CHAPTER X.

EXCEPTIONS—RESERVATIONS.

§ 119. Exceptions and reservations in general.—Often it is the understanding of the parties to a conveyance that the grantor shall not convey the land described without retaining some part of it or having some rights in it. These ends are accomplished by inserting in the deed the proper clauses of exception or reservation.

If he is to retain some existing part of the thing granted, which would otherwise pass to the grantee by the grant, he makes an exception of that part, and title to it simply remains in him. The result is, obviously, that his interest or estate in the thing excepted is the same as it was before, and if he had an estate in fee in it he still has the same estate, and no words of inheritance or perpetuity are needed to produce this effect.

An exception relates to something in existence at the time of the conveyance as a part of the thing granted.[1]

By a reservation there is created some new interest for the grantor in the thing granted, and a reservation, therefore, relates to something not in existence at the time the grant is made.

[1] Co. Litt. 47a; Shep. Touchstone, pp. 78-80.

Technically and strictly the term reservation is applicable only to rents and services and whatever things are stipulated to be rendered for the tenure of the land.

But the application of the term has been extended, and easements are now said to be reserved. An easement reserved, being a new right created for the grantor in property which he conveys, is often regarded as created by a regrant, or a counter-grant, made by the grantee to the grantor.[3]

This counter-grant, however, is a fiction (generally, at least, as the grantee does not execute the deed); it exists only in the imagination, or, at least, the only part of it in existence is the reservation clause in the actual deed. Hence, if the new right thus created is to last beyond the life of the grantee in the imaginary deed (who is the grantor in the actual deed), it must be so stated in that part of the imaginary deed which is in existence, and this is the reservation clause in the actual deed; in this clause, therefore, it should appear whether the regrant is to the grantor alone and for life, or to the grantor and his heirs, that is, in fee.[4] This would be necessary, at least, where the reservation is regarded as a regrant and where at the same time the common law rule has not been modified by a statute making words of inheritance unnecessary to the creation of a fee.[5] Where the technical word "heirs" is no longer necessary to create a fee in an ordinary grant, it may not be necessary for this purpose in a reservation,[6] but its use, if a reservation in fee be intended, can do no harm and would clearly indicate the intention.

[3] Hence it is said, "a reservation operates by way of implied grant." Whitney v. Fitchburg R., 1900, 178 Mass. 559, 563; 60 N. E. 384.

[4] Kister v. Reeser, 98 Pa. St. 1; Simpson v. B. & M. R., 1900, 176 Mass. 359; 57 N. E. 674.

[5] See post, § 136.

[6] See Karmuller v. Krotz, 18 Iowa 352.

§ 120. **Difference in effect.**—A simple illustration will perhaps bring out the difference in effect between an exception and a reservation.

I, the owner in fee of "Lot A," convey Lot A to M and his heirs, "excepting therefrom a strip twenty feet wide, running easterly and westerly, off the north side thereof." The result is that I own in fee the strip kept out, and everything below it and above it. No one can use it, or build upon it, or over it, or dig under it, without my consent. I may convey it, or part of it. I may sell separately the trees on it, or the minerals beneath it. And if I die, not having conveyed it, or a part of it, all these incidents descend to my heirs.

If, on the other hand, I convey said lot A, "reserving therefrom for a roadway, easterly and westerly, twenty feet off the northerly side thereof," I have reserved, according to the usual American view, an easement—a right of way. The fee in the twenty feet has passed together with the rest of lot A, subject, however, to my easement. Another person may build over the space, provided my right of way is not interfered with; I do not own the trees on the strip of land, nor the minerals beneath it; and, unless I have reserved the exclusive use, my grantee (of lot A) may use the way also; furthermore, unless the duration of this easement is defined or limited to extend to my heirs, its use as an easement ceases with my life.

§ 121. **Expressions causing doubt.**—A slight variation in the phraseology makes it less clear whether the intention is to create a reservation or an exception. As, I grant lot A, "reserving a road twenty feet wide for my own use." Is this a reservation of a right of way—an easement—merely, and for life, or is it an exception of a strip twenty feet wide which I may use as a right of way and for other purposes, also? It is at least doubtful, from reading the clause, which I have intended.

If, in this last case, a reservation of the easement, sim-

ply, is made, the fee passes subject to the easement, and the grantee has all the rights in the strip of an owner in fee subject to the easement reserved.[7] And the reservation of "a road" would ordinarily be construed by many courts as retaining an easement, merely, in the grantor.[8] But if the road already existed when the deed was executed such a clause might be held an exception, at least to the extent of not requiring words of inheritance to make its use perpetual, even in those states where such words would be generally required for a reservation in fee.[9] And it might be held an exception to the further extent of reserving not only a perpetual use (without words of inheritance) but of retaining in the grantor the fee of the land over which the road extended.[10] In multitudes of cases litigation has been necessary to settle the doubts as to meaning, but it seems clear, from an examination of the authorities, that, in nearly every case, confusion might have been avoided by the exercise of care when the conveyance was drawn, and the intention of the parties so plainly expressed as to leave no doubt about it.

Just what expressions should be used it would be impossible to state for all cases, as exceptions and reservations are almost numberless in variety, but it can not be difficult to clearly express in words whether the intention is to retain an incorporeal right for life, or whether it is to retain a definite part of the thing granted.

It is generally of greater importance to the grantor and his successors than to the grantee that the intention be clearly expressed, for if it is left in doubt the grantee will generally get the benefit of the doubt, but if it is clearly expressed there is no need of applying this rule.[11]

[7] Moffitt v. Lytle, 1895, 165 Pa. 173; 30 Atl. 922.

[8] Wellman v. Churchill, 1898, 92 Maine 193; 42 Atl. 352; Bolio v. Marvin, 1902, 130 Mich. 82; 89 N. W. 563; 8 D. L. N. 160.

[9] White v. New York &c. R., 1892, 156 Mass. 181; 30 N. E. 612.

[10] Munn v. Worrall, 53 N. Y. 44; 13 Am. R. 470.

[11] Richardson v. Clements, 89 Pa. St. 503.

§ 122. **Place for such clauses.**—Attention to certain matters in drawing these clauses will often prevent obscurity, and consideration of the same principles will sometimes assist in the proper interpretation of them as drawn by others.

The appropriate place for an exception is just after the description of the property conveyed; the place for a reservation of rent is in the reddendum, as is now commonly seen in the "lease;" if the reservation is of an easement it is usually placed now after the description, it being quite generally regarded, as before stated, as a regrant rather than as a technical reservation.

As an illustration of the propriety of placing a clause in its proper place may be taken the case of Knapp v. Woolverton;[12] in this case the deed was in the usual form, with covenants; following the covenants, in the blank space left in the printed form, were inserted the words, "except all the wheat on the ground or land as above described." The result was that instead of conveying the property "except the wheat," it was a conveyance of all the property, with covenants, except that the wheat was taken out from the operation of the covenants; and the dispute in this case having arisen as to whether the grantor could recover from the grantee damages for injury to the wheat by the grantee's cattle, it was held that he could not, because the grantee, and not the grantor, owned the wheat, which was simply excepted from the warranty.

If the exception had been in its proper place there could have been no such question.

§ 123. **Effect of certain words.**—The appropriate word or words for the creation of an exception are: "saving and excepting" or "excepting," alone; for a reservation, "reserving."

[12] 47 Mich. 292; 11 N. W. 164.

But these words are, as deeds are drawn, often used interchangeably, so very little assistance in construing doubtful clauses is to be derived from them, for the use of the one or the other does not control in fixing the character of the clause as an exception or a reservation.

Illustrations: An exception may be created by words more appropriate to a reservation, as: "Saving and reserving for his own use the coal contained in said parcel of land, together with free ingress and egress by wagon road to haul the coal therefrom as wanted"—this clause was held to except the coal—something already existing as a part of the thing granted—and not to reserve merely the right to use coal for the grantor's life, as was contended.[13]

Sometimes the words are used together; as where the clause was: "excepting and reserving, however, the full right of keeping and maintaining booms on the flats between high and low water mark of said river along the premises hereby conveyed, either to use myself or to let or sell to other persons"—and it was construed not to be merely the reservation of an easement but practically an exception.[14]

So where the same two words were used—"reserving and excepting" a strip of land, it was held that a reservation, rather than an exception, was created.[15]

From such cases, and there are many, the conclusion is sometimes hastily drawn that there is no advantage to be gained from considering the distinction between an exception and a reservation—if, indeed, the distinction exists.

But the truth is, that while there is often difficulty in determining whether a particular clause is one or the other, and while, also, in particular cases, there is much room for difference of opinion, yet when once the character of the provision has been settled, the legal incidents

[13] Whitaker v. Brown, 46 Pa. St. 197.
[14] Engel v. Ayer, 1893, 85 Maine 448; 27 Atl. 352.
[15] Biles v. Railroad, 1893, 5 Wash. 509; 32 Pac. 211.

belonging to it as of that particular character attach to it, and so in most cases the distinction cannot be disregarded.

§ 124. **Particular cases—Timber—Minerals.**—It is not unusual for the grantor to retain in one form or another an interest in a portion of the growing timber on land conveyed by him.

He may except it, in which case the actual ownership of the timber is in him, together with an implied power to enter on the land to cut the timber and remove it, as also the right to have it left unhurt by the removal of the soil; subsequent purchasers must take notice of his rights, and if no time is named within which he is to remove the timber, it seems that he is not required to remove it within a limited time.[16] And even if a time has been limited within which the grantor must remove timber cut by him under an exception which leaves the title in him, his title to the excepted timber will not be forfeited to the grantee by his failure to remove what he has cut within the time limited.[17]

On the other hand, he may reserve simply the right to cut the timber and to do it within a limited time, in which case the title to the timber does not remain in him, and should he neglect to cut it within the time limited it would become the property of the grantee.[18]

Exceptions of minerals of one kind or another are not uncommon, but here, also, the distinction must be borne in mind between keeping back a specified thing, and reserving a right to enter the lands and remove it.

For example, where a deed reserved to the grantor

[16] Wait v. Baldwin, 60 Mich. 622; 27 N. W. 697; 1 Am. St. R. 551; Howard v. Lincoln, 13 Maine 122; Sears v. Ackerman, 1903, 138 Cal. 583; 72 Pac. 171. Though see, Huron Land Co. v. Davison (Mich. 1902), 90 N. W. 1034; 9 D. L. N. 239; holding that the grantor must remove the timber within a reasonable time after notice from the grantee.

[17] Irons v. Webb, 41 N. J. L. 203; 32 Am. R. 193.

[18] Martin v. Gilson, 37 Wis. 360.

"the right of mining on the above granted premises" a certain amount of ore annually, "at a duty of thirty-seven and one-half cents per ton, including all the facilities needful for doing the same," it was held that the property in the mines themselves and in the ore they contained passed to the grantee, and that there was reserved to the grantor a license to enter on the granted premises and exercise certain rights for the purpose of extracting from the mines a limited quantity of the ore, and revesting in the grantor the property in that which was thus separated from the mass; and that if the reservation had been of an exclusive right it might be held to retain in the grantor the property in the mines, being practically an exception; but, as it was not exclusive, there was nothing to prevent the grantee from working the mines at the same time.[19]

And a deed containing a clause by which a grantor "reserves for himself, his heirs and assigns, a free toleration of getting coal for their own use without hindrance or denial," conveys the land with its minerals to the grantee subject only to the privilege kept by the grantor, which is not an exclusive right to the coal.[20] Whereas, on the other hand, by a clause in the deed reading, "except the right to all valuable minerals in said land, which we hereby reserve, together with the right to mine the same," the grantor retains the exclusive right to and ownership in the minerals.[21]

§ 125. Reservation of easements appurtenant to grantor's other land.—It often happens that the grantor reserves a right of way or other easement for the benefit of other land of his in the vicinity, and the question has arisen in such cases as to the duration of the easement.

[19] Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290, 321, 322.
[20] Algonquin Coal Co. v. Northern &c. Co., 1894, 162 Pa. 114; 29 Atl. 402.
[21] Snoddy v. Bolen, 1894, 122 Mo. 479; 24 S. W. 142; 25 S. W. 932.

While the general rule is recognized that a reservation, in order to continue in fee, should be limited to the grantor and his heirs, as if it were actually a regrant, such cases as those now referred to are considered as justifying a disregard of this technical rule, and the easement in such cases is held to be one in fee (though words of inheritance are wanting), and capable of passing to subsequent grantees as appurtenant to the land retained by the grantor.[22] And in such cases, besides looking at the reservation in this way, the courts sometimes regard it as an exception, considering the grantor's estate at the time the conveyance is made as a collection of rights in esse, from which collection the one reserved is excepted, with the same incidents attached to it as if it were a technical exception, among which incidents is the non-requirement of words of inheritance to create a fee, provided the owner's estate was formerly a fee.[23]

While such doctrines have undoubtedly resulted in substantial justice in particular cases, they are not adopted by all courts,[24] and there are consequently, in the law as to reservations of easements in this country, uncertainty and confusion which are annoying.[25]

§ 126. **Exception and reservations repugnant to grant —Effect of.**—Exceptions and reservations will be held void if repugnant to the estate granted, because the grant in such case would be inoperative were the repugnant exception or reservation to stand.

Having, therefore, granted a specific and definite num-

[22] Lathrop v. Elsner, 1892, 93 Mich. 599; 53 N. W. 791; Walz v. Walz, 1894, 101 Mich. 167; 59 N. W. 431; Chicago &c. R. v. Ward, 128 Ill. 349; 18 N. E. 828; 21 N. E. 562; Wells v. Tolman, 156 N. Y. 636; 51 N. E. 271.

[23] Chappel v. Railroad, 1892, 62 Conn. 195; 24 Atl. 997; 17 L. R. A. 420; Smith v. Furbish, 1894, 68 N. H. 123, 145; 44 Atl. 398; 47 L. R. A. 226. See Knowlton v. Railroad, 1899, 72 Conn. 188; 44 Atl. 8.

[24] See, for example, Simpson v. Railroad, 1900, 176 Mass. 359; 57 N. E. 674.

[25] There is a useful note on this subject in 20 L. R. A. 631.

ber of acres, the grantor cannot except part of the number granted; or having granted an estate in fee he cannot by exception or reservation retain absolute control in fee of the estate granted.

But exceptions may be very broad without being held repugnant; as an exception of all minerals, valuable earths, substances, coals, ores, all manner of compositions, etc., was held to leave something for the grantee in the water, timber and ordinary soil.[26]

And, the grant being in general terms, an exception of a part is valid; as, if the grant be of the "S. W. quarter, etc.," an exception may be made of five acres in the southwest corner, etc.; or, even if the boundaries be definitely given, but the grant does not name a specific number of acres as conveyed, the woodland or marsh may be excepted.[27]

So there is no repugnancy, if, having granted a fee, the grantor reserves a life estate, or an estate for years; and express reservations of such interests are not unusual.[28]

§ 127. **Reservation to a stranger.**—It is a general principle that a reservation to a stranger not a party to the conveyance is void, and the stranger can take nothing by virtue of the reservation.[29] In order, however, to carry out the intention of the parties, such a reservation has sometimes been construed as an exception, practically giving the stranger the benefit of the reservation, and as giving notice of his rights.[30] And in Wall v. Wall,[31] where a reservation clause was: "reserving to herself

[26] Foster v. Runk, 109 Pa. 291.

[27] Painter v. Water Co., 1891, 91 Cal. 74; 27 Pac. 539.

[28] McDougal v. Musgrave, 1899, 46 W. Va. 509; 33 S. E. 281; Fisk v. Brayman, 1899, 21 R. I. 195; 42 Atl. 878.

[29] Edwards Hall Co. v. Dresser, 1896, 168 Mass. 136; 46 N. E. 420; Littlefield v. Mott, 14 R. I. 288.

[30] Martin v. Cook, 1894, 102 Mich. 267; 60 N. W. 679; Beinlein v. Johns, 1898, 102 Ky. 570; 44 S. W. 128.

[31] 1900, 126 N. C. 405; 35 S. E. 811.

(grantor), the possession, use, enjoyment and control of the tract of land for her natural life, and reserving, also, the care and support of her daughter for and during the life of the said daughter," it was held that the reservation for the support of the daughter was a lien on the land, enforceable by the daughter against the land in the hands of a subsequent grantee, who took it with notice of this clause.[32]

[32] See also, Blakeley v. Adams (Ky., 1902), 68 S. W. 393.