediaeval legal ritualism. The traditional common law penalty of forfeiture of estate for the trifling misdemeanor of employing a layman or incompetent lawyer as conveyancer has in many instances proven too great for the Court to accept, a fact which in large part accounts for much of the present uncertainty in the law. A rule of law which is having the props cut from under it by judicial attrition is hardly one to cite as an example of beautiful certainty in the law.

That the Court is in general hostile to the rule has been evinced in the opinions of the last fifty years.<sup>215</sup> However, *stare decisis* is

215. "This is the rule of the common law from which the Courts can not escape, though its operation nearly always results in the injustice of defeating the intention of the parties. The rule serves generally as a snare to those unlearned in technical law, and it would be difficult to suggest any reason for its continued existence; but it has been so long established in this State that the Courts can not now overrule the cases laying it down without imperilling vested rights. . . . It was made inapplicable to wills by the first section of the Act of 1824. . . . The General Assembly has not, however, seen fit to extend this statute to deeds, and the Courts are powerless to do so." Mr. Justice Woods in *Sullivan v. Moore*, 84 S. C. 426, 428, 65 S. E. 108 (1910); quoted with slight changes in *McMillan v. Hughes*, 88 S. C. 296, 299, 70 S. E. 804 (1911); *Holder v. Melvin*, 106 S. C. 245, 248, 91 S. E. 97 (1917).

"It is a strange survival of a feudal technicality that the Courts are without power to give effect to the plain purpose, as distinguished from the legal intention, of the parties. The legislature alone can give relief from this thorn in the flesh. The word 'heirs' is not used, and the Courts are powerless to carry out

justifiably sought in an age when certain courts have at times gone overboard in rewriting the law to accord with personal whim and predilection. No thinking lawyer, particularly one concerned with dispositions of property, can have other than respect and regard for the reassuring stability of decision which the Court of South Carolina has displayed throughout its long judicial history.

While repeatedly announcing its disapproval of the rule, the Court has expressed a reluctance to change it by decision, and has declared that the rule must be abrogated by statute. Hence the issue has squarely confronted the Bar, and here the Bar has been derelict in revising the law to meet modern needs.

The responsibility for the continuance of the rule squarely rests upon the lawyers of the State. In such a technical field of law, the Court's remark that "the law making body of the State have not seen fit"<sup>216</sup> to change the rule is only a euphemism politely veiling the unpleasant truth that in this instance the lawyers have failed to meet their responsibility to the citizenry of the community. For how can there be a popular referendum on such an issue as words of inheritance in inter vivos conveyances of land when the only laymen who have heard of the rule are the unfortunates who have run afoul of it? Such legislation must be instituted by lawyers, just as the Rule in Shelley's Case,<sup>217</sup> the indefinite failure of issue construction,<sup>218</sup> and other such technical doctrines have been changed by members of the profession rather than by mass revolt.

It is submitted that the rule should be abrogated by a statute similar to that abolishing the necessity of words of inheritance in devises.<sup>219</sup> As hereinbefore mentioned,<sup>220</sup> while it is probable that such a statute might in many instances be given a retroactive effect, the statutes adopted in England<sup>220a</sup> and the majority of the states<sup>220b</sup> have not been made retroactive. Hence, any legislation adopted in

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the purpose of the parties . . . ." Mr. Justice Fraser in *Son v. Shealy*, 112 S. C. 312, 318, 99 S. E. 825 (1919).

"The Legislature by its Act of 1824 declared that it should no longer be necessary to insert words of inheritance in a will in order to carry the fee. In all the hundred years which have passed since the passage of that Act, the lawmaking body of the state have not seen fit to adopt similar legislation in regard to deeds. It is manifest that Courts should be cautious in enforcing a rule which in effect does that which the Legislature has not done." Mr. Justice Bonham in *Groce v. Benson*, 168 S. C. 145, 152, 167 S. E. 151 (1933), quoted in *Gowdy v. Kelley*, 185 S. C. 415, 420, 194 S. E. 156 (1937).

216. See note 215, *supra*.

217. See note 211, *supra*.

218. See note 209, *supra*.

219. See note 214, *supra*.

220. See note 5, *supra*.

220a. See note 1, *supra*.

220b. See notes 2, 5, *supra*.

South Carolina quite possibly may be made applicable only to deeds executed after the passage of such an act.

The Rule in Shelley's Case was abolished in 1924,<sup>221</sup> but problems under the rule since have arisen and will arise for years to come, due to the fact that it is inapplicable to instruments executed before October 1, 1924. Must the same be true of deeds executed before the enactment of a statute abolishing the requirement of words of inheritance in deeds executed after the passage of such a statute?

It is here that the judiciary can make its contribution in an area where the legislature may be doubtful of its power to act. As pointed out in the discussion of reformation of deeds,<sup>222</sup> the precedents are ample to justify the reformation of deeds for value and of gratuitous deeds reciting a nominal consideration. All that is needed to assure the certainty needed by the title examiner is the crystallization of the constructional rule that it will be presumed the parties meant to convey in fee, unless the language employed in the deed, or convincing extraneous evidence, indicates that a life estate was intended.

The establishment of such a rule will be a simple matter involving no disavowal of the principle of stare decisis, for the question is one of construction, a matter of evidence rather than one of substantive law. No repudiation of a rule of law will be necessary, a step which in a good cause the Court did not hesitate to take in holding that "issue" and "children" may be words of limitation when used in a deed.<sup>223</sup> Once the problem has been abandoned for the future by statute, the Court may well elect to end it once and for all by decision.<sup>224</sup>

The unequivocal affirmation of the doctrine that a deed without words of inheritance in equity conveys a fee would make the clearing of titles the mere matter of a perfunctory circuit court decree. Costly and time-consuming appeals would be unnecessary once it was known that the Supreme Court would stand squarely behind such decrees. The title examiner would be able to announce with confidence the state of the title in limitations omitting the word "heirs." No less

221. See note 211, *supra*.

222. See p. 359, *supra*.

223. See p. 349, *et seq.*, *supra*.

224. This was the course adopted in North Carolina as to deeds omitting words of inheritance executed prior to the Act of 1879, abolishing the requirement of such words. That even gratuitous deeds may be reformed to embody omitted words of inheritance, see *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308 (1889); *Moore v. Quince*, 109 N. C. 85, 13 S. E. 872 (1891); *Rackley v. Chesnutt*, 110 N. C. 262, 14 S. E. 750 (1892); *Whichard v. Whitehurst*, 181 N. C. 79, 106 S. E. 463 (1921).

important would be an end to the cases where the intention of grantors has been thwarted needlessly because of the fiction that such intention has not been expressed.

The adoption of the above suggestions will not achieve the millennium in South Carolina, for death, taxes, and the defective title will be with us always. However, such action will effect a long overdue reform, and bring the State's practice in accord with that in other modern Anglo-American jurisdictions. It is by such isolated small gains that the few rough edges of the State's basically sound land law eventually will be eliminated.