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Ancient, Antiquated, & Archaic: South Carolina Fails to Embrace the Rule that a Grantor May Reserve an Easement in Favor of a Third Party

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ANCIENT, ANTIQUATED, & ARCHAIC: SOUTH CAROLINA FAILS TO EMBRACE THE RULE THAT A GRANTOR MAY RESERVE AN EASEMENT IN FAVOR OF A THIRD PARTY*

I. INTRODUCTION

South Carolina courts continue to adhere to traditional and antiquated ideas in the area of property law. In a recent case, *Springob v. Farrar*,[1] the South Carolina Court of Appeals held that an appurtenant easement in a deed of sale, reserving access to a well on an adjoining lot, was actually an easement in gross.[2] The court reached this conclusion, in part, based on archaic common-law requirements for appurtenant easements.[3] Although the court recognized that the cardinal rule in South Carolina is to effectuate the grantor's intent, it refused to do so in this case.[4] The court also failed to overturn the viability of the stranger to the deed rule, stating that "the question of the rule's viability is purely academic."[5]

In an articulate and well-reasoned dissent, Judge Anderson rejected the notion that the rule is purely academic and held that parole evidence should be admissible to effectuate the grantor's intent.[6] He further held that the common-law rule prohibiting the creation of an interest in a stranger to the deed was no

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* A previous version of this Note was published in error in Volume 51 of the SOUTH CAROLINA LAW REVIEW 1019 (2000). This Note supercedes that prior publication.

1. 334 S.C. 585, 514 S.E.2d 135 (Ct. App. 1999), *reh'g denied* (May 8, 1999), *and cert. denied* (Sept. 24, 1999).

2. *Id.* at 589, 514 S.E.2d at 138.

3. *Id.*

4. *Id.* at 594, 514 S.E.2d at 140.

5. *Id.* at 592, 514 S.E.2d at 139.

6. *Id.* at 593, 514 S.E.2d at 140.

longer viable.[7] In reaching this conclusion, Judge Anderson stated that "[t]he efficacy of the common-law rule [that a grantor cannot create an interest in a stranger to the deed] in modern property relationships is obsolete and lacking in any utilitarian value. Moreover, the rule is antiquated and in direct contradiction with our cardinal rule of construction, which is to ascertain and effectuate the intention of the parties."[8] Additionally Judge Anderson also noted that "[t]he efficacy of the majority's opinion is to place the law of easements in a continuum of confusion."[9]

This Note addresses the current easement law of South Carolina and advocates a change in ancient common-law principles. The logic of this Note is simple. It begins, in Part II, with a detailed review of the *Springob* case. Part III outlines the differences between, and the elements required for, an appurtenant easement verses an easement in gross. In light of these differences, Part IV analyzes the common-law rule preventing a grantor from reserving an easement in favor of a third party through a single instrument of conveyance. Finally, after establishing that there are problems with current South Carolina easement law, Part V of this Note suggests that the majority and the Supreme Court of South Carolina should have followed the cutting edge lead of other jurisdictions—as well as Judge Anderson's dissent—by overruling the antiquated common-law reservation rule.

II. *SPRINGOB V. FARRAR*

Dr. Narayan R. Shenoy owned an unimproved lot (Lot 14)[10] in Block H of the Spring Valley Subdivision in Columbia, South Carolina.[11] His wife, Sulochana N. Shenoy, owned the contiguous lot (Lot 13)[12] where the couple resided.[13] The couple titled Lot 13 in Mrs. Shenoy's name and Lot 14 in Dr. Shenoy's name.[14] Prior to May 1996, the Shenoys dug a well on Lot 14 and immediately connected the well to a new irrigation system located around their house on Lot 13.[15] The electric power for the well pump, located on Lot 14,

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7. *Springob*, 334 S.C. at 599, 514 S.E.2d at 143.

8. *Id.*

9. *Id.* at 593, 514 S.E.2d at 140.

10. The burdened property, Lot 14, is recorded in the R.M.C. Office for Richland County in Plat Book "U", at pages 125-26.

11. *Springob*, 334 S.C. at 587, 514 S.E.2d at 136.

12. The benefitted property, Lot 13, is recorded in the R.M.C. Office for Richland County in Plat Book "X", at page 3830.

13. *Springob*, 334 S.C. at 587, 514 S.E.2d at 136.

14. Final Brief for Appellant at 3, Springob v. Farrar, 334 S.C. 585, 514 S.E.2d 135 (Ct. App. 1999) (No. 96-CP-40-1174).

15. *Id.* Through the testimony of both Mr. Farrar and Mr. Springob, the record clearly indicates that the disputed well is located approximately three quarters of the way to the rear line of Lot 14 (the Farrar lot) and approximately 3.8 feet from the common boundary with Lot 13 (the Springob lot). Record at 40, 73, 91, 157 (Plaintiff's Exhibit 9).

was connected to the electric service for Lot 13, Mrs. Shenoy's lot.[16] The Shenoys continuously enjoyed the benefit of the well while they resided on Lot 13.[17]

On May 19, 1986, Dr. Shenoy deeded Lot 14 to L.G.B., Inc.[18] The Contract of Sale stated, *inter alia*:

> Seller to reserve perpetual easement for the continual operation of maintenance [sic] of water well which straddles property line & fence that extends over property line. (Seller shall acquire easement rights).[19]

The attorney, who prepared the deed of Lot 14 from Dr. Shenoy to L.G.B., Inc., knew that the contract reserved a perpetual easement for Dr. Shenoy to operate the well on Lot 14.[20] However, the attorney testified that he did not know that the well on Lot 14 was connected to the irrigation system on Lot 13.[21] Moreover, the attorney mistakenly believed that Lot 13 was titled to Dr. Shenoy and not to his wife.[22] The deed prepared by the attorney to convey Lot 14 from Dr. Shenoy to L.G.B., Inc., and reserve an easement for Dr. Shenoy states, in relevant part:

> There is reserved to the Grantor [an] easement from Lot Thirteen (13), Block H, onto the hereinabove described premises [Lot 14] for ingress and egress to and for the maintenance and operation of a well situated on said [L]ot

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16. Final Brief for Appellant at 3, *Springob* (No. 96-CP-40-1174).
17. *Id.* at 5.
18. *Id.* at 4.
19. *Id.*
20. *Id.*
21. *Id.*
22. Final Brief for Appellant at 4, Springob (No. 96-CP-40-1174). Mr. Cohn, the attorney retained by Dr. Shenoy to handle the closing transaction with L.G.B., Inc., testified Dr. Shenoy stated that he "wanted the right to be able to go onto Lot 14 and use the well that was on his lot, which was Lot 14." Record at 92-93. When asked on direct examination if Dr. Shenoy ever told him that Dr. Shenoy "owned or didn't own Lot 13," Cohn responded: "No. We never discussed Lot 13. I was not involved in Lot 13." Record at 93. Cohn later corroborated his earlier testimony:

> [Dr. Shenoy] contacted me about the easement to use and maintain the well. And I am not even sure that when he talked to me he used the word easement. He more likely than not just asked for the right to go to and use the well. He did not use the word easement.

Record at 94. Cohn further testified that it was his understanding that "Dr. Shenoy was selling Lot 14 for development but wanted to reserve the right to use the well to irrigate *what I assumed* was his property." Record at 95 (emphasis added). During cross examination, Cohn stated that when he prepared the deed he did not know if Dr. Shenoy owned Lot 13. Record at 100-01.

> Fourteen (14), Block H adjacent to the lot line between Lots [sic] Fourteen (14) and Lot Thirteen (13), Block H.[23]

That same day, L.G.B., Inc., immediately deeded Lot 14 to its partner, Irwin Marmostein, d/b/a Irbo Developers.[24] The same attorney who drafted the deed from Dr. Shenoy to L.G.B., Inc., preserved the easement, in relevant part, as follows:

> There is reserved to Narayan R. Shenoy an easement from Lot Thirteen (13), Block H, onto the hereinabove described premises [Lot 14] for ingress and egress to and for the maintenance and operation of a well situated on said Lot Fourteen (14) Block H, adjacent to the lot line between Lots Fourteen (14) and Lot Thirteen (13), Block H.[25]

Essentially, the deeds contained the same language, reserving an easement for the benefit of Lot 13 and burdening Lot 14.[26]

Subsequently, Irbo Developers constructed a house on Lot 14.[27] On August 1, 1988, Irbo sold Lot 14 to the Farrars.[28] The deed from Irbo Developers to the Farrars did not specifically mention an easement.[29] The deed stated that "[t]his conveyance is subject to all easements, rights, reservations, restrictions and covenants of record affecting said property."[30] When the Farrars purchased the lot, the closing attorney informed them about the existence of the easement on their property.[31]

During the next year, the Shenoys continued to live on Lot 13 while the Farrars lived on Lot 14.[32] The Shenoys maintained exclusive use and control of

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23. Springob v. Farrar, No. 96-CP-40-1174, at 3 (S.C. Cir. Ct. July 7, 1997) (order of special referee holding that the easement was in gross) (quoting the deed from Narayan R. Shenoy to L.G.B., Inc.).

24. *Id.* The Trial Record indicates that the Farrars were unsure about the exact relationship between L.G.B., Inc., Marmorstein, and Irbo Developers. Record at 53-54. However, Cohn testified that "L.G.B. was a builder. Bob Sternburg was L.G.B. He was a builder. Irbo . . . is Irwin Marmorstein . . . . They formed some sort of partnership that I am not really that familiar with, not privy to, by which Irbo put up some money—by which Marmorstein put up some money, Sternburg did the construction work, and when the property was sold they would divide the profits on some basis." Record at 98-99. Whatever the relationship between these parties was, it did not play a substantive role in either the testimony, the Master's reasoning, or the court's analysis.

25. *Springob*, No. 96-CP-40-1174, at 3 (quoting deed from L.G.B., Inc. to Irwin Marmorstein d/b/a Irbo Developers).

26. *Id.*

27. Final Brief for Appellant at 5, *Springob* (No. 96-CP-40-1174).

28. *Id.*

29. *Id.*

30. *Springob*, No. 96-CP-40-1174, at 3.

31. Final Brief for Appellant at 5, *Springob* (No. 96-CP-40-1174).

32. *Id.*

the well on Lot 14 to operate their sprinkler system on Lot 13.[33] The well was not connected to any sprinkler system on Lot 14, and the Farrars were aware that the well exclusively serviced the Shenoy's sprinkler system on Lot 13.[34]

After moving onto Lot 14, the Farrars installed a sprinkler system for the benefit of their lot.[35] They connected the sprinkler system on Lot 14 to the city water supply instead of drilling another well on their property.[36] As a result, the Farrars often incurred water bills as high as $200.00 per month to irrigate their yard during the summer.[37]

On May 19, 1989, Mrs. Shenoy sold Lot 13 to Kenneth and Ellen Perry.[38] While the Perrys owned Lot 13, they continued to use the well located on Lot 14 for the exclusive benefit of their irrigation system on Lot 13.[39] In early 1993, South Carolina Federal Savings Bank obtained title to Lot 13 in a foreclosure proceeding, and the house on Lot 13 remained vacant for at least four months.[40] During this time, the Farrars disconnected the sprinkler system and electrical service from Lot 13 and reconnected the well and electrical service to the sprinkler system located on their property (Lot 14).[41]

Mr. V. Les Springob subsequently purchased Lot 13 from the lender and moved onto the property.[42] At the time of purchase, Springob did not know about the easement, and the Farrars represented to Springob that they owned the well.[43] When Springob later learned about the easement from a copy of the L.G.B. deed, he demanded that the Farrars surrender the well for the benefit of

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33. *Id.*
34. *Id.*
35. *Id.* at 6.
36. *Id.*
37. Final Brief for Appellant at 5, *Springob* (No. 96-CP-40-1174).
38. *Springob*, No. 96-CP-40-1174, at 2.
39. Final Brief for Appellant at 6, *Springob* (No. 96-CP-40-1174).
40. *Id.* First Union National Bank of South Carolina, as successor by merger with South Carolina Federal Savings Bank, actually deeded Lot 13 to Mr. Springob. *Springob*, No. 96-CP-40-1174, at 2.
41. Final Brief for Appellant at 6, *Springob* (No. 96-CP-40-1174). Mr. Farrar testified that he "physically cut the plastic pipe" connecting the well to the sprinkler system on Lot 13 and left the disconnected pipe in place before connecting the well to the sprinkler system on his lot (Lot 14). Record at 48.
42. Final Brief for Appellant at 7, *Springob* (No. 96-CP-40-1174).
43. *Id.* Springob relied on the Farrar's representations about the well ownership because they were friends and business partners. *Id.* The Record indicates that when asked if he ever told Springob that there was an easement for the property, Mr. Farrar stated: "I think I did." Record at 50. However, Mr. Springob testified that the Farrars never mentioned to him that there was an easement for the property. On direct examination, Springob was asked: "Did they represent to you that the well was theirs?" Springob stated that "he relied on these representations because "[w]e weren't only friends, we were in business together." Record at 66-67. Interestingly, this entire dispute began after Springob had already begun construction for a new well on his property. When Dr. Shenoy happened to be making a house call in the neighborhood, he noticed the well drilling equipment at his former residence. Dr. Shenoy then notified Springob about the easement benefitting Lot 13. *See* Record at 67-70.

his property.[44] The Farrars refused.[45] After the dispute arose, Dr. Shenoy and his wife executed and recorded a "Corrective Title to Real Estate" and an "Easement Agreement" to clarify that Dr. Shenoy created an appurtenant easement in perpetuity for Lot 13 so the then current owner of Lot 13 would have access to the well on Lot 14.[46]

Springob eventually sued Farrar for "trespass and intentional interference with and obstruction of an easement."[47] At trial, the special referee found that because "Narayan R. Shenoy only reserved the easement to himself the easement was an 'Easement in gross' and a mere personal privilege to use the lands of the Grantee for the uses reserved and incapable of transfer to another."[48] Further, the special referee found that the easement was incapable of being classified as an "'appurtenant easement' as it must have one terminus on lands of the party reserving the easement" and "that South Carolina follows the Common Law rule that a reservation in a deed cannot create an easement in favor of a third party."[49] Springob's motion to reconsider was denied and an appeal followed.[50]

III. APPURTENANT EASEMENTS VS. EASEMENTS IN GROSS

The Supreme Court of South Carolina has held that "[t]he generally approved definition of an easement is . . . a liberty, privilege or advantage without profit, which the owner of one parcel of land may have in the lands of another . . . or a right or privilege in one man's estate for the advantage or convenience of the owner of another estate."[51] There are two types of easements in American and South Carolina Jurisprudence—the appurtenant easement and the easement in gross.[52] In *Fisher v. Fair*,[53] the South Carolina Supreme Court affirmed the ruling in *Whaley v. Stevens*[54] that a "right of way

44. Final Brief for Appellant at 7, *Springob* (No. 96-CP-40-1174).
45. *Id.*
46. *Id.*
47. *Springob*, 334 S.C. at 588, 514 S.E.2d at 137.
48. Record on Appeal at 7, *Springob* (No. 96-CP-40-1174) (decision of special referee).
49. *Id.* (citing Glasgow v. Glasgow, 221 S.C. 322, 70 S.E.2d 432 (1952)).
50. *Id.* at 11 (order of the special referee denying Springob's motion to reconsider).
51. Forest Land Co. v. Black, 216 S.C. 255, 261, 57 S.E.2d 420, 423 (1950). *See, e.g.*, Douglas v. Medical Investors, Inc., 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971) (defining an easement as a right in which one person has to use the land of another for a specific purpose without giving title to the land where the servitude is imposed and stating that "[a]n easement is therefore not an estate in lands in the usual sense"); Brasington v. Williams, 143 S.C. 223, 244, 141 S.E. 375, 382 (1927) (stating that an easement is incorporeal, imposed on corporeal property for its benefit, but it confers no right to participation in profits, and there must be two distinct tenements).
52. *See infra* note 55.
53. 34 S.C. 203, 13 S.E. 470 (1891).
54. 27 S.C. 549, 4 S.E. 145 (1887).

appurtenant is a right which inheres in the land to which it [is] appurtenant, is necessary to its enjoyment, and passes with the land, while a right of way in gross is a mere personal privilege, which dies with the person who may have acquired it."[55] More specifically, in *Steele v. Williams*,[56] the court noted:

> The important difference between a way appurtenant and one in gross . . . is that a way in gross is an individual right, non-transferable, and dying with the claimant. A way appurtenant, however, makes the estate to which it is attached a dominant estate and the one over which it runs a servient one, and this relation lasts as long as the estate lasts, and it inheres, not only in the dominant estate as a whole, but to every portion and subdivision thereof. It is a complete servitude which runs with the land. It would seem in principle, therefore, that before such an important right should be acquired by one close over another that there should be some necessity therefor, it should not be a mere matter of convenience. [The court further noted that] ways are said to be appendant or appurtenant when they are incident to an estate; one terminus being on the land of the party claiming. They must inhere in the land, concern the premises, and be *essentially necessary to their enjoyment.*[57]

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55. *Fisher*, 34 S.C. at 208, 13 S.E. at 472; *see* Safety Bldg. & Loan Co. v. Lyles, 131 S.C. 542, 546, 128 S.E. 724, 725 (1925) (affirming the holding in *Fisher* that easements must either be appurtenant or in gross); Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644, 646-47 (1944); *see* Ballington v. Paxton, 327 S.C. 372, 380, 488 S.E.2d 882, 887 (Ct. App. 1997) (affirming the holding in *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965), that an appendant or appurtenant easement must inhere in the land, concern the premises, have one terminus on the land of the party claiming it, and be essentially necessary to the enjoyment thereof). For a detailed analysis of the easement in gross, see Alan David Hegi, Note, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109 (1986).

56. 204 S.C. 124, 28 S.E.2d 644 (1944).

57. *Id.* at 130, 28 S.E.2d at 646-47 (quoting Whaley v. Stevens, 27 S.C. 549, 560, 4 S.E. 145, 147 (1887)); *see Sandy Island Corp.*, 246 S.C. at 420, 143 S.E.2d at 806. In *Sandy Island Corp.*, the court stated:

> An appendant or appurtenant easement must inhere in the land, concern the premises, have one terminus on the land of the party claiming it, and be essentially necessary to the enjoyment thereof. It attaches to, and passes with, the dominant tenement as an appurtenance thereof. An easement, or right-of-way, in gross is a mere personal privilege to the owner of the land and incapable of transfer by him, and is not, therefore assignable or inheritable.

Id. at 420, 143 S.E.2d at 803.

Generally speaking, an appurtenant easement attaches to a certain parcel of land for the benefit of the "possessor of the land and his use of the land."[58] The benefitted estate is known as the "dominant tenement" and the burdened estate is the "servient tenement."[59] Conversely, an easement in gross is a benefit personal to its holder and is not tied to any particular parcel.[60]

South Carolina courts adhere strictly to the requirements for an appurtenant easement. While a majority of jurisdictions hold that an appurtenant easement "must inhere in the land, [and touch and] concern the premises,"[61] South Carolina adds the additional requirements that an appurtenant easement "be *essentially necessary* to the enjoyment thereof" and "have one terminus on the land of the party claiming it."[62] Without the requirement of a terminus on the dominant estate or the "essentially necessary" character, an appurtenant easement in majority jurisdictions is considered an easement in gross under South Carolina law.[63] Also, in South Carolina, unless an easement has all of the

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58. RESTATEMENT OF PROPERTY § 453 (1944); 25 AM JUR. 2D *Easements and Licenses* §10 (1996).

59. 12 S.C. JURIS. *Easements* § 2 (1992).

60. *Id.* § 3(c). Another type of easement, the "quasi easement," is an easement-like right that arises when two tracts of land are owned by the same person. Because a landowner cannot have an easement over his or her own property, the notion of a quasi easement arises. A quasi easement may develop into an easement appurtenant or easement in gross if the landowner sells one of the tracts. *See* HERBERT THORNDIKE TIFFANY, A TREATISE ON THE MODERN LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND § 540 (1940).

61. Universal Motor Fuels, Inc. v. Johnston, 917 P.2d 877, 881 (Kan. 1996); *see* Smith v. Dennedy, 194 N.W. 998, 999 (Mich. 1923) (quoting and adopting the language in C.J.S. that and appurtenant easement is "an incorporeal right . . . [that] inhere[s] in the land [and] concern[s] the premises"); 7 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 60.02(f)(1) (David A. Thomas ed., 1994).

62. Brasington v. Williams, 143 S.C. 223, 245, 141 S.E. 375, 382 (1927) (emphasis added). In *Whaley v. Stevens*, 21 S.C. 221, 224 (1883), Mr. Justice McIver was the first to state that an appurtenant easement must be "essentially necessary" to the land in which it inheres. In the later case of *Whaley v. Stevens*, 27 S.C. 549, 560, 4 S.E. 145, 147 (1887), the court adopted the essentially necessary test imposed by Judge McIver. The later *Whaley* court stated that the essentially necessary test "seems to be the law" and cited to "Washb. Easem. c. 11, § 5, p. 217." *Id.* Professor Washburn uses the same language as quoted by the court in the later *Whaley* case. EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES ch. II § 1, at 257 (4th ed. 1885). More specifically, Professor Washburn cites *Dennis v. Wilson*, 107 Mass. 591 (1871), for the proposition that an appurtenant easement must be "essentially necessary" to the dominant estate. WASHBURN, *supra*. Ironically, the *Dennis* case does not use the word "essentially" or any variation thereof in the entire opinion.

63. An appurtenant easement remains with the property whenever title to either the servient estate or the dominant estate is transferred. *Sandy Island Corp.*, 246 S.C. at 420, 143 S.E.2d at 806. South Carolina also follows the rule that an easement in gross is usually not transferrable unless it is of a commercial nature or the parties clearly intended for the easement in gross to be assignable. *Id.* at 422, 143 S.E.2d at 808 (adopting the holding in *Miller v. Lutheran Conference & Camp Ass'n*, 200 A. 646, 651 (Pa. 1938), that "easements in gross designed and used for commercial exploitation, are assignable where in the deed creating such it was the intention of the parties to make them assignable"); *see* 12 S.C. JURIS. *Easements* § 3(d) (1992).

essential elements of an appurtenant easement, the courts will characterize the easement as an easement in gross.[64]

The facts of *Springob* indicate that the appurtenant easement arguably met the South Carolina tests so that its benefit remained with the dominant estate—Lot 13—upon transfer of ownership.[65] The word "inhere" means "[t]o exist in and inseparable from something else; to stick fast."[66] As such, the easement for the well clearly *inhered* in the land within the meaning of this definition. Additionally, whether the easement was essentially necessary for the enjoyment of Lot 13 (the dominant estate) is debatable. In 1796, the Constitutional Court of Appeals of South Carolina was one of the first courts to use the phrase "essentially necessary" in *Shoolbred v. Charleston*.[67] Mrs. Shoolbred inherited property at the end of Meeting Street in downtown Charleston.[68] The state legislature determined that Meeting Street needed to be extended and that several buildings on her property would have to be demolished to accommodate the extension.[69] Although the controversy surrounded which government entity should pay for the proposed expansion, the court stated in dicta that "the demolition of those houses was *essentially necessary* for the purpose of [expanding Meeting Street]."[70] The *Shoolbred*

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64. Tupper v. Dorchester County, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997); 12 S.C. JURIS. *Easements* § 3(c) (1992). A majority of jurisdictions, however, follow the rule that "where the documentation or surrounding circumstances do not make clear the intent of the parties, courts presume that the easement is appurtenant." THOMPSON ON REAL PROPERTY, *supra* note 61, § 60.02(f)(5); *see also* Lester Coal Corp. v. Lester, 122 S.E.2d 901, 904 (Va. 1961) (holding that an easement will be appurtenant unless the parties clearly intended for it to be in gross); Goetz v. Knoxville Power & Light Co., 290 S.W. 409, 414 (Tenn. 1926) (stating that appurtenant easements are favored over easements in gross).

65. *See* Carolina Land Co. v. Bland, 265 S.C. 98, 106, 217 S.E.2d 16, 20 (1975) (affirming the holding in *Sandy Island Corp.*, 246 S.C. at 423, 143 S.E.2d at 808, that an appurtenant easement passes with the dominant estate even if the conveyance of the dominant estate does not expressly mention it).

66. BLACK'S LAW DICTIONARY 782 (6th ed. 1990); *see also* Majestic Theater Co. v. Lutz, 275 S.W. 16, 20 (Ky. Ct. App. 1925) (defining the word inhere to mean "existing in and inseparable from something else; sticking fast); Columbia Water Power Co. v. Campbell, 75 S.C. 34, 42, 54 S.E. 833, 835 (1906) (stating that a specific tax exemption, "instead of being a right investing only in the appellant, is a right that inheres in the property to which it applies and follows it into the hands of whomever may become its owner").

67. 2 S.C.L. 63 (1796).

68. *Id.* at 63.

69. *Id.* at 64. Interestingly, the court stated that after the war, "when all the fortifications in the rear of the city became useless . . . it became necessary, for the accommodation and convenience of the citizens, to open Meeting-street from the point where it formerly ended, as it would then form one of the greatest and most convenient communications between the town and country." *Id.*

70. *Id.* at 66 (emphasis added); *see also* Safety Bldg. & Loan Co. v. Lyles, 131 S.C. 542, 128 S.E. 724 (1925) (holding that a circular roadway was not *essentially necessary* for the enjoyment of the dominant estate because it could still be serviced by streets intersecting at right angles instead of a circle).

case merely suggests the meaning of essentially necessary in South Carolina because the courts have never precisely defined the phrase, despite their frequent use of it. As such, it is possible that the well was essentially necessary in this case for the benefit of Lot 13. Moreover, the sprinkler system (arguably a part of the dominant estate) had a terminus[71] on the dominant estate and thus satisfied this element of the South Carolina test.

Peculiarly, at least one South Carolina case states that easements in gross are not to be favored by the courts and an easement will never be presumed as personal when it may fairly be construed as appurtenant to another estate.[72] Additionally, the deed from Dr. Shenoy to L.G.B., Inc., reserved to the "Grantor" an easement from Lot 13 onto Lot 14.[73] Because Dr. Shenoy did not own Lot 13, which was titled exclusively in his wife's name, he had access to the easement only by virtue of his right to use Lot 13.[74] Since the right of ownership, or access, to Lot 13 was a prerequisite to accessing the easement to the well on Lot 14 and because Dr. Shenoy did not have a personal right of access to Lot 14, other than from Lot 13, the easement truly seems to inhere in Lot 13, concern Lot 13, and add to the enjoyment of Lot 13.[75] Once Dr. and Mrs. Shenoy sold Lot 13, although Dr. Shenoy would still own the easement if it were in gross,[76] he would have no further use for it. As such the easement, but for the essentially necessary test and the language which granted it only to Dr. Shenoy, seems really to be appurtenant to Lot 13 and should have passed with the conveyance of this property.[77]

The additional South Carolina common-law requirements present numerous practical problems for both property owners and attorneys in this state. The depth of these potential problems is best illustrated by comparing South Carolina to other jurisdictions. In *Shingleton v. North Carolina*[78] the North Carolina Supreme Court held that an appurtenant easement is one "which is attached to and passes with the dominant tenement as an appurtenance thereof; it is owned in connection with other real estate and as an incident to

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71. A "terminus" is "[t]he final point; the end." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1399 (3d ed. 1993). Although it can be argued that the sprinkler system did not have a single terminus on the dominant estate within the historical meaning of the word, an analogy can be drawn in this case to the many ends (sprinkler heads) of the sprinkler system on the dominant estate.

72. Smith v. Comm'r of Pub. Works, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994); 25 AM. JUR. 2D *Easements and Licenses* § 12 (1996) ("If doubt exists as to its real nature, an easement is presumed to be appurtenant and not in gross.").

73. Plaintiff's Pretrial Brief at 5, Springob v. Farrar, 334 S.C. 585, 514 S.E.2d 135 (Ct. App. 1999) (No. 96-CP-40-1174).

74. *Id.*

75. *Id.*

76. However, it is also possible that a court would consider Dr. Shenoy's easement in gross to have terminated if Lot 13 were sold.

77. Plaintiff's Pretrial Brief at 5, *Springob* (No. 96-CP-40-1174).

78. 133 S.E.2d 183 (N.C. 1963).

such ownership."[79] Mr. Shingleton sued North Carolina over the right to use certain roadways in the Holly Shelter Wildlife Area managed by the North Carolina Wildlife Resources Commission.[80] More specifically, Shingleton and the State settled a previous lawsuit whereby each party deeded the other a portion of land in and around the Wildlife Area.[81] The quitclaim deed Shingleton received from the State contained the following easement provision: "[the state of North Carolina] reserves . . . the right to maintain and use the roads existing on [the land] . . . Shingleton is hereby granted the right to use the roads existing on other lands of the [State] for the purpose of ingress and egress."[82] When Shingleton's brother attempted to use the roads, the State posted an armed guard at the entrance so as to "keep out all persons except [Shingleton]."[83] Shingleton sued, claiming the land he received was benefitted by an appurtenant easement burdening the State's property.[84] At trial, the State contended that the easement was in gross and, therefore, could only be used by Shingleton personally.[85] In holding that the easement was appurtenant, the court defined an easement appurtenant to be one that "is incapable of existence apart from the particular land to which it is annexed, it exists only if the same person has title to the easement and the dominant estate; it must bear some relation to the use of the dominant estate, and it must agree in nature and quality to the thing to which it is claimed to be appurtenant."[86] The North Carolina courts have since reaffirmed this definition of an appurtenant easement.[87] Numerous other jurisdictions have adopted similar approaches and have avoided the additional common-law requirements imposed under current South Carolina law.[88]

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79. *Id.* at 185.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Shingleton*, 133 S.E.2d 183 (N.C. 1963).
85. *Id.*
86. *Id.* In ruling that the easement was appurtenant, the court also stated that "the situation of the property and the surrounding circumstances indicates beyond question that an easement appurtenant was intended." *Id.* at 187.
87. Yount v. Lowe, 215 S.E.2d 563, 567 (N.C. 1975) (holding that an appurtenant easement is "an incorporeal right attached to the land and incapable of existence separate and apart from the particular land to which it is annexed"); Shear v. Stevens Bldg. Co., 418 S.E.2d 841, 846 (N.C. Ct. App. 1992) (stating that "[a]n appurtenant easement is an easement created for the purpose of benefitting particular land [and that it] attaches to, passes with and is an incident of ownership of the particular land"); *see* Gibbs v. Wright, 195 S.E.2d 40, 42-43 (N.C. Ct. App. 1973).
88. *See In re* Bende, 152 B.R. 677, 682 (Bankr. S.D. Fla. 1993) (holding that an easement appurtenant is incapable of existence separate and apart from a particular piece of land and that an appurtenant easement must bear some relationship to the use of the dominant estate and agree in nature and quality with the thing to which it is claimed to be appurtenant); Conrad v. Strickler, 211 S.E.2d 248, 253 (Va. 1975) (stating that before an appurtenant easement can exist, there must

If the easement had met the two South Carolina tests (which the court said it did not), then the Farrars would have to abide by the easement until it terminated. Although the Farrars could have argued that First Union abandoned the easement before it deeded Lot 13 to Springob, the defendants would have the burden of proof to show any abandonment by "clear and unequivocable [sic] evidence."[89] The mere non-use of an easement for a period of time does not amount to an abandonment.[90] Instead, there must be some other action by the dominant estate owner which manifests either a "present intention to relinquish the easement or purpose inconsistent [with the easement's further existence]."[91] In this case, First Union did not own the property for a period of time sufficient to raise an inference of abandonment, and the Farrars did not produce evidence sufficient to suggest that First Union relinquished the easement to them.[92]

IV. ABOLISHING THE STRANGER TO THE DEED RULE

Another problem with asserting that the easement was to benefit Lot 13 (and whomever was its then owner) rather than Dr. Shenoy, the grantor of the deed conveying Lot 14, is the archaic rule that at common law, a property owner could not reserve a property interest in favor of a stranger to the title.[93] Under this common-law rule, Dr. Shenoy would first have to grant his wife a separate deed of easement rather than reserving an easement for her in the deed he gave to L.G.B., Inc. The rule originally developed based on feudal considerations and early common-law courts upheld the rule because they "mistrusted and wished to limit conveyance by deed as a substitute for livery by seisin."[94] However, the trend in modern American jurisprudence is to allow a grantor to create a reservation or exception to a stranger to the deed. In the leading case, *Willard v. First Church of Christ, Scientist*,[95] the California Supreme Court rejected the common-law rule's mistrust foundation because "it

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be both dominant and servient tracts of land); Holland v. Flanagan, 81 S.E.2d 908, 912 (W. Va. 1954) (adopting the BLACK'S LAW DICTIONARY definition that an appurtenant easement is an "'incorporeal right' which is attached to and belongs with some greater and superior right or something annexed to another thing more worthy and which passes as incident to it and is incapable of existence separate and apart from the particular land to which it is annexed"); Town of Moorcroft v. Lang, 779 P.2d 1180, 1184 (Wyo. 1989) (professing the Wyoming rule that an appurtenant easement cannot exist separate from the land to which it is annexed).

89. Carolina Land Co. v. Bland, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975).

90. *Id.*

91. *Id.*

92. Plaintiff's Pretrial Brief at 5, *Springob* (No. 96-CP-40-1174). Additionally, the record does not indicate that either First Union or the Farrars recorded a document showing any intent to abandon or transfer the easement.

93. Willard v. First Church of Christ, Scientist, Pacifica, 498 P.2d 987, 989 (Cal. 1972).

94. *Id.*

95. *Id.* at 989.

is clearly an inapposite feudal shackle today."[96] In that case, the court also rejected the rule because it frustrated the grantor's intent.[97] More specifically, the court noted that the rule was unfair and produced an inequitable result because "the original grantee has presumably paid a reduced price for title to the encumbered property."[98] After balancing both equitable and policy considerations, the *Willard* court overruled the antiquated common-law rule, concluding that the grantor's intent should be effectuated.[99]

The *Willard* court relied on two previous decisions which favored effectuating the grantor's intent by establishing an interest in favor of a third party rather than following the archaic common-law rule. The Oregon Supreme Court held in *Garza v. Grayson*[100] that the grantor's intent to reserve an interest in a third party should not be defeated merely because the third party was not a party to the deed.[101] In that case, the defendants attempted to prevent a sewer line easement from burdening their property.[102] Ultimately, the court stated that the grantor intended:

> [T]o impose the servitude upon defendants' land for the benefit of the land previously conveyed to plaintiffs. The grantor himself testified that this was his purpose. Considering the location of the easement in relation to the surrounding land, it is difficult to conceive of the easement as having any other purpose than to benefit the plaintiffs' land.[103]

A substantial parallel can be drawn between the facts in *Willard* and the facts in *Springob*. Given the close proximity and function of the easement that Dr. Shenoy created, together with the contract of sale and his testimony in the form of a "Corrective Title to Real Estate" and "Easement Agreement," the cases are virtually identical.[104]

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96. *Id.* For an interesting commentary on how the heroic California Supreme Court "comes to the rescue" and overrules the "villain" of frustration, see June Carbone, *Dukeminier and Krier as Narrative: The Stories We Tell in the First Year Property Course*, 32 HOUS. L. REV. 723, 730 (1995).

97. *Willard*, 498 P.2d at 989.

98. *Id.* By allowing an easement to be reserved to a stranger to the deed, the *Willard* court arguably made it easier for future purchasers to know what reservations lie in their chain of title.

99. *Id.* at 991.

100. 467 P.2d 960 (Or. 1970).

101. *Id.* at 961-62.

102. *Id.* at 961.

103. *Id.* at 962.

104. Because the deed mistakenly showed that Dr. Shenoy owned both lots, documents were later executed to memorialize Dr. Shenoy's intent to create an appurtenant easement. Record at 95, Springob v. Farrar, 334 S.C. 585, 514 S.E.2d 135 (Ct. App. 1999).

The Kentucky Supreme Court also had "no hesitancy in abandoning this archaic and technical rule" in *Townsend v. Cable*.[105] In *Townsend* the parties were seeking to quiet title to a one-half interest in oil and gas mineral rights in a tract of land.[106] The appellee, Dorsie Cable, acquired title to the tract from Crit Cable.[107] The deed Dorsie received from Crit did not mention a previous conveyance for oil and gas mineral rights.[108] Before conveying the tract to Dorsie, Crit acquired title to the property from Fielden Townsend.[109] In the deed Fielden gave to Crit, a separate paragraph followed the description of the land conveyed.[110] More specifically, the deed contained a reservation clause to one Jesse Townsend for use of one-half of the oil and gas mineral rights located under the property.[111] Jesse subsequently deeded this one-half interest in the oil and gas mineral rights to R.R. Adams.[112] Adams then deeded the one-half interest to Crit, who was owner of the surface rights and the other one-half of the oil and gas mineral rights, thereby vesting him with complete ownership of the property and all rights therein.[113]

The appellants were the intestate heirs of Fielden Townsend.[114] They claimed that the paragraph in the deed purporting to create an interest in Jesse Townsend was ineffective to convey a right or interest in the property because he was a stranger to the deed.[115] As such, the heirs believed that they were entitled to a one-half interest in the oil and gas mineral rights.[116]

In overruling the common-law, the court affirmed that Kentucky would no longer distinguish between a "conveyance" to a third party and a "reservation in his favor" because the distinction had "long outlived the reason for its existence in the first place."[117] In short, the court decided to respect the grantor's intent, and held that minor technicalities in the deed were irrelevant where the grantor's intention was clear.[118]

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105. 378 S.W.2d 806, 808 (Ky. 1964).
106. *Id.* at 806.
107. *Id.* at 806-07.
108. *Id.*
109. *Id.* at 807.
110. *Townsend*, 378 S.W.2d at 807 (Ky. 1964).
111. *Id.* The reservation clause stated: "There is reserved out of the foregoing tract of land for the use and benefit soly [sic] of Jesse Townsend one half interest of all the oil and gas to dispose of at his will." *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Townsend*, 378 S.W.2d at 807 (Ky. 1964).
117. *Id.* (quoting Combs v. Hounshell, 347 S.W.2d 550, 555 (Ky. Ct. App. 1961)).
118. *Id.*; *see also* Long v. Madison Coal Corp., 125 F. Supp. 937, 940 (W.D. Ky. 1954) (stating that technicalities should be disregarded where the intention of the grantor is clear); Hogan v. Blakney, 251 P.2d 209, 213 (Idaho 1952) (holding that deed technicalities should be disregarded and the real intention of the grantor should be effectuated); Forrest v. Jones, 226 S.W.2d 10, 11 (Ky. Ct. App. 1950) (implying that the old rule may be inconsistent with the basic

Subsequent to these leading cases, a number of other jurisdictions overruled the antique common-law rule as well.[119] Curiously, only a small number of courts that addressed the issue have declined to overrule the common-law rule, favoring instead the principles of stare decisis.[120] As these courts noted, relying on the common-law rule only serves to frustrate the parties' intentions.[121]

The leading case in South Carolina, *Glasgow v. Glasgow*,[122] carved out an exception to the common-law rule.[123] In that case, a single instrument of conveyance attempted to create a fee estate in the grantor's son while preserving a life estate in the grantor's wife.[124] In concluding that the wife was a stranger to the deed, the trial court held that although the grantor intended to create two separate property interests through a single instrument of conveyance, the court could not effectuate his intent because it violated the common-law rule.[125] The South Carolina Supreme Court reversed the trial court

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principal of deed construction which is to determine the intention of the grantor); Wilkerson v. Young, 147 S.W.2d 53, 55 (Ky. Ct. App. 1941) (adopting the rule that the "intention of the parties and substance, rather than form, is the controlling element in the construction of deeds").

119. More recent cases include *Aszmus v. Nelson*, 743 P.2d 377 (Ala. 1987) (rejecting justification for the rule and holding that a deed can create an easement in favor of a third party); *Katkish v. Pearce*, 490 A.2d 626 (D.C. App. 1985) (holding a single instrument of conveyance can create a new estate in one person while reserving an easement in another and following the RESTATEMENT OF PROPERTY § 472 (1944) which stated that "[b]y a single instrument of conveyance, there may be created an estate in land in one person and an easement in another"); *Nelson v. Parker*, 687 N.E.2d 187, 189 (Ind. 1997) (rejecting the common-law rule because it is "a trap for the unwary and if enforced serves only to frustrate the intent of the grantor"); *Enderle v. Sharman*, 422 N.E.2d 686 (Ind. App. 1981) (holding a grantor cannot reserve a life estate to a stranger to the deed but can convey an easement by reservation to a party who is a stranger to the deed); *Medhus v. Dutter*, 603 P.2d 669 (Mont. 1979) (recognizing the intent of the grantor, as evidenced by the grantor's testimony, to create an easement in favor of a stranger to the deed will prevail over the common-law rule); *Malloy v. Boettcher*, 334 N.W.2d 8 (N.D. 1983) (effectuating the intent of the grantor to create a property interest in a stranger to the deed should prevail over the common-law rule); *Borough of Wildwood Crest v. Smith*, 509 A.2d 252 (N.J. 1986) (adhering to the RESTATEMENT OF PROPERTY rule that an easement can be created to a stranger to the deed); *Zurn Indus., Inc. v. Lawyers Title Ins. Corp.*, 514 N.E.2d 447 (Ohio App. 1986) (following the more enlightened approach that a grantor can create an easement in one party and an estate in land in another party by a single instrument of conveyance); *Simpson v. Kistler Inv. Co.*, 713 P.2d 751, 756 (Wyo. 1986) (repeating the rule and stating that the court was "[j]oining the enlightened approach that intent should control and that archaic and inappropriate feudalistic principles should no longer apply").

120. *See* Tripp v. Huff, 606 A.2d 792 (Me. 1992) (relying on the principals of stare decisis as an excuse for not overruling the common-law rule); Estate of Thomson v. Wade, 509 N.E.2d 309 (N.Y. 1987) (declining to follow the *Willard* court and affirming the common-law rule that a property interest cannot be reserved in a stranger to the deed); Pitman v. Sweeney, 661 P.2d 153 (Wash. App. 1983) (holding that an easement cannot be created in a stranger to the deed).

121. *See* cases cited *supra* note 120.

122. 221 S.C. 322, 70 S.E.2d 432 (1952).

123. *Id.* at 331, 70 S.E.2d at 435.

124. *Id.* at 324-25, 70 S.E.2d at 432-33.

125. *Id.* at 325, 70 S.E.2d at 433.

and held that because the wife "had an inchoate right of dower in the land, a homestead right and an expectancy of inheritance from her husband if she survived him, . . . [she was] not a stranger to the title."[126] In short, the court carved out an exception to the common-law rule by allowing a grantor to reserve an interest in the grantor's spouse even if the spouse is a stranger to the deed.

In *Springob v. Farrar*,[127] a strong argument exists that, at the very least, Dr. Shenoy created this reservation for his wife and her property. However, even if this were his intent, the court's interpretation of an easement in gross would have ended when Mrs. Shenoy sold her lot. As such, the exception in *Glasgow* does not parallel the real issues in this case. Nevertheless, it is a concrete example of how South Carolina has previously embraced the notion of allowing a grantor to reserve an easement in favor of a third party.

V. ANALYSIS AND CONCLUSION

Common sense suggests Dr. Shenoy clearly did not intend for the easement to be personal to himself. Rather, he intended the easement to burden Lot 14 for the benefit of Lot 13 in perpetuity. Dr. Shenoy's intent is the only plausible explanation for his actions. After all, although he did not technically "own" Lot 13, Dr. Shenoy did stand to benefit from the added value which the easement undoubtedly vested in that property. Some critics may argue that the easement was in gross because Dr. Shenoy personally benefitted from it as a resident of Lot 13. However, considering the lawyer's mistaken belief that Dr. Shenoy owned both lots together with Dr. Shenoy's later execution of the corrective instruments, it is obvious that he intended for the easement to be appurtenant to Lot 13.[128]

The special referee held that "South Carolina follows the Common Law rule that a reservation in a deed cannot create an easement in favor of a third party."[129] In reaching this conclusion, the special referee erred by finding that the grantor did not attempt to reserve an easement in anyone but himself.[130] By affirming this judgment, the majority in *Springob* further confounded the error because the "Corrective Title to Real Estate" and "Easement Agreement" distinctly prove that Dr. Shenoy intended to create an appurtenant easement in favor of a third party.

In South Carolina, the "cardinal rule of construction [of a deed] is to ascertain and effectuate the intention of the parties, unless that intention

126. *Id.* at 331, 70 S.E.2d at 435.

127. 334 S.C. 585, 514 S.E.2d 135 (Ct. App. 1999).

128. The Record directly support this conclusion. *See supra* note 22.

129. Springob v. Farrar, No. 96-CP-40-1174, at 4 (S.C. Cir. Ct. July 7, 1997) (order of special referee holding that the easement was in gross and did not vest an interest in a third party).

130. *Id.*

contravenes some well settled rule of law or public policy."[131] Given this fact, the inconsistencies and ambiguities in South Carolina's easement law cannot be overstated. Favoring an antiquated common-law rule which serves no purpose today only frustrates the grantor's intent. *Springob* presented the majority and the South Carolina Supreme Court with a clear opportunity to clarify and update the law. However, they chose not to do so, leaving the state of easement law riddled with ancient and archaic common-law requirements.

By overruling the common law, states like California and Kentucky made it easier for potential buyers conducting a title search to find encumbrances on a specific tract of land. Under the common-law rule, if a grantor wanted to reserve an easement in favor of a third party the grantor had to execute a deed of easement to that third person. Next, the grantor had to execute a deed to the grantee. By abandoning the inefficient common-law rule and allowing a grantor to reserve an easement in favor of a third party to the deed, transaction costs associated with document preparation, title searching, and recording are also reduced.[132]

Considering these facts, Judge Anderson's belief that a grantor should be able to reserve an easement in favor of a stranger to the title is clearly the best approach. South Carolina had no problem finding that an interest may be reserved in a grantor's spouse who is a stranger to the deed in *Glasgow*. The rule serves no modern purpose except to frustrate the grantor's intent, which is the very result that the law tries to prevent. When taken as a whole, the facts in *Springob* presented an excellent opportunity for the courts to clarify the easement law of South Carolina. By failing to overrule the common law, the courts have ignored the ultimate consideration when construing deeds: to effectuate the intent of the grantor!

John E. Lansche, Jr.

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131. Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 420, 143 S.E.2d 803, 806 (1965); *see* Wayburn v. Smith, 270 S.C. 38, 239 S.E.2d 890 (1977); Lake View Acres Dev. Co. v. Tindal, 306 S.C. 477, 412 S.E.2d 457 (Ct. App. 1991); Wall v. Huguenin, 301 S.C. 94, 390 S.E.2d 372 (Ct. App. 1990), *rev'd on other grounds*, 305 S.C. 100, 406 S.E.2d 347 (1991); Batesburg-Leesville Sch. Dist. Number 3 v. Tarrant, 293 S.C. 442, 361 S.E.2d 343 (Ct. App. 1987); *see also* Byars v. Cherokee County, 237 S.C. 548, 118 S.E.2d 324 (1961); Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953). It is also well established that "the character of an express easement is determined by the nature of the right and the *intention* of the parties creating it." Smith v. Comm'r of Pub. Works, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994) (emphasis added). *See generally* 25 AM. JUR. 2D *Easements and Licenses* § 12 (1996) (stating that the parties will determine what constitutes an express easement).

132. Eliminating the common-law rule also makes it slightly easier to conduct title searches and precisely locate all encumbrances.

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