

Spring 1958

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Recommended Citation

Patrick H. Grayson Jr., The Effect of a Conflict Between the Granting and Habendum Clauses in Deeds in South Carolina, 10 S.C.L.R. 431. (1958).

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THE EFFECT OF A CONFLICT BETWEEN THE GRANTING AND HABENDUM CLAUSES IN DEEDS IN SOUTH CAROLINA

In many actions involving real estate the court must determine what estates or interests pass under deeds which contain conflicting clauses. Many courts in seeking the intention of the parties, consider the whole deed together, without undue preference to any particular part.¹ However, the court in South Carolina has stated that while the intention of the parties should govern, it cannot violate established rules of law.² The purpose of this note is to discuss the technical common law rule of property which must be followed when there is a conflict between the granting and habendum clauses in a deed.

At common law the formal parts of a deed consist of the premises, the habendum, the tenendum, the reddendum, the conditions, the warranty, the covenants and the conclusion.³ The premises is that part of the deed preceding the habendum that sets forth the number and names of the parties, recitals necessary to explain the transaction, the consideration, the certainty of the grantor and the grantee and the thing granted.⁴ Within the premises is found the granting clause which usually reads: "... and by these presents do grant, bargain, sell and release unto the said [grantee] ..." Early South Carolina cases refer to repugnancy between premises and habendum,⁵ whereas later cases refer to a conflict between granting and habendum clauses.⁶ However, there seems to be little distinction between the terms "premises" and "grant" when they are used in the technical rule under discussion.

Following the premises is the habendum, which limits the estate to be taken by the grantee, and is usually introduced

1. PATTON, TITLES § 124 (1938).

2. *Sandford v. Sandford*, 106 S. C. 304, 91 S. E. 294 (1916); *Steele v. Williams*, 204 S. C. 124, 28 S. E. 2d 644 (1944).

3. 1 DEVLIN, DEEDS § 176 (1887).

4. *McLeod v. Tarrant*, 39 S. C. 271, 17 S. E. 773, 20 L. R. A. 846 (1892).

5. *Ingram v. Porter*, 4 McCord 198 (S. C. 1827); *McLeod v. Tarrant*, note 4 *supra*.

6. *Wilson v. Poston*, 129 S. C. 345, 123 S. E. 849 (1924); *Rhodes v. Black*, 170 S. C. 193, 170 S. E. 158 (1933).

by the words "to have and to hold." The office of the habendum is properly to determine what estate or interest is granted by the deed.⁷ At common law it can enlarge, explain or qualify the estate granted in the premises, but it cannot contradict or defeat such estate.⁸ According to Chancellor Kent "it has degenerated into a mere useless form; and the premises now contain the specification of the estate granted, and the deed becomes effectual without any habendum."⁹

Today most deeds drawn in South Carolina follow the form set out in a statute enacted in 1795.¹⁰ The form provided by that statute as sufficient to pass a fee simple title is composed of premises, habendum and warranty. However, the statute does not abrogate the forms of conveyance at common law, but merely set out a form which can be followed. Thus, since the enactment of the statute it has been held that an informal paper intended as a conveyance, under seal and with two witnesses, but without habendum or warranty clauses, may operate to convey title as a bargain and sale.¹¹

GENERAL RULE

Where the habendum clause is repugnant to or in irreconcilable conflict with the granting clause, the rule at common law is that the granting clause controls and the habendum is void.¹² To be effective the habendum must be consistent with the granting clause.¹³ However, in determining whether there is irreconcilable conflict between the two clauses, the court will consider the whole deed together and give effect to every part, if all can stand consistently with law.¹⁴

One general rule of construction which would seem to support this technical rule is that in case of a conflict between two provisions in a deed, the last should yield to the first and the first should be given its full effect.¹⁵ This follows the

7. See note 4 *supra*; ELPHINSTONE, RULES FOR THE INTERPRETATION OF DEEDS 226 (1889).

8. CO. LITT. § 299a; 1 DEMBITZ, LAND TITLES § 47 (1895).

9. 4 KENT 468.

10. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-251.

11. Lorick & Lowrance v. McCreery, 20 S. C. 424 (1882).

12. Rhodes v. Black, note 6 *supra*; 1 DEVLIN, *op. cit. supra* note 3, § 214.

13. Wilson v. Poston, note 6 *supra*.

14. Chancellor v. Windham, 1 Rich. 161, 42 Am. Dec. 411 (S. C. 1844).

15. Boyman v. Lobe, 14 Rich. Eq. 271 (S. C. 1868); Rhodes v. Black, note 6 *supra*; ELPHINSTONE, *op. cit. supra* note 7, at 125.

ancient maxim that the first clause of a deed and the last clause of a will shall operate.¹⁶

A second rule of construction leading to the result that the granting clause prevails over a repugnant habendum is that the words in a deed will be construed most strongly against him who uses them.¹⁷ By this rule the grantor is prevented from contradicting or retracting by a subsequent part of the deed. Thus, the habendum is not allowed to destroy an estate already vested by the granting clause.

Another basis for holding that the granting clause controls is that where the estate has been clearly defined and expressed in the granting clause, the habendum will not be allowed to defeat the clearly expressed intention of the grantor in the granting clause. Hence, after a clear grant of the fee, nothing in the deed thereafter can cut down the estate so conveyed.¹⁸

MODERN RULE

As opposed to the technical rule, the modern and now widely accepted rule to determine what estate is conveyed when there is repugnancy between granting and habendum clauses in a deed is "that, if the intention of the parties is apparent from an examination of a deed 'from its four corners' without regard to its technical and formal divisions, it will be given effect even though, in doing so, technical rules of construction will be violated."¹⁹ The courts of California, Kentucky and North Carolina were the first to hold that the rule that a repugnant habendum must be rejected as void is not a rule of property, but is merely a rule of construction which will be resorted to only where the courts cannot determine which of the clauses was intended to be controlling.²⁰ The modern view is that the intention of the parties must be given effect when ascertainable, so that when it appears from a consideration of the entire instrument and attendant circumstances that the grantor intended the habendum to enlarge, restrict or repugn the granting clause, the habendum must control.²¹

16. *Fraser v. Boone*, 1 Hill Eq. 360 (S. C. 1833); *SHEP. TOUCH.* 88.

17. *Peay v. Boggs*, 2 Mill Const. 98, 12 Am. Dec. 656 (S. C. 1818); *Coleman v. Gaskin*, 165 S. C. 301, 163 S. E. 790 (1932); *ELPHINSTONE*, *op. cit. supra* note 7, at 127 and at 233.

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

19. Annot., 84 A. L. R. 1054, 1063 (1933).

20. *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049 (1894); *Bodine v. Arthur*, 91 Ky. 53, 34 Am. St. Rep. 162 (1890); *Tripplett v. Williams*, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514 (1908).

21. *Bodine v. Arthur*, note 20 *supra*.

SOUTH CAROLINA APPROACH

The South Carolina approach to this rule can be simplified by the use of A, B and C situations. Therefore, that treatment will be used in the following discussion.

1. *Grant* *Habendum*

Deed from A to B. To B and his heirs.

A deed in this form conveys a fee simple absolute estate to the grantee.²² At common law the court resorts to the habendum to ascertain the grantor's intention where an incomplete or indefinite estate is conveyed by the granting clause.²³ Since the above deed lacks words of inheritance in the granting clause, which by implication is construed to be a life estate,²⁴ the court may, by resorting to the habendum, enlarge the implied life estate into a fee simple absolute estate.²⁵ Also, such a deed, containing words of limitation only in the habendum, is in the form set out in the statute²⁶ for the conveying of an estate in fee simple.

2. *Grant* *Habendum*

Deed from A to B for life. To B and his heirs.

At common law a deed in this form conveys a fee simple absolute estate.²⁷ While it is a well settled common law rule that the premises prevail over a repugnant habendum, the premises control only to the extent that an estate specifically limited in the granting clause cannot be abridged or cut down to a less estate by language in the habendum.²⁸ Thus, the inconsistencies of the above deed are reconciled by the common law rule which permits the habendum to enlarge the estate granted in the premises.²⁹ Although the court in South Carolina has stated that where the habendum of the deed is wholly inconsistent with the premises, it must be rejected,³⁰ it was

22. 1 DEVLIN, *op. cit. supra* note 3, §§ 220, 215; SHEP. TOUCH. 102; ELPHINSTONE, *op. cit. supra* note 7, at 231.

23. McLeod v. Tarrant, note 4 *supra*; Smith v. Clinkscales, 102 S. C. 227, 35 S. E. 1064 (1915); Wilson v. Poston, note 6 *supra*; Groce v. Southern R. Co., 164 S. C. 427, 162 S. E. 425 (1931).

24. Varn v. Varn, 32 S. C. 77, 10 S. E. 829 (1839).

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

26. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-251.

27. Co. Litt. § 299a.

28. TIFFANY, REAL PROPERTY § 980 (3rd ed. 1939).

29. ELPHINSTONE, *op. cit. supra* note 7, at 233.

30. Ingram v. Porter, note 5 *supra*; Wilson v. Poston, note 6 *supra*; Rhodes v. Black, note 6 *supra*.

evidently intended for this rule to apply only where the habendum invalidated or cut down the estate specifically limited in the granting clause.³¹ Accordingly, a deed in the above form conveys a fee simple absolute in South Carolina.

Suppose, however, that the grantor conveyed "to B for life, then to C and his heirs" in the granting clause, with the habendum "to B and his heirs". Since the granting clause of such a deed conveys the entire estate, no further disposition can be made of the property elsewhere in the deed. A deed in this latter form, therefore, gives B only a life estate and a vested remainder in fee simple to C.³²

3. *Grant*

Deed from A to B (words of inheritance omitted), but if he die without issue living at his death, over.

Habendum

To B and his heirs.

In two cases in which the South Carolina court has been called upon to construe deeds similar in form to the one above, it held that a fee defeasible, rather than an estate in fee simple absolute, was conveyed. After finding that the grantor plainly indicated his intention that the grantee should take a fee defeasible estate, the court in *Wilson v. Poston*³³ sought a construction of the deed clauses separately and together so that the estate held to be conveyed was reconcilable with both clauses and utilized the terms of each. It was stated that "where a complete estate is not created in the granting clause, which contains a conditional limitation, and resort must be had to the habendum for the purposes of enlarging the incomplete estate created by the granting clause, the granting clause must be taken as it stands, with the conditional limitation." Similar reasoning had been used in the earlier case of *Smith v. Clinkscales*³⁴ to reach a like result.

31. In *Zobel v. Little*, 120 S. C. 212, 113 S. E. 68 (1922), where the deed was essentially the same as the form in the illustration, the court held that the habendum enlarged the life estate in the granting clause into a fee simple absolute.

32. This latter illustration is the essence of the deed in *Barrett v. Still*, 102 S. C. 19, 86 S. E. 204 (1915), where the court held that B took a life estate and C took a vested remainder in fee simple.

33. Note 6 *supra*.

34. Note 23 *supra*; note also, *McLeod v. Tarrant*, note 4 *supra*, where the grant was "to A" with the habendum "to A and B and their heirs." In holding that a fee simple absolute estate passed to both A and B, the court reasoned that since no words of inheritance were coupled with

4. *Grant*

Deed from A to B and his heirs, but if he die without issue living at his death, over.

Habendum

To B and his heirs.

In construing a deed almost identical to the above illustration, the court in *McDaniel v. Conner*³⁵ held that a fee defeasible estate passed to the grantee. In that case the court stated that the clearly expressed intention of the grantor to pass a defeasible fee had in fact been accomplished without contravening a rule of law. In reaching that decision, which appears to be a reversal of earlier cases,³⁶ the court apparently disregarded the reasoning that the validity of the conditional limitation depended upon the presence or absence of words of inheritance in the granting clause,³⁷ for it is stated: "Suppose the words 'his lawful heirs after him' had been omitted from the granting clause, after the name of the grantee, could there be any doubt of the grantor's intention and the legal effect of the deed, in view of the habendum, regular and statutory in form to vest the fee-simple title? Undoubtedly, no. Then, does the presence of the quoted words indicate an intention to restrict the named grantee to a life estate (otherwise not done by the terms of the deed) and create remainders in his children (which is appellants' contention)? Plainly again, no."

5. *Grant*

Deed from A to B.

Habendum

To B and his heirs, but if he die without issue living at his death, over.

No South Carolina case involving a deed in exactly this form has been found, so it appears that the question is still open as to what estate a deed in this form will convey. However, in view of the recent decision of *McDaniel v. Conner*,³⁸

the estate vested in the grantee in the granting clause, the habendum must be used to enlarge the estate and a person mentioned for the first time in the habendum will be admitted to be a grantee in the deed.

35. 206 S. C. 96, 33 S. E. 2d 75 (1945).

36. *Edwards v. Edwards*, 2 Strob. Eq. 101 (S. C. 1848); *Glenn v. Jamison*, 48 S. C. 316, 26 S. E. 677 (1896); See 5 S. C. L. Q. 73 (1952).

37. See notes 33 and 34 *supra*.

38. Note 35 *supra*; see also notes 33 and 34 *supra*. Note that the estate conveyed by the granting clause in the illustrative deed is incom-

which held valid an executory interest preceded by words of inheritance in the granting clause, there is reason to believe that the court will hold that a fee defeasible estate, instead of a fee simple absolute estate, passes under a deed in the above form because the common law rule that no new estate can be created after a conveyance of fee simple absolute³⁹ does not apply to a case of a mere possibility of the divesting of the fee simple estate by reason of the occurrence of some future contingency. The grantee has, in spite of this divesting clause, an estate in fee simple and not a life estate.⁴⁰

6. *Grant*

Deed from A to B and his heirs.

Habendum

To B for life.

It is clear that a deed in this form conveys a fee simple absolute estate to the grantee.⁴¹ By this deed two separate and inconsistent estates have purportedly been conveyed. Therefore, because of the irreconcilable repugnancy between the two estates, the deed must be construed in accordance with the common law rule that the granting clause conveying the larger estate cannot be limited by the habendum clause reducing that estate.⁴²

plete; hence, resort must be had to the habendum to ascertain the grantor's intention. *Cf. Antley v. Antley*, 132 S. C. 306, 128 S. E. 31 (1925), where the court held void an executory interest after a grant of a fee simple conditional estate in the habendum, the granting clause containing no words of inheritance. However, the question with respect to the executory interest was purely academic, since the grantee had discharged the condition burdening her fee conditional estate by having had born unto her lawful bodily issue and having in her life time conveyed away the fee vested in her.

39. *Shealy v. Shealy*, note 18 *supra*. In *Keels v. Crowell*, 180 S. C. 63, 185 S. E. 39 (1936), the granting clause of the deed was said to be regular, which may be supposed to mean in accordance with the statutory form in South Carolina where the granting clause of the deed contains no words of inheritance. The habendum contained words of inheritance followed by a clause purporting to limit the grantee to a life estate with remainder to his issue, if he had any such issue surviving him at the time of his death, if not, then the remainder over. There it was held that a fee simple absolute estate was conveyed which the grantor could not thereafter cut down to a lesser estate.

40. *TIFFANY*, *op. cit. supra* note 28, § 980.

41. A deed like the one in the illustration was found in *Shealy v. Shealy*, note 18 *supra*, where the court held that a fee simple absolute estate was conveyed and that nothing in the deed thereafter could change or cut down the estate so conveyed.

42. *ELPHINSTONE*, *op. cit. supra* note 7, at 234.

7. *Grant*

Deed from A to B and his heirs, reservation of life estate to A.

Habendum

To B and his heirs.

It is settled in South Carolina that a deed in this form will pass a fee simple estate to B subject to a life estate reserved to A.⁴³ The most recent case involving a deed in this form is *Glasgow v. Glasgow*,⁴⁴ where the lower court held void the reservation of a life estate to the grantor and his wife as an attempt to cut down by superadded words the fee simple absolute granted in the granting clause, and also, because the wife had no former interest in the premises and was a stranger to the deed. On appeal the Supreme Court reversed the lower decision on both grounds and held that the deed conveyed a fee simple absolute subject to life estates reserved in the grantor and his wife. The court in that case quoted from 16 AM. JUR., *Deeds* § 305, which is as follows: "Anciently, exceptions seem to have been inserted in the premises of the deed just before the habendum clause. It is not, however, necessary that exceptions appear in that position. It is said that a reservation may be inserted in any part of the deed. The view has been taken that the position ordinarily occupied by the reddendum clause may be used to effect a reservation of an estate in land previously granted, or it may be used for excepting a severable thing from the premises granted, and that in whatever part the clause appears, the deed will be construed to give effect thereto, if possible, as well as to the granting clause. However, there is authority to the effect that where no exception is made in the granting clause of a deed, an exception in the habendum clause is ineffective." The court also quoted from 26 C. J. S., *Deeds* § 138 (a), in part as follows: "Where not repugnant to the grant, a reservation or exception may appear in any part of the deed. However, the reservation or exception must be to the grant, not to some other provision in the deed"

Although the courts recognize a reservation of a life estate to the grantor after a grant of the fee simple in the granting clause, it should be noted that apparently no case has con-

43. *Senterfeit v. Rogers*, 71 S. C. 259, 51 S. E. 142 (1904).

44. 221 S. C. 322, 70 S. E. 2d 432 (1952), noted in 4 S. C. L. Q. 561.

strued a deed in the following form: *Grant*: Deed from A to B and his heirs; *Habendum*: To B and his heirs, reserving a life estate in A.⁴⁵ If the court is ever called upon to construe such a deed, it may hold the reservation valid in light of the *Glasgow* case wherein it was stated that a reservation may be inserted in any part of the deed.

8. *Grant*

Deed from A to B and his heirs.

Habendum

To B and his heirs, reserving a right of way across the land conveyed and excepting the oil, gas and mineral rights.

There is no question about the right of a landowner to convey his land, reserving a right of way across the land⁴⁶ and excepting the oil, gas and mineral rights.⁴⁷ However, this general statement is subject to the well settled common law rule that where a full grant of the fee is made in a deed by the granting clause, any reservation or exception which has the effect of destroying the fee granted is void because of repugnancy.⁴⁸ Of course, if the reservation or exception is explicable without destroying the grant in whole or in part, there is no repugnancy. The question presented here, which apparently has not been decided in South Carolina, is whether the reservation and exception following the habendum are void because of repugnancy with the granting clause conveying the full fee. While at least one state⁴⁹ has answered this question in the affirmative, the general view today is that "the limiting of the general words of a grant by an exception is not regarded as rendering the exception void for repugnancy, regardless of the position in the instrument which the

45. In *Page v. Lewis*, 209 S. C. 212, 39 S. E. 2d 787 (1946), where the court set aside an identical deed on the grounds of undue influence, it was said by way of dictum that the deed conveyed an unqualified fee simple in both the premises and the habendum, which estate could not be cut down by subsequent language in the deed. The court probably will repudiate this dictum if called upon in the future to decide the question. See *McDougal v. Musgrave*, 46 W. Va. 509, 33 S. E. 281 (1899), where a reservation of a life estate placed after the habendum clause was held valid.

46. Annot., 28 A. L. R. 2d 243 (1953).

47. Annot., 37 A. L. R. 2d 1440 (1954).

48. For example, if there is a specific grant of 20 acres of land, the exception of one acre is void for repugnancy. But if a tract of land is conveyed in general terms, an exception of one or two acres is not repugnant. 5 AM. & ENG. ENCY. LAW, p. 456.

49. *Cole v. Collie*, 131 Ark. 103, 198 S. W. 710 (1917); *Mason v. Jackson*, 194 Ark. 236, 106 S. W. 2d 610, 111 A. L. R. 1071 (1931).

exception occupies with reference to the granting part of the deed. Ordinarily, the granting clause and the clause making the reservation or exception will be reconciled, and effect will be given to both."⁵⁰ The courts⁵¹ following this latter view have refused to apply the rule that the granting clause prevails over a repugnant habendum for the reason that at common law neither the reservation nor the exception constitute a part of the habendum, but are separate and independent clauses, whereas, the habendum, being only a definition of the premises, must yield in case of repugnancy because its terms are subsidiary to the premises.

At common law when anything is to be reserved out of the property granted, it is properly done by the clause of *reddendum* which commonly follows that of the *habendum*.⁵² Under the pure feudal system the office of the *reddendum* was employed to set forth the return to the grantor, consisting principally of military services.⁵³ Since the abolition of the feudal incidents of tenure, it is properly used to reserve an annual or periodical rent as compensation or return for the property granted.⁵⁴ It is also used to effect a reservation of some easement or servitude incapable of severance from the grant.⁵⁵ The *reddendum* is not regarded as being repugnant to the premises since it merely sets forth the terms of stipulation upon which the grant is made. Both clauses are deemed to be in equal dignity and virtue, thus being read together and allowed effect and operation.⁵⁶

At common law the exception is customarily and properly inserted in the premises just after the description of the thing granted, but it may be in any part of the deed.⁵⁷ It is a clause of a deed whereby the grantor excepts something out of that which he has before granted.⁵⁸ Accordingly, a portion of an estate is withheld from the operation of the grant. There is no legal repugnancy between the granting clause and the exception because they perform the same function, namely

50. 16 AM. JUR., *Deeds* § 303 (1938).

51. *McDougal v. Musgrave*, note 45 *supra*; *Freudenberger Oil Co. v. Simmons*, 75 W. Va. 337, 83 S. E. 995 (1914).

52. 1 DEVLIN, *op. cit. supra* note 22, § 221.

53. 2 BL. COMM. *299.

54. 2 MIN. INS. 630.

55. See note 52 *supra*.

56. *Freudenberger Oil Co. v. Simmons*, note 51 *supra*.

57. SHEP. TOUCH. 77.

58. See note 52 *supra*.

expression of primary intent.⁵⁹ Thus, it follows logically that the exception placed after the habendum clause in a deed is not void for repugnancy with the granting clause.

9. *Grant*

Deed from A to B and his heirs.

Habendum

To B and his heirs, imposing restrictive building covenant.

The validity of the building restriction placed after the habendum is apparently an open question in South Carolina since no cases have been found construing a deed in the above form. Since a restrictive building covenant may be in the form of a condition, or a covenant, or of a reservation or exception in the deed,⁶⁰ it will only be necessary to discuss the condition and covenant here, the reservation and exception having been previously discussed. At common law conditions, limitations and similar agreements properly appear after the habendum or reddendum, but may be in any other part of the deed and be equally effectual.⁶¹ However, the restriction must be imposed in a manner that is good as a condition or a covenant, but in no other form.⁶² According to one case,⁶³ a statement respecting the use or purpose for which the land was granted does not lessen the effect of the language in the granting clause in the absence of certain characteristic clauses or words which indicate that the vesting or continuance of the estate is to depend upon the condition. Moreover, conditions which are repugnant to the nature of the estate granted are not sustained.⁶⁴

10. *Grant*

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

Habendum

To B and his heirs in trust to convey to C and his heirs, reservation of life estate to A.

The deed here, known as a trust deed, derives its character

59. *Freudenberger Oil Co. v. Simmons*, note 51 *supra*.

60. 14 AM. JUR., *Covenants, Conditions and Restrictions* § 195 (1938).

61. MARTINDALE, CONVEYANCING § 121 (1882).

62. *Craig v. Wells*, 11 N. Y. 315 (1854).

63. *Allen v. Trustees of Great Neck Free Church*, 269 N. Y. S. 341 (1934).

64. Thus, an imposition of a condition in a deed that the grantee is not to mortgage or in any wise dispose of the land is void as an attempt

and qualities from rules adopted by courts of equity.⁶⁵ Although these rules conform as strictly as possible to the rules of common law which govern legal estates,⁶⁶ nevertheless, it has been held in South Carolina that a court of equity in its jurisdiction over trusts, not being bound by the technical rules of common law, will seek the intention of the grantor from the whole instrument.⁶⁷ Thus, the clauses of a deed may be transposed in order to give effect to the intention of the grantor.⁶⁸ No case has been found in South Carolina dealing with a deed as shown in the illustration, but since it is a trust deed, the court of equity may, if necessary, transpose the reservation in the habendum to the granting clause and thus effectuate the intention of the grantor by holding the reservation valid.

11. *Grant*

Deed from A to B and his
heirs.

Habendum

To B and the heirs of his
body.

Although no South Carolina cases involving a deed in the above form has been found, the issue under a construction of such a deed is whether a fee simple absolute estate or a fee simple conditional estate is created. The fee simple conditional estate was abolished in England in 1285 by the Statute *De Donis*⁶⁹ which replaced it with the fee tail. South Carolina never adopted the Statute *De Donis*⁷⁰ and therefore the state is in the awkward position of purporting to follow the law in existence in feudal England before the year 1285. In view of the fact that today there is no comprehensive authority on

to convey an estate in fee simple and deprive the owner of the incidents of ownership, no matter where it is placed in the deed. Sandford v. Sandford, note 2 *supra*.

65. 2 WASHBURN, REAL PROPERTY 489 (4th ed. 1876).

66. CO. LITT. 290 b, § 16.

67. *McMichael v. McMichael*, 51 S. C. 555, 29 S. E. 403 (1897); *Holden v. Melvin*, 106 S. C. 245, 91 S. E. 97 (1916).

68. *McCown v. King*, 23 S. C. 232 (1885), is the leading case holding that clauses of a deed may be transposed in order to arrive at the intention of the grantor. The cases of *Folk v. Graham*, 82 S. C. 66, 62 S. E. 1106 (1907); *Rhodes v. Black*, 170 S. C. 193, 170 S. E. 158 (1933); and *First Carolinas Joint Stock Land Bank of Cola. v. Ford*, 177 S. C. 40, 180 S. E. 562 (1935), each list the above statement as a rule of construction, but in none of them is the rule applied.

69. *De Donis Conditionalibus*, St. Westm. II, 13 Edw. I c. 1 (1285).

70. See, among other cases, *Murrell v. Mathews*, 2 Bay 397 (S. C. 1802); *Cruger v. Heyward*, 2 Des. 94 (S. C. 1802); *Warnock v. Wightman*, 1 Brevard 331 (S. C. 1804); *Cresswell v. Bank of Greenwood*, note 25 *supra*.

the fee simple conditional estate as it existed prior to the enactment of *De Donis*, the court will probably follow the common law authority with respect to the fee tail. According to the common law after the year 1285, "... although the grant in the premises was to A and his 'heirs,' the habendum might show that a fee tail only was created, this being regarded, not as abridging the estate granted, but as merely a qualification of the word 'heirs' as first used."⁷¹ There is, therefore, good reason to believe that the court will, if ever confronted with the problem, find that a fee simple conditional estate passes under a deed in the above form.

CONCLUSION

It appears from an examination of South Carolina cases that the Court still regards the rule that a repugnant habendum must be rejected as void as a technical rule of property. In construing deeds the court has said that intention is a term of art, signifying the meaning of the writing;⁷² but intention cannot override legal principles where words of settled import are used and contrary principles are encountered.⁷³ In such cases the intention will be conclusively presumed to accord with the established meanings of the words and to conform to the fixed rules of law. This is quite different from the modern view which holds that the rule that a repugnant habendum must be rejected as void is not a rule of property, but is merely a rule of construction which will be resorted to only where the court cannot determine which of the clauses was intended to be controlling. The South Carolina court has not adopted the modern view that the intention gathered from the entire deed must control, but confines itself to an examination of the two clauses, treating the question of the intent of the grantor as subordinate to the purpose of reconciliation. However, an examination of the South Carolina cases on this topic shows that the trend of the court is toward the modern view and that the court will attempt to uphold the conveyance in some form, rather than declare it void for repugnancy.

PATRICK H. GRAYSON, JR.

71. Tiffany, *op. cit. supra* note 28, § 980, n. 93.

72. Sandford v. Sandford, note 2 *supra*.

73. Cresswell v. Bank of Greenwood, note 25 *supra*.