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Reservations to Strangers to the Deed

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RESERVATIONS TO STRANGERS TO THE DEED

INTRODUCTION

The real property laws applied in a large part of the United States, and especially in South Carolina,[1] are those developed and designed for an English society which was predominantly feudalistic. Although these laws have grown and in some measure have been modified to ease their stringency, they remain, except, of course, for statutory changes, for the most part in their original harshness based on the reason and requirements of bygone age. Despite the fact that the courts of this country continually declare their dissatisfaction and distaste for the rigidity and harshness of that part of these rules for which reasons no longer exist,[2] they realize that the necessity of the quality of stability in this field prevents a drastic or abrupt change from the cumbersome rules, unless some basis for the change can be found in the logic or reasoning of the common law. One of the rules of real property law that has from time to time been the subject of this struggle between the maintenance of stability and the relief from unjust results of rules for which reason has ceased to exist is the validity of a reservation in a deed by the grantor to a third party. This problem usually arises as a result of inadvertence or inept conveyancing where the drafter of a deed draws what is in terms a reservation to a person other than the grantor of the deed.

The general requirements for an effective reservation of an interest in the thing granted in a deed were summarized around 1641 as follows:

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1. For example: retention of the fee simple conditional estate, Wright v. Herron, 5 Rich. Eq. 442 (S. C. 1853); Withers v. Jenkins, 14 S. C. 597 (1880); Hewitt v. Hewitt, 187 S. C. 86, 196 S. E. 541 (1938); retention of the requirement of the word "heirs", Lorick & Lowrance v. McCreery, 20 S. C. 424 (1883); Gowdy v. Kelly, 185 S. C. 415, 194 S. E. 156 (1937).

2. JUSTICE WOODS, speaking of the requirement of words of inheritance, said: "This is the rule of 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 (*sic*) vested rights". Sullivan v. Moore, 84 S. C. 426, 428, 65 S. E. 108 (1909).

> In every reservation these things must always concur, 1. It must be by apt words. 2. It must be of some thing issuing, or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing. 3. It must be of such a thing whereunto the grantor may have resort to distrain. 4. *It must be made to one of the grantors, and not to a stranger to the deed.* As for examples. . . . *if a lease be made, rendering rent to the heirs of the lessor; this reservation is void because the rent is not reserved to himself first.*[3]

From the example given illustrating the fourth requirement in the above-quoted passage, it appears that the term "stranger to the deed" actually means one who is a stranger to the title of the granted premises.

Although the requirements and limitations on the effectiveness of reservations in a deed originated in the English Common Law, the English courts have ceased to experience any difficulty with a reservation to a stranger to the deed: for in accord with their policy to effectuate the intention of the grantor if possible, without violating a rule of law, the English courts regard a reservation as a counter-grant by grantee to grantor in a deed of indenture;[4] and by statute passed in 1925, the problem is completely eliminated.[4a]

> . . . A reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before

3. SHEPPARD'S TOUCHSTONE, 80 (Emphasis supplied).

4. Wickham v. Hawker, 7 Mees. & W. 63, 151 Eng. Reprint 685 (1840), where the court considered an indenture deed from A to B with a reservation of an interest to C and construed the interest to C as a regrant by B. The Kentucky Court, in Beulein v. Jones, 102 Ky. 570, 44 S. W. 128 (1898), took the further position that the English rule also applied to a deed poll, as the acceptance of it was held to bind the grantee to covenants contained therein. For the effect of the grantee's acceptance of a deed poll upon covenants contained threin, see Giles v. Pratt, 2 Hill 439 (S. C. 1834); Hammond v. Port Royal & Augusta Ry. Co., 15 S. C. 10, 33 (1880); Epting v. Lexington Water Power Co., 177 S. C. 308, 313, 314, 181 S. E. 66 (1935); WILLISTON ON CONTRACTS, § 214.

4a. "(1) A reservation of a legal estate shall operate at law without any execution of the conveyance by the grantee of the legal estate out of which the reservation is made, or any regrant by him, so as to create the legal estate reserved, and so as to vest the same in possession in the person (whether being the grantor or not) for whose benefit the reservation is made.

"(2) A conveyance of a legal estate expressed to be made subject to another legal estate not in existence immediately before the conveyance, shall operate as a reservation, unless a contrary intention appears." LAW OF PROPERTY ACT, 1925. 15 Geo. 5, Ch. 20 § 65.

> the grant. On the other hand, an exception operates to withdraw some part of the thing granted which would otherwise pass to the grantee under the general description, which was in esse at the time of the conveyance, and which until such conveyance and the severance thereby was comprised in the thing granted.[5]

The courts, however, seldom distinguish the terms, but instead are inclined to use them interchangeably due to the narrowness of the distinction.

In the United States, the rule that an attempted reservation to a stranger to the deed is void, is still recognized and effectuated.[6] However, probably a majority,[7] although not all,[8] of the jurisdictions of this country make an exception to the rule where the person to whom the reservation is made is the spouse of the grantor.

EFFECTUATION AS RESERVATION

There are at least three, and probably four, theories on which this exception may be and is, by various jurisdictions, justified. The first of these methods by which the reservation to the spouse of the grantor is effectuated is by excepting the wife from that class who are strangers to the deed because of her interest in the premises which stems from the marital relation. It should be noted that by this theory the interest in the spouse is passed by means of the reservation as such. The application of this theory is well illustrated by the Illinois case of *Saunders v. Saunders*.[9] There it was held that the marital rights of the grantor's spouse (statutory dower in husband, dower in wife, expectancy of inheritance) was a sufficient interest in the premise to support the reservation of a life estate. Although in this case, the non-owning spouse joined in the conveyance, which act in that state effectively waived the marital rights of such spouse, other cases have

5. 16 AM. JUR. 607, § 298.
6. Deaver v. Aaron, 159 Ga. 597, 126 S. E. 382, 39 A. L. R. 126 (1925); Hornbeck v. Westbrook, 9 Johns. 73 (N. Y. 1812); see note, 39 A. L. R. 128, and cases cited therein.
7. "The weight of authority supports the view that a deed of the kind here involved operates as giving both husband and wife a life estate". Saunders v. Saunders, 373 Ill. 302, 26 N. E. 2d 126 (1940); see cases cited in note, 129 A. L. R. 310.
8. Lemon v. Lemon, 273 Mo. 484, 201 S. W. 103 (1918); Ogle v. Barker, 224 Ind. 489, 68 N. E. 2d 550 (1946).
9. 373 Ill. 302, 26 N. E. 2d 126, 129 A. L. R. 306 (1940).

applied the same reasoning where the non-owning spouse did not join in the conveyance.[10]

By applying this reasoning, the courts allow, in many cases, a reservation of a larger interest than the non-owning spouse initially had. This is, of course, in conflict with the common law requirements for an effective reservation.[11] In the absence of another method to reach the same result, as for example, in a jurisdiction where prior decisions have closed the door on the other two theories, this slight deviation from the strict requirements of the common law is well justified.

In states having neither statutory dower in the husband, nor curtesy, the objection to the effectuation of a reservation of a greater interest in the premises than formerly existed, would perhaps be stronger in a situation where the grantor is the wife and the non-owning spouse to whom the reservation is made is the husband. The increased strength of this objection would arise from the fact that the non-owning spouse's interest is founded on dower, homestead and expectancy of inheritance. Since the husband has, of course, no dower nor curtesy, and homestead in any particular case may not exist, and the expectancy of inheritance is at most speculative, it could be argued, that the husband has insufficient interest to remove him from the class of strangers to the deed.

EFFECTUATION AS A COVENANT TO STAND SEIZED TO USES

Another method by which the estate attempted to be reserved to the spouse of the grantor is validated is by construing the limitation as a covenant by the grantor to stand seized to the use of the non-owning spouse. The requirements for a limitation to be effective as a covenant to stand seized to uses are: a consideration of love and affection,[12] a relationship of blood or marriage between the convenantor and convenantee,[13] and a reservation of an interest in the grantor.[14] An at-

10. Rollins v. Davis, 96 Ga. 107, 23 S. E. 392 (1895); Murphy v. Merritt, 48 N. C. 37 (1855); McDonald v. Jarvis, 64 W. Va. 62, 60 S. E. 990 (1908).
11. Note 3, *supra*.
12. Milledge v. Lamar, 4 DeSaus. Eq. 417 (S. C. 1816).
13. Chancellor v. Windham, 1 Rich. 161, 42 Am. Dec. 411 (S. C. 1844).
14. Cresswell v. Bank of Greenwood, 210 S. C. 47, 41 S. E. 2d 393 (1947). This requirement seems peculiar to South Carolina law. See Crossing v. Scudamore, 2 Levinz 9, 83 Eng. Rep. 428 (1671); Vanhorn's Lessee v. Harrison, 1 Dallas 137, 1 L. ed. 70 (Pa. 1765); Adams v. Ross, 1 Vroom 505, 82 Am. Dec. 237 (N. J. 1860).

tempted reservation by a grantor husband and his non-owning wife (who joined in the conveyance) of a life estate in a deed of the fee to their son was sustained as creating a covenant by the husband to stand seized to the use of the wife for her life in the New York case of *Wood v. Swart*.[15] After holding that the deed could not operate by way of exception or reservation the court said:

> . . . But it has effect and operation as a covenant to stand seized, as it is within the principles adopted in *Bedell's Case*, 7 Co., 133 . . . In *Bedell's Case* . . . the question was, whether any use arose to the wife, or not; and it was resolved, that if a man covenant to stand seized to the use of his wife, son or cousin, it shall raise a use, without any express words of consideration . . . It is scarcely necessary to observe, that in such a conveyance no technical words are required; such as that the grantor covenants to stand seized to the use of A, & c; but any other words will create a covenant to stand seized, if it appears to have been the intention of the party to use them for that purpose. . . .[16]

Although the application of the covenant to stand seized theory seems to be subject to no logical objection, and is some broader in scope than the reservation theory, it too is subject to limitations, which in some cases might necessitate the adoption of a broader theory. These limitations consist of the necessity of a relation of blood or marriage to the grantor, of a consideration of love and affection, and, in South Carolina, of a reservation of a life estate in the grantor.[17a]

RESERVATION CONSTRUED AS A GRANT

The third theory by which a reservation to the grantor's spouse might be effectuated is by construing the reservation as a grant. This construction is justified by the reasoning that the clear intention of the grantor should be carried out if it can be done without violation of a rule of law or construction.

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15. 20 Johns. 85 (N. Y. 1882); *Acc.*, Eysaman v. Eysaman, 24 Hun. 430 (N. Y. 1881).
16. *Id.*, at 87, 88.
17a. See note 14, *supra*.

This theory has been applied principally to the reservation of easements to a third person. Thus, in *Long v. Fewer*,[17] the court said:

> . . . it is urged that to construe this deed as granting an easement would be to convert a reservation into a grant. But the day is past for adhering to technical or literal meaning of particular words in a deed or other contract against the plain intention of the parties as gathered from the entire instrument.[18]

And in *Aldrich v. Soucheray*,[19] the court held that the word "reserved", when used in connection with the word "excepting" will be held to mean "granted" if the manifest intention which would otherwise be defeated is thereby effectuated.

The Restatement of Property is in accord with the view that an easement in terms reserved to a third party may be effective as a grant.[20] Also concurring in this view is Tiffany in his work on Real Property, where he says: "It may be questioned, however, whether such words of reservation might not occasionally be construed as words of grant, vesting in the third person named a *life estate,* with remainder in fee simple".[21]

This view not only appears as sound or more sound than the first two theories, in that it established a desirable rule of construction which violates no rule of law or other rule of construction, but it also allows a broader effectuation of the intention of the grantor without detracting from the stability of the applicable rules of law. By utilizing this theory, what is in terms a reservation, whether made to a spouse of the grantor, a person related by blood or marriage to the grantor, or to a person coming within neither of these classes, may be validated where the intention of the grantor is apparent. Apparently, the only deterrent to the application of this theory is the relatively small amount of authority supporting it.

17. 53 Minn. 156, 54 N. W. 1071 (1893).
18. 54 N. W. at 1071.
19. 133 Minn. 382, 158 N. W. 637 (1916).
20. RESTATEMENT, PROPERTY § 472, comment *b* (1944).
21. 4 Tiffany, Real Property (3rd Ed. 1939) § 974, p. 54.

OTHER THEORIES

There is another possible theory by which a reservation to a stranger to the deed might be effectuated. Some authority[22] supports the view that if a grantee accepted such a deed, in which the grantor's intention is clear that a third person is to take an interest thereunder, there is an implied agreement by the grantee to hold the property for the benefit of the third person, which agreement equity will enforce.

TREATMENT IN SOUTH CAROLINA

Recently the South Carolina Supreme Court was squarely faced, for the first time,[23] with the validity of an attempted reservation of a life estate to the grantor's wife.[24] The granting clause of the deed there presented read in part:

> I, Robert B. Glasgow, . . . for and in consideration of Five ($5.00) Dollars and love and affection which I bear for my son . . . do grant, bargain, sell and release unto the said Robert B. Glasgow, Jr., his heirs and assigns forever, *saving, excepting and reserving unto the grantor herein, Robert B. Glasgow, and Mrs. Elizabeth Glasgow, the use, occupancy, and possession of the property hereinafter described, for and during their natural lives and the natural life of each of them;*[25] . . .

The habendum and general warranty clauses were in usual form, to Robert B. Glasgow, Jr., his heirs and assigns. The circuit court sustained the demurrer of the defendant, Robert B. Glasgow, Jr., to the complaint of the plaintiff, Mrs. Elizabeth Glasgow, which sought a confirmation of the life estate in plaintiff by way of a declaratory judgment.

The Supreme Court, in considering the case on appeal, first determined, in an enlightening discussion, that the circuit

22. Eysaman v. Eysaman, 24 Hun. 430 (N. Y. 1881); Sherman v. Estate of Dodge, 28 Ut. 26 (1885); see also 3 SCOTT ON TRUSTS § 467.2.

23. The South Carolina Supreme Court appears to have construed limitations in which a reservation to the grantor's spouse appeared on previous occasions, but that particular point was neither raised nor discussed. Branyan v. Tribble, 109 S. C. 58, 95 S. E. 137 (1917); Antley v. Antley, 132 S. C. 306, 128 S. E. 31 (1925); Myrick v. Lewis, 139 S. C. 475, 138 S. E. 198 (1927); Drake v. Drake, 148 S. C. 147, 145 S. E. 705 (1928); First Carolinas Joint Stock Land Bank v. Ford, 177 S. C. 40, 180 S. E. 562 (1935).

24. Glasgow v. Glasgow, ... S. C. ....., Westbrook Adv. Sheet, April 12, 1952.

25. *Id.*, at page 8. (Emphasis supplied).

judge was in error in holding that the attempted reservation was void in that it attempted to cut down the estate granted in the granting clause by superadded words.

The circuit court had also held that the attempted reservation to the plaintiff was void for the reason that the plaintiff, wife of the grantor, having no former interest in the premises, was a stranger to the deed. The Supreme Court reversed this holding also, on the theory that the spouse of a grantor has sufficient interest in the premises, by virtue of dower, homestead and expectancy of inheritance, to except such spouse from the class who are strangers to the deed.

In adopting this theory, the court did not overlook the possibility of construing the limitation as a covenant to stand seized to use, or of construing it as a grant in effectuation of the grantor's intention. The circuit court had expressly held, without citing authority, that the limitation could not be construed as a covenant to stand seized to uses, to which the Supreme Court replied that this was possibly erroneous, but unnecessary to decide. The court justified the application of the theory utilized by them by saying that it was sufficient to reach the end under the facts of that case. Thus, the court left the door open for a possible application of the other theories if and when the necessity for their adoption occurs.

An examination of the cases in South Carolina reveals no prior holding that would preclude the application of either the covenant theory or the grant theory. In fact, some of the prior decisions would seem to make the application of the covenant to stand seized to uses theory most appropriate. For example, in *Cresswell v. Bank of Greenwood*,[26] it was said:

> A covenant to stand seized was originally a device of equity whereby the rigid rules of the common law were circumvented in order to effectuate the manifest intention of the maker of a deed to grant a freehold to commence in the future and sometimes, at least, despite absence of the technical words necessary at common law to effect the conveyance intended by the instrument.[27]

As to the construction of the reservation as a grant in order to effectuate the intention of the grantor, the ground-

26. 210 S. C. 47, 41 S. E. 2d 393 (1947).
27. *Id.*, at 54.

work in prior cases is probably even better laid, by Justice Wardlaw's expressions in *Chancellor v. Windham*:[28]

> 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 a manner as to operate, if possible, in some other way.*[29]

CONCLUSION

The decision of the South Carolina Court in the *Glasgow* case, *supra,* is to be commended for the soundness of the result which it reaches in the particular case, as well as for its indication of the court's liberal approach to such problems in the field of conveyancing. In an area of the law which must necessarily cling to precedent in order to maintain stability, the court has shown a fine discrimination. Without repudiating a rule of law, the court has followed the lead of other American jurisdictions and engrafted a desirable and needed exception onto the rule. The theory chosen is ample for the factual situation presented. More important, the opinion seems to indicate that in a proper case in which one of the broader views above discussed is necessary, the court will not hesitate to adopt such a view in order to attain the desired result.

J. F. BUZHARDT, JR.

28. 1 Rich. 161 (S. C. 1844).
29. *Id.*, at 167. (Emphasis supplied).