Reservations in Favor of Strangers to the Title: California Abandons the Common Law Rule

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RESERVATIONS IN FAVOR OF STRANGERS TO THE TITLE: CALIFORNIA ABANDONS THE COMMON LAW RULE

A common practice in modern conveyancing is for A to grant Blackacre to B, reserving or excepting an interest in Blackacre for himself. However a problem develops when A attempts to reserve an interest in favor of a third person. The common law opposed reservations in favor of third persons. The common law rule, which grew out of feudal considerations, can be stated as follows:

No interest or estate in land may be created in favor of a stranger to the title by means of a reservation or exception in the conveyance thereof.

California has traditionally recognized this common law rule prohibiting reservations to strangers, although this recognition has been in name only, since California has frequently circumvented the rule when its application would lead to an undesirable result. In Willard v. First Church of Christ, Scientist, decided in July, 1972, the California Supreme Court expressly abandoned the common law rule, thereby following the lead of Kentucky and Oregon. Numerous commentators have criticized the rule, and the Restatement of Prop-

1. 6 R. Powell, Real Property § 892 (P. Rohan ed. 1972) [hereinafter cited as Powell]; 6 G. Thompson, Real Property § 3090 (repl. 1962) [hereinafter cited as Thompson]. See generally Bigelow & Madden, Exception and Reservations of Easements, 38 Harv. L. Rev. 180 (1924).

2. Powell, supra note 1, at § 892; 1 Shepp. Touch 80 (7th ed. 1820); Thompson, supra note 1, at § 3091; accord, Eldridge v. See Yup Co., 17 Cal. 44 (1860); Hornbeck v. Westbrook, 9 Johns. 73 (N.Y. 1812). See also Annot., 88 A.L.R.2d 1199 (1963).

3. Harris, Reservations in Favor of Strangers to the Title, 6 Okla. L. Rev. 127, 131 (1953) [hereinafter cited as Harris]; 23 A.M. Jur.2d Deeds § 279 (1965).

4. Eldridge v. See Yup Co., 17 Cal. 44 (1860), was the first California decision to apply the common law rule. Mott v. Nardo, 73 Cal. App. 2d 159, 166 P.2d 37 (1946), has been the only California appellate decision since 1860 to apply the rule. But in Mott application of the rule did not defeat the grantor's intent.

5. 7 Cal. 3d 473, 498 P.2d 987, 102 Cal. Rptr. 739 (1972).

6. Townsend v. Cable, 378 S.W.2d 806 (Ky. 1964); accord, Blair v. City of Pikeville, 384 S.W.2d 65 (Ky. 1964); cf. Combs v. Hounshell, 347 S.W.2d 550 (Ky. 1961).


8. E.g., Harris, supra note 3, at 131; Meyers & Williams, Oil and Gas Conveyancing: Grants and Reservations by Owners of Fractional Mineral Interests, 43 Va. L. Rev.
property rejected the rule nearly four decades ago. Furthermore, the rule has been partially abrogated by statute in England, California and other jurisdictions.

**Willard v. First Church of Christ, Scientist**

*Willard* was a quiet title action against the First Church of Christ, Scientist (the church). A owned two adjoining parcels of land, lots 19 and 20, across the street from the church. Lot 19 had a building on it, and lot 20 was vacant and used by the church for parking purposes. A sold lot 19 to B, who used the building thereon as an office. B later decided to resell the lot and approached the plaintiff, Willard, a real estate broker. Willard wanted to purchase both lots 19 and 20, and he subsequently entered into escrow with B for that purpose. B then approached A with an offer to purchase lot 20. A, who was willing to sell the lot provided the church could continue to use it for parking purposes, consulted the attorney for the church. The attorney drafted a deed which provided that the conveyance was:

subject to an easement for automobile parking during church hours for the benefit of the church on the property at the southwest cor-


9. Restatement of Property § 472 (1944). "By a single instrument of conveyance, there may be created an estate in land in one person and an easement in another." Comment b provides: "Thus an easement may be created in C by a deed by A which purports to convey Blackacre to B in fee reserving an easement to C. If, in other respects, the necessary formalities for the creation of an easement are complied with, such a reservation operates as an effective conveyance to the person in whose favor the reservation is, in terms, made."

10. Law of Property, Act of 1925, 15 & 16 Geo. 5, ch. 20, § 65(a). "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."

11. Cal. Civ. Code § 1085 (West 1954). "A present interest, and the benefit of a condition or covenant respecting property, may be taken by any natural person under a grant, although not named a party thereto." This code section did not apply to the Willard decision because the Church was not a "natural person." Furthermore, only one intermediate appellate court opinion prior to Willard had cited section 1085, Glatts v. Hanson, 181 P.2d 917, 922 (Cal. Dist. Ct. App. 1947). On appeal to the California Supreme Court, 31 Cal. 2d 368, 188 P.2d 745 (1948), the opinion was modified and affirmed without further reference to the statute.

ner of the intersection of Hilton Way and Francisco Boulevard... such easement to run with the land only so long as the property for whose benefit the easement is given is used for church purposes.13

Satisfied by the inclusion of this clause in the deed, A then sold the property to B, who recorded the deed. Willard paid the agreed purchase price into escrow and received B's deed to the property ten days later. Willard then recorded the deed that he had received from B. This deed did not mention the easement for parking purposes in favor of the church.14

Willard became aware of the easement some months later and brought an action to quiet title to lot 20. The trial court found that the parties to the deed containing the reservation clause intended to convey an easement to the church, but that the clause they employed was ineffectual in light of the common law rule that an interest in property cannot be reserved to a stranger to the title. The court of appeal affirmed.15

The Supreme Court reversed, holding that the common law rule should no longer be followed in California.16 The court emphasized that the rule was based on outmoded feudal considerations and that the rule often frustrated the grantor's intent, thereby producing inequitable results.17 Justice Peters, speaking for a unanimous court,18 pointed out that the modern tendency was to abandon the strict common law rules of construction in deeds19 and that the cardinal objective in construing deeds is to effectuate as far as possible the intention of the grantor.20 The court also noted that in some instances the common law approach conflicts with section 1085 of the Civil Code,21 which allows an interest to pass to a third person under a grant provided the interest is present and the third party is a natural person.22 Thus, although section 1085 would not apply to Willard because the

13. 7 Cal. 3d at 475, 498 P.2d at 988, 102 Cal. Rptr. at 740.
14. Id. Other problems were involved in the case, such as the failure of the deed from B to Willard to contain the reserve clause. However, the court ignored these peripheral issues and concentrated solely on the validity of the common law rule against reservations in favor of strangers.
16. 7 Cal. 3d at 479, 498 P.2d at 991, 102 Cal. Rptr. at 743.
17. Id. at 476-77, 498 P.2d at 989, 102 Cal. Rptr. at 741.
18. Justice Mosk did not participate.
19. Harris, supra note 3, at 148-49 suggests that prior to Willard, California had treated the common law rule as a mere rule of construction, thereby reducing it in dignity and making avoidance of the rule more justifiable.
20. 7 Cal. 3d at 476, 498 P.2d at 989, 102 Cal. Rptr. at 741.
21. CAL. CIV. CODE § 1085 (West 1954). The rule also conflicts with various other sections of the Civil Code which deal with the interpretation of grants. See note 81 infra.
22. 7 Cal. 3d at 477 n.3, 498 P.2d at 990 n.3, 102 Cal. Rptr. at 742 n.3.
church was not a natural person, application of the common law rule would conflict directly with section 1085 whenever a present interest was reserved in favor of a stranger to the title who was a natural person.

Justice Peters added that a balancing of equitable and policy considerations might warrant future application of the common law rule to grants made prior to Willard, where the grantee has detrimentally relied on the common law rule, or in situations where the rule must be applied to protect settled titles.\(^\text{23}\) However, since Willard involved no such special factors, the court concluded that the grantor's intention to reserve an easement for automobile parking in favor of the church should be given effect.\(^\text{24}\)

**Origins of the Common Law Rule**

At common law, although both reservations and exceptions diminished the estate of the grantee, they were distinguishable from each other in their consequences.\(^\text{25}\) A reservation creates in favor of the grantor a *new* interest issuing out of the estate transferred—an interest that did not exist as an independent right prior to the transfer. An exception prevents some part of the grantor's interest from passing under the granting clause so that the excepted interest remains in the grantor.\(^\text{26}\) For example, if A grants his farm, Blackacre, to B, “reserving” for himself an easement across Blackacre to construct a sewer line, A has created a new interest in himself that did not previously exist as an independent right. However, if A grants his farm, Blackacre, to B, “except” the barn thereon, A has retained ownership of the barn by preventing it from passing under the granting clause, and the excepted interest remains in A.\(^\text{27}\)

Another primary distinction between a reservation and an exception at common law was that, because a reservation created an interest in the grantor that did not exist as an independent right prior to

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\(^{23}\) For example, if the grantee, reasonably relying on the common law rule, obtains title insurance on the property reserved in the deed to the stranger, a balancing of the equities might result in the future application of the common law rule, if the grant was made prior to Willard. See text accompanying notes 116-20 infra.

\(^{24}\) 7 Cal. 3d at 479, 498 P.2d at 991, 102 Cal. Rptr. at 743.

\(^{25}\) 2 American Law of Property § 8.29 (A.J. Casner ed. 1952); 6 Powell, supra note 1, at ¶ 892; 6 Thompson, supra note 1, at § 3090.

\(^{26}\) 6 Powell, supra note 1, at ¶ 892; 6 Thompson, supra note 1, at § 3090.

\(^{27}\) Boyer v. Murphy, 202 Cal. 23, 34, 259 P. 38, 41-42 (1927) quoting 18 C.J., Deeds § 339 at 340 (1919) as follows: “While this distinction between a reservation and an exception has been uniformly recognized, the terms ‘reservation’ and ‘exception’ are often used interchangeably; and the technical meaning will give way to the manifest intent, even though the technical term to the contrary is used.” See also 6 Thompson, supra note 1, § 3090.
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the transfer, in order for the interest to pass to his heirs words of inheritance were necessary. Words of inheritance were not necessary in an exception, since the interest simply remained in the grantor. Since words of inheritance are no longer necessary in California, this distinction is no longer valid.

By definition, then, an exception cannot vest an interest in a third party because title remains in the grantor. On the other hand, reservations theoretically create a point in time when the reserved interest passes from the grantee back to the grantor. This interruption in the grantor's title would appear to make possible the vesting of the reserved interest in a third person instead of only in the grantor. Yet the common law rule refused to permit a reserved interest to vest in favor of a third person.

There were originally two reasons why property could not be conveyed by reservation. The first reason was that operative words of grant were necessary to create title. This requirement was a product of the old feudal rules governing the alienability of land and was based on feoffment with livery of seizin. Feoffment was the method used to transfer estates of inheritance. Livery of seizin consisted of a formal delivery of possession on the premises, symbolized by the manual delivery of a clod or piece of turf from the land, which was done in the presence of neighbors to confirm the transfer.

Livery of seizin was an essential requisite of a feoffment, for without it the feoffee had a mere estate at will. Thus, a writing was not necessary to pass title by feoffment, although a charter was sometimes drafted recording the ceremony. This cumbersome ceremony was superseded by conveyances by deed, such as the bargain and sale under the Statute of Uses, the lease and release, the quit-

28. 6 POWELL, supra note 1, at ¶ 892. See also 24 CALIF. L. REV. 468 (1936).
30. See generally Harris, supra note 3, at 131-34.
31. 6 POWELL, supra note 1, at ¶ 879.
32. Id.
33. Id.
34. 26 C.J.S. Deeds § 5 (1956).
35. 6 POWELL, supra note 1, at ¶ 879.
36. Id. at 163-64; Statute of Uses, 27 Hen. 8, ch. 10 (1536). A bargain and sale was, before the Statute of Uses, merely a contract to convey for a pecuniary consideration, in consequence whereof equity regarded the bargainor as trustee or seized to the use of the bargainee, and no deed or writing was necessary. The Statute of Uses vested in such bargainee the complete ownership.
37. Id. at 163-64. A conveyance by lease and release was effected by creating a use in land for years by means of the bargain and sale. The Statute of Uses annexed a constructive possession thus executing the use, and creating a lease in posses-
These new and ingenious devices later were consolidated into a single form of conveyance, the grant. Thus, deeds in their present form have evolved from the ancient charter, which consisted of a recording of the ceremony of livery of seizin, describing who gave what to whom.

Viewed in this light, a deed, in order to be effective, must explicitly manifest the grantor's intent to convey the property. At common law this manifestation of intent depended on the presence of certain technical words, such as "grant, bargain, sell, and convey." Even today, although no particular words are necessary to pass title by deed, and precisely what are operative words of grant is difficult to determine, the general rule still provides that a conveyance is valid only if the grantor sufficiently signifies a clear intention to transfer title by operation of the instrument.

Most jurisdictions hold that words such as "subject to," "reserving," or "excepting" fail to evidence the necessary intent to pass title by deed and therefore do not qualify as words of grant. For example, in McGarrigle v. Roman Catholic Orphan Asylum, Jones conveyed to McGarrigle certain described property provided "that after the death of [McGarrigle], the said described lands shall become and be the property of the Roman Catholic Girls Orphan Asylum . . . ." The court held that the words "shall become and be" were merely an expression of the grantor's purpose and were not operative words of grant.

A quitclaim deed is one that passes any title, interest, or claim which the grantor may have in the premises. It does not profess that such title is valid. Nor does it warrant or covenant title. BLACK'S LAW DICTIONARY 1417 (4th ed. 1951).

A grant, at common law, was the regular method of passing the title of incorporeal hereditaments and all things other than personalty which were not susceptible of livery or seizin. 3 AMERICAN LAW OF PROPERTY § 12.4 (A.J. Casner ed. 1952).


Id.; 24 CALIF. L. REV. 468, 470 (1936). The difficulty in determining precisely what are operative words of grant is that there is no particular formula required, nor are technical words necessary. Thus, the only test in detecting operative words of grant is the somewhat nebulous requirement that the grantor's intent to transfer be manifest. For a list of words that have been held sufficient and insufficient to manifest the requisite intent to transfer, see 26 C.J.S. Deeds § 28 n.36 at 637.

3 AMERICAN LAW OF PROPERTY § 12.48 (A.J. Casner ed. 1952). "[W]ords of exception or reservation are not words of grant and are ineffective to convey a right or interest to a stranger to the deed."

145 Cal. 694, 79 P. 447 (1905).

Id. at 695, 79 P. at 447.

Id. at 696, 79 P. at 448.
The second reason why property could not be conveyed by reservation was that during the period in which the rule developed, alienation by deed was becoming far more flexible. The new method of conveyance by deed such as the bargain and sale, the lease and release and the quitclaim resulted in a vast increase in the frequency of the transfer of property, which alarmed the judges. Consequently, the courts sought to counteract these new liberal forms of conveyancing by engrafting guidelines which defined the limits and methods of alienability and assigned to each clause in the deed a specific and exclusive function.

For example, it was the purpose of the granting clause to pass seizin and the function of the reddendum to specify some rent or service reserved by the grantor which was to be a charge upon the land.\textsuperscript{47} The courts strictly construed each clause in the deed. No clause could have any operative effect beyond its assigned powers. This strict construction of the functions of each clause precluded a reservation from creating or transferring an interest to anyone other than the grantor since that was the exclusive function of the granting clause. A reservation could do no more than create in the grantor a specified interest that had previously existed in the property conveyed.\textsuperscript{48}

The Response of Modern Courts to the Common Law Rule

In interpreting the common law rule against reservations to strangers, judges had to determine who might be properly classified as a "stranger."\textsuperscript{49} Frequently, judicial dissatisfaction with the common law rule led to the development of exceptions by which certain persons were deemed not to be strangers. Various courts have held that a reservation to the heirs of the grantor is equivalent to a reservation to the grantor himself.\textsuperscript{50} An heir of the grantee also has been excepted.

\begin{footnotes}
\item[48.] \textit{Id.} at § 12.48.
\item[49.] Harris, \textit{supra} note 3, at 131. Harris points out the confusion of the courts in determining whether the rule prohibits reservations to strangers to the title or to strangers to the deed. A stranger to the title is a person who does not have an interest in the property, whereas a stranger to the deed is a person who is not a party to the deed. Fortunately, this distinction is usually not important because in most cases the "stranger" is both a stranger to the deed and to the title. Furthermore, California refused to give effect to a reservation in favor of a stranger to the title in Mott v. Nardo, 73 Cal. App. 2d 159, 166 P.2d 37 (1946), even though in Boyer v. Murphy, 202 Cal. 23, 259 P. 38 (1927), the court stated the rule applied only to strangers to the deed. For the purposes of the present discussion, the rule applies to both types of strangers.
\end{footnotes}
from stranger status. However, executors and administrators of the grantor have been held to be strangers within the common law rule. Perhaps the most common exemption from stranger status is that which has been accorded the spouse of the grantor. Finally, in some instances a public body or governmental agency is not considered to be a stranger.

California's Treatment of the Rule

California's treatment of the common law rule prior to Willard was marked by a conscious effort by the courts to avoid applying the rule when it conflicted with the manifest intent of the grantor. The rule first was applied in California in 1860 in Eldridge v. See Yup Co., but since then only one appellate decision has applied the rule, and in that case its application did not defeat the grantor's intent.

Since the Eldridge decision, California's courts resorted to three distinct methods of avoiding the rule. First, the courts construed the language of the deed as creating an exception rather than a reservation, thus preventing the interest from passing to the grantee under the terms of the grant. For example, in Butler v. Gosling, two wives conveyed their property, joined by their respective husbands, "reserving and saving from the effect and operation of this conveyance four square miles in two separate parts to be hereafter selected and located by the said parties of the first part." The court held

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52. Petition of Young, 11 R.I. 636 (1877); cf. Herbert v. Pue, 72 Md. 307, 20 A. 182 (1890) (attorney executing deed held a stranger).
55. 17 Cal. 44 (1860). The common law rule was an alternative reason for the decision. The primary reason for invalidating the interest was the rule that a restriction of property to a certain use was void. See Willard v. First Church of Christ, 7 Cal. 3d 473, 477 n.2, 498 P.2d 987, 989-90 n.2, 102 Cal. Rptr. 738, 741 n.2 (1972).
58. 130 Cal. 422, 62 P. 596 (1900).
59. Id. at 424, 62 P. at 596.
that although the clause began with the word "reserving," "it was in reality, as its terms declare, an 'exception' of a portion of the land from the effect and operation of the conveyance." Treating a reservation as an exception also causes the title to the interest to remain in the grantor, thus still failing to carry out the grantor's intent. Despite the fact that this method of avoiding application of the rule does not confer title on the stranger, the method is still recognized as an effective means of creating a reservation in favor of a stranger; since the interest remains in the grantor, he may subsequently convey that interest to the stranger, thereby accomplishing the same result in two conveyances as was attempted in the original transfer.

A second method of frustrating application of the common law rule against reservations to strangers is for the stranger to invoke the doctrine of estoppel. The courts reason that one who has notice and has agreed to a reservation to a third person should not be allowed to disregard it. Thus, in Sutter Butte Canal Co. v. Richvale Land Co., Richvale reserved "to its assigns and successors a right of way in, to and across said colony number one and all portions thereof for the purpose of constructing and maintaining and operating . . . irrigation and drainage ditches . . ." Thereafter, an agreement to sell a portion of the land was executed, in which the vendors recognized and consented to the reservation. The court held that an attempted reservation or exception in favor of a stranger, although not conferring title, may sometimes operate as an admission in his favor or as an estoppel against the grantor. In other words, since the grantor recognized and consented to the reservation of an interest in favor of a third person, the recognition operated as an admission of the interest vested in the third person. The grantor was therefore estopped from denying the validity of the reservation in favor of the stranger.

The above reasoning was not directed to estopping the grantee from denying the validity of the reservation in favor of the stranger. However, courts in other jurisdictions have held that persons claiming

60. Id. at 425, 62 P. at 597.
61. 3 AMERICAN LAW OF PROPERTY § 12.48 (A.J. Casner ed. 1952); 2 B. DEV-LIN, DEVLIN ON DEEDS § 982 (3d ed. 1911).
64. Id. at 454, 181 P. at 99.
65. Id. at 457, 181 P. at 100.
under the grantee are precluded from avoiding a reservation of rights already existing in a stranger. Adding strength to the estoppel line of reasoning is the fact that the grantee frequently has paid a deflated price for the property as a result of the reserving clause.

California courts have fashioned a third exception to the common law rule when the third person is the grantor's spouse. In such instances the courts have recognized the close relation between husband and wife and accordingly have refused to classify the spouse as a stranger. There is a sound basis for holding that a spouse is not a stranger within the common law rule against reservations to strangers. In Saunders v. Saunders the court explained that:

The husband . . . has such a present interest in the property by way of a homestead, or such indefeasible interest as heir or by way of dower, that the combined interest of husband and wife in the property might be deemed sufficient to support the reservation of a life estate to either or both of them, by their joint execution of a deed which conveyed or waived all of their rights.

In Boyer v. Murphy, a husband and wife joined in a conveyance to their children of improved property belonging to the wife. The habendum clause reserved to the husband and wife "the ownership and possession [of the property] during the lifetime of the parties of the first part [husband and wife] and the survivor of them." The court ignored the common law rule that a reservation cannot be made in favor of a stranger to the title by treating the husband as a non-stranger and construing the "reservation" as an exception, thus giving a life estate to both husband and wife.

Finally, in some instances, California courts have simply refused to resort to technicalities to defeat the obvious intention of the parties. For example, in Smith v. Kraintz, Hollender owned certain

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67. E.g., Dade County v. Little, 115 So. 2d 19 (Fla. App. 1959); Dalton v. Eller, 153 Tenn. 418, 284 S.W. 68 (1925). Furthermore the courts frequently recognize and preserve presently existing rights in strangers by treating the purported reservation as an exception. See also text and accompanying notes 57-61 supra.


70. 373 Ill. 302, 26 N.E.2d 126 (1940).

71. Id. at 308, 26 N.E.2d at 129. Boyer v. Murphy, 202 Cal. 23, 32, 259 P. 38, 42 recognized that a reservation in favor of a spouse also benefits the grantor, although the court declined to rule on whether the reservation was valid.


73. Id. at 26, 259 P. at 39.

74. Id. at 33, 259 P. at 42.


property which he conveyed to Goodrich, reserving a "non-exclusive right of way for road purposes and public utilities."\textsuperscript{77} Goodrich later conveyed the property to Smith, who attempted to deny the efficacy of the reservation. The court, after recognizing that generally a reservation would be valid only if in favor of the grantor, stated:

the intent to dedicate, however, may be established in every conceivable way in which such intention may be manifested, and the reservation in the deed, although not effectual as such reservation, may be found by the courts to evidence the essential intent to dedicate to the public.\textsuperscript{78}

The court concluded that the reservation in favor of the public and the intent to dedicate for public purposes were sufficient to overcome the effect of the common law rule.\textsuperscript{79}

A central theme runs through the cases noted above: namely, that where application of the common law rule would frustrate the clear intention of the grantor and thereby work an injustice, the California courts have not hesitated to find ways to circumvent the rule. By expressly abandoning the common law rule in \textit{Willard}, the California Supreme Court has finally made it possible for California courts to uphold reservations in favor of third persons without having to resort to legal fictions. As expressed by Justice Peters, the court's "primary objective in construing a conveyance is to try to give effect to the intent of the grantor."\textsuperscript{80} The court's recognition of the basic incompatibility of the grantor's intent with the common law rule, and its rejection of the latter, is a step away from the shadows of feudalism. Also, by expressly making the grantor's intent the dominant consideration, the court has aligned this area of the law with California's general statutory principles of construction.\textsuperscript{81}

\textsuperscript{77} \textit{Id.} at 699, 20 Cal. Rptr. at 473.
\textsuperscript{78} \textit{Id.} at 700, 20 Cal. Rptr. at 474. \textit{Accord}, Sutter Butte Canal Co. v. Richvale Land Co., 40 Cal. App. 451, 456-57, 181 P. 98, 100 (1919) (court not justified in resorting to technical refinements as to the meaning of "reservations" to defeat obvious intent).
\textsuperscript{79} 201 Cal. App. 2d at 700, 20 Cal. Rptr. at 474.
\textsuperscript{80} \textit{Willard} v. First Church of Christ, Scientist, 7 Cal. 3d 473, 476, 498 P.2d 987, 989, 102 Cal. Rptr. 739, 741 (1972).
\textsuperscript{81} The construction of contracts is treated in several sections of the Civil Code. \textit{E.g.,} \textit{CAL. CIV. CODE} \textsection 1066 (West 1954): "Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this Article"; \textit{id.} \textsection 1636: "A contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful"; \textit{id.} \textsection 1641: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"; \textit{id.} \textsection 1644: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning;
The Rule's Treatment in Other Jurisdictions

The common law rule has been recognized in jurisdictions outside California. However, many of these states follow California's former practice of applying the rule in some instances, while finding methods of circumventing it in others. Many courts will construe the pertinent provision in the deed as an exception, thus preventing the interest from passing to the grantee. Under this construction title does not pass to the stranger. It remains in the grantor, thus creating a less than desirable result.

One Oklahoma case, *Burns v. Bastien,* went so far as to hold that the purported reservation was an exception, and an executive passive trust was created in favor of the stranger.

In *Burns* the defendant Bastien, joined by his wife, executed a warranty deed of certain land to Trippett. The deed contained a provision “reserving an undivided three-fourths interest in and to all the royalties of oil and gas under and pertaining to said premises, which said reservation of royalty shall belong to George Bastien, Charles Bastien, and E.E. Mead, share and share alike.” E.E. Mead later conveyed his one-quarter interest to Burns, who brought the action to quiet title to the royalties. The court construed the reservation to be an exception in favor of the grantors and held that a valid express trust was created in favor of E.E. Mead, based on the intent of the parties.

Courts in other jurisdictions also have raised the issue of estoppel by deed and equitable charges to invalidate the common law rule unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.”


E.g., *Deaver v. Aaron,* 159 Ga. 597, 126 S.E. 382 (1925); *Martin v. Cook,* 102 Mich. 267, 60 N.W. 679 (1894); *Lemon v. Lemon,* 273 Mo. 484, 201 S.W. 103 (1918); *Burns v. Bastien,* 174 Okla. 40, 50 P.2d 377 (1935).

See authorities cited note 61 supra.


Id. at 41, 50 P.2d at 379.

Id. at 45-46, 50 P.2d at 384.

Beinlein v. Johns, 102 Ky. 570, 44 S.W. 128 (1898); *Dalton v. Eller,* 153 Tenn. 418, 284 S.W. 68 (1926); *Hodge v. Boothby,* 48 Me. 68 (1861).
where the grantor's intent is clear and injustice would result from application of the rule. For example, in *Dalton v. Eller*,\(^9\) where a storehouse occupied and owned by the stranger, situated on property owned by the grantor, was excepted\(^9\) from the deed, the clause was held valid even though it was in favor of a third person. The grantee was held estopped from asserting the invalidity of the exception based on the intent of the parties.\(^9\)

Similarly, in *Wall v. Wall*,\(^9\) where the deed recited that the grantor reserved to herself "the possession, use, enjoyment, and control of the tract of land for and during her natural life"\(^9\) and reserved also "the care and support of her daughter for and during [her] life,"\(^9\) the court held that the clause was sufficient to create an equitable charge on the rents and profits of the land for the care and maintenance of the daughter, a stranger to the title, as against owners who took title to the land with *express notice* of the provision.\(^9\) Finally, as in California, several other jurisdictions do not apply the rule when the third person is the grantor's spouse.\(^9\)

### Abolition of the Rule in Other Jurisdictions

In abandoning the common law rule, the California court in *Willard* relied on decisions in Kentucky\(^9\) and Oregon,\(^10\) which previously had rejected the rule as unsuited to modern conveyancing needs. In the Kentucky case, *Townsend v. Cable*,\(^10\) A granted a parcel of land to B with a reservation in favor of C. The Kentucky Supreme Court, which had indicated in an earlier decision its possible willingness to abolish the rule,\(^10\) forthrightly rejected the rule and held that an inter-

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91. 153 Tenn. 418, 284 S.W. 68 (1927).
92. Although the clause implemented in *Dalton* was, by its terms, an exception, the same result could have been reached in California had the clause been a reservation. *Boyer v. Murphy*, 202 Cal. 23, 34, 259 P. 38, 41-42 (1927).
93. 153 Tenn. at 429, 284 S.W. at 71.
94. 126 N.C. 405, 35 S.E. 811 (1900).
95. *Id.* at 406, 35 S.E. at 811.
96. *Id.* The court construed this clause to mean that the grantor intended to have her daughter supported out of the income and profits from the land.
97. *Id.* at 407-08, 35 S.E. at 811.
98. Cases cited note 53 *supra*.
101. 378 S.W.2d 806 (Ky. 1964).
102. "In a future case involving what is intended to be a conveyance over of some interest such as an easement . . . but is inartfully couched in terms of reservation or
The court reasoned that "the distinction between a conveyance to a third party and a reservation in his favor is tenuous and artificial and has long outlived the reason for its existence in the first place" and that the intention of the grantor as expressed within the four corners of the instrument must be the controlling factor in construing a deed. The court indicated that substance rather than form should control and that technicalities should be avoided when the intent of the grantor is plain and obvious.

In 1970 the Supreme Court of Oregon adopted the reasoning of Townsend and abolished the common law rule in Oregon. In Garza v. Grayson, the plaintiff sought a declaratory judgment to establish the existence of an easement over defendant's land for the maintenance and construction of a public utility service line. The court confronted the rule directly and, relying on the language of Townsend and the Restatement of Property, abandoned the rule.

The common law rule, then, represents the preference of form over substance, of technicalities over intention. Furthermore, the rule runs counter to a vast number of commonly accepted forms of conveyancing in which it is common for a grantor to convey different interests to two or more persons by the same instrument. These interests may all be corporeal, as in the case of the grant of a cotenancy to two or more parties; or one may be corporeal and the other incorporeal, as where successive interests are granted, one being a present estate and the other a remainder.

The common law rule against reservations in favor of strangers was developed at a time when alienation by deed was becoming far more commonplace. The courts, however, mistrusted these ingenious devices and therefore established strict rules constraining the methods of alienability. Today, with the modern tendency to favor the free alienability of land, such a rule has no logical basis or justification, and

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103. 378 S.W.2d at 808.
104. Id. at 807, quoting Combs v. Hounshell, 347 S.W.2d 550, 555 (Ky. 1964).
105. Id. at 808.
106. Id.
108. Id.
109. Townsend v. Cable, 378 S.W.2d 806 (Ky. 1964).
110. RESTATEMENT OF PROPERTY § 472 (1936).
111. 255 Ore. at 415, 467 P.2d at 962.
113. See text accompanying notes 30-48 supra.
the abandonment of what Justice Peters called an “inapposite feudal shackle” was long overdue.114

**Impact of the Rule**

As a result of *Willard*, California now allows interests to pass to persons not a party to the deed without words of grant. As mentioned, modern conveyancing commonly permits a single instrument to convey an interest to more than one person. However, despite the liberal construction afforded instruments today, words of grant generally are necessary to pass title by deed.115 *Willard* may on its face appear to be inconsistent with the requirement that words of grant be employed to pass title. However, a more accurate interpretation of *Willard* is that interests may be created by a conveyance through the granting clause or the reddendum. Thus, in a deed of conveyance, words of reservation—without traditional words of grant—are now sufficient to pass title through the reddendum. The effect of *Willard* is that no longer will the practicing attorney have to depend on a sympathetic judge to imply some fictitious exception to the common law rule against reservations to strangers in order to effect the grantor’s intent. Now a grantor may, through words of reservation, pass title to a third person who is a stranger to the title.

**Further Application of the Rule**

Although the supreme court ruled in *Willard* that the common law rule should no longer be followed as the law in California, the court indicated that in certain cases a “balancing of equitable and policy considerations” might warrant future application of the rule to presently existing deeds. The court noted that:

> We must balance the injustice which would result from refusing to give effect to the grantor’s intent against the injustice, if any, which might result by failing to give effect to reliance on the old rule and the policy against disturbing settled titles.116

For example, where *A* conveys Blackacre to *B*, reserving an interest in favor of *C*, and *B* and his title insurance company reasonably rely on the common law rule, the rule may still be applied to prevent a substantial hardship to *B*. Similarly, where *A* grants Blackacre to *B* reserving an interest to *C*, and *C* asserts title to his interest many years later, the common law rule may also be employed to promote the policy against disturbing settled titles by defeating *C*’s claim.

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116. 7 Cal. 3d at 479, 498 P.2d at 991, 102 Cal. Rptr. at 743.
However, instances such as these, where the rule might defeat the interest in favor of a third person, are likely to occur only infrequently. First, the rule will apply only to presently existing deeds.117 Second, even if the rule is held to apply, the court will still consider the several exceptions to the rule developed by the courts118 and the partial abrogation of the rule by section 1085 of the Civil Code.119 In Willard these equitable considerations were not sufficient to justify application of the common law rule.120 There was no evidence of any reliance on the common law rule by a title insurance company and, further, no reliance on the rule by Willard, since he had not read the deed containing the reservation. Nor were there any problems with ancient title because the church had used the parking lot continuously throughout the period in question.

Conclusion

For more than one hundred years American courts have espoused the commendable theory that the intention of the grantor should be the controlling factor in interpreting deeds and that technicalities should not defeat the obvious intent of the grantor. Despite this purported liberal construction of deeds, many of these same courts have upheld, at least in name, the archaic common law rule that reservations to strangers are ineffective. This obvious inconsistency has at times led to highly undesirable results. Admittedly, the courts have been reluctant to apply the rule. Unfortunately, however, it has been the practice of many courts to avoid rather than abandon the rule. In an attempt to give effect to the intention of the grantor by circumventing technical rules of construction, the courts have resorted to technicalities as artificial as those they were seeking to avoid, and the resultant unpredictability is precisely what the common law rule sought to eliminate.

Today the common law rule has clearly outlived the reasons for its existence. Its abandonment is a significant step towards creating clarity and uniformity in conveyancing. Unfortunately, to date only three states have abandoned this obviously archaic and impractical rule;121 indeed its rejection is less than a trend.122 However, such aban-

117. Id.
118. Id. at 479, n.8, 498 P.2d at 991 n.8, 102 Cal. Rptr. at 743 n.8.
119. Id.
120. Id. at 479, 498 P.2d at 991, 102 Cal. Rptr. at 743.
121. Three states—Kentucky, Oregon and California—have completely abandoned the common law rule by judicial action. Cases cited note 5-7 supra. Four other states—Montana, North Dakota, South Dakota and Rhode Island—have partially abrogated the rule by statute. Statutes cited note 12 supra.
122. The following cases still recognize the common law rule: Rye v. Baumann, 231 Ark. 278, 329 S.W.2d 161 (1959); Davis v. Gowen, 83 Idaho 204, 360 P.2d 403
donment is the only true solution to a problem area of the law that has become unnecessarily contrived.

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