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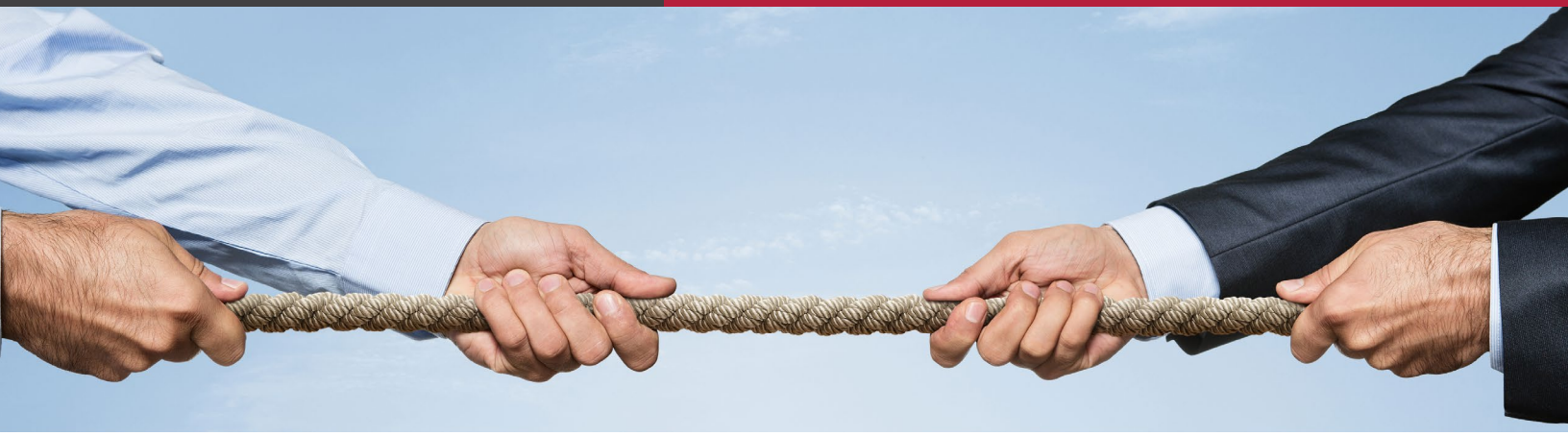
TERMINOLOGICAL INEXACTITUDE

by Robbie S. Morris
May 13, 2020



When Winston Churchill used this phrase in 1906 in his speech to the House of Commons, he probably did not have in mind the construction of language contained in a deed. Nevertheless, terminological inexactitude in drafting a reservation from conveyance or an exception to the conveyance can make a difference. The drafter might accidentally accomplish what he or she set out to accomplish - but then again, maybe not. *Griswold v. EOG Resources, Inc.,* 459 S.W.3d 713 (Tex. App – Fort Worth 2015, no pet.) is illustrative of this point.

THE *GRISWOLD* CASE

In 1926, A sold Blackacre to B, with A reserving a one-half mineral interest. In 1938, C obtained a foreclosure judgment against A **and** B and Blackacre (both B's estate **and** A's reserved estate) was ordered to be seized and sold. At a public sale, Blackacre (both B's estate **and** A's reserved estate) was conveyed to C by Constable's Deed (the "Constable's Deed"). The surface plus B's one-half of the minerals and A's reserved one-half of the minerals were thus reunited in C. After the constable's sale, C conveyed Blackacre to D. Eventually, Williams and Wellington succeeded to D's ownership of Blackacre.

In 1993, Williams and Wellington sold Blackacre to Caswell, and that deed (hereinafter referred to as the "Caswell Deed") contained the following provision:

> "LESS, SAVE AND EXCEPT an undivided ½ of all oil, gas and other minerals found in, under[,] and that may be produced from [Blackacre] **heretofore reserved by predecessors in title** [emphasis added];
>
> SUBJECT TO THE FOLLOWING:
>
> [a recorded oil and gas lease];
>
> [a recorded right of way easement]; [and]
>
> [a strip of land under fence, but outside the Blackacre property line]."

Caswell subsequently conveyed Blackacre to Griswold by deed (that deed is hereinafter referred to as the "Griswold Deed"), and the foregoing "LESS, SAVE AND EXCEPT" and "SUBJECT TO" language contained in the Caswell Deed was replicated in the Griswold Deed.

Griswold leased his mineral interest to EOG. EOG made royalty payments to Griswold, but only for 50 percent of the minerals. Griswold sued EOG for breach of contract and conversion, alleging that Griswold owned 100 percent of the minerals and was therefore entitled to royalty for 100 percent of the minerals.

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The *Griswold* court explained that on its face, the deed was not susceptible to more than one meaning, and therefore, was not ambiguous. The court cited *Friendswood Dev. Co. v. McDade & Co.,* 926 S.W.2d 280, 283 (Tex. 1996) to support this proposition. When a deed is not ambiguous, the court's role is to construe the deed as a matter of law. The court elaborated on the standard for construction. It stated that the exercise in construing a deed as a matter of law was to determine the "true intention of the parties as expressed within the 'four-corners' of the instrument" – and this means "not the intent that the parties meant but failed to express [which could only have been accomplished by extrinsic evidence if the court had determined that the deed was ambiguous on its face], but the intent that is expressed [by the writing]." In other words, the "LESS, SAVE AND EXCEPT" and "SUBJECT TO THE FOLLOWING" provisions said what they said, and the court would determine what the parties meant by these expressed provisions. Indeed, the court pointed out that the proper construction of the save-and-except provision was the "sole" issue on appeal.

The *Griswold* court then queued up the various operative legal premises to be invoked (some of which, at first blush, will seem to be conflicting) in determining what was intended by the parties to the Griswold deed. First, the court pointed out that "a warranty deed [which the Griswold deed was] will pass all of the estate owned by the grantor at the time of the conveyance unless there are **reservations or exceptions** [emphasis added] that reduce the estate conveyed." (Citing *Cockrell v. Tex. Gulf Sulphur Co.,* 299 S.W.2d 672, 676 (Tex. 1956)). Next, "Property 'excepted' or 'reserved' under deed is **never** [emphasis added] included in the grant and is something to be deducted from the thing granted, narrowing and limiting what would otherwise pass by the general words of the grant." (Citing *King v. First Nat'l Bank of Wichita Falls,* 192 S.W.2d 260, 262 (Tex.1946)). With respect to a reservation, the court said that "it must be made by clear language" that a reservation is what is intended, and that "courts do not favor reservations by implication." (Citing *Monroe v. Scott*, 707 S.W.2d 132, 133 (Tex. App. – Corpus Christi 1986)). With respect to an exception (as distinguished from a reservation), the court said that the property to be excepted from the larger property being conveyed must identify the excepted property with "reasonable certainty." Finally, the court reminded its audience that a rule in construing deeds is that "they are to be most strongly construed against the grantor and in favor of the grantee" – and "this rule applies to reservations and exceptions."

Obviously, of the two techniques addressed by the *Griswold* court, the draftsmen of the Caswell Deed and the Griswold Deed "elected" to use the save-and-except method. So now that we have set up the premises, the question becomes where does the court end up after applying them? I know the reader at this point is beside himself or herself with wild anticipation. So let's find out – but first, the respective arguments.

Griswold argued that attempts in the Caswell Deed and the Griswold Deed to except out of those conveyances a previously reserved interest (which, you will recall, had been extinguished by virtue of the merger of the reserved interest with the balance of the fee in the 1938 Constable's Deed) were of no legal consequence. It follows, therefore, as the Griswold argument goes, that the grantors in both the Caswell Deed and the Griswold Deed excepted from their conveyances a prior reservation which was not in existence, and in consequence, each constituted a legal nullity; and moreover, unlike a reservation clause, a save-and-except clause cannot create a mineral interest where one did not exist.

EOG simply argued that both deeds clearly expressed an intent "to save and except out of the conveyances the ½ mineral interest, and the fact that the reason for doing so was in error would not defeat the expressed intent to save and except the ½ mineral interest from the estate conveyed.

I'm going to have to tell you that when I read the *Griswold* court's version of the opposing arguments, I put my equity hat on and said, "Griswold wins." Well - I would be wrong!

The *Griswold* court stated that Griswold was correct in his distinction between a reservation and an exception – they are **not** synonymous terms. The court explained that an exception generally does not pass title in and of itself – it operates instead to prevent the excepted interest from passing at all. (Citing *Patrick v. Barrett*, 734 S.W.2d 646, 647 (Tex. 1987)). On the other hand,

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the court explained, a reservation is made in favor of the grantor wherein the grantor reserves unto himself some right in the property, the balance of which is being conveyed. But then, the court delivered the knockout punch – "But a save-and-except clause may have the same legal effect as a reservation when the excepted interest [is owned by the grantor]." In support of its position, the court harkened back to an earlier case out of the Texas Supreme Court which, for all practical purposes, was directly on point. In *Pich v. Lankford*, 302 S.W.2d 645 (Tex. 1957), the Texas Supreme Court said that where a deed excepts an interest from a grant (rather than reserves it), since the interest does not pass to the grantee (by virtue of the fact that it was excepted) and was not outstanding in another (even though erroneously reciting that it did), "the legal effect of the language excepting [the excepted interest] from the grant **was to leave it in the grantor** [emphasis added]"! The *Griswold* court then added a pithy guide: "[W]hile…a save-and-except clause will not operate to pass title, it may be effective to fail to pass title…" (Citing *Pich v. Lankford*). The *Griswold* court went on to point out that the *Pich* court, in underscoring its position that even where the chain of title clearly showed that the recitation that there had been a prior reservation in another party was in error, nevertheless "[t]he giving of a false reason for an exception from a grant does not operate to cut down the interest or estate excepted, nor does it operate to pass the excepted interest or estate to the grantee. (Citing *Pich* 306 S.W.2d at 648).

There you have it!

THE *PERRYMAN* CASE

What about the situation where grantor excepts from his conveyance an interest which is not outstanding in another person, and does not recite in error that such interest is outstanding in another person – and the excepted interest is, in fact, then owned by the grantor doing the excepting? Without getting into the weeds of a recent Texas Supreme Court case full of chain-of-title complexities, one premise emerged from that case which is pertinent to the subject matter of this article. In that case, the grantor (whose name was "Ben") owned all of the surface fee and all of the mineral fee in Whiteacre. Ben's deed recited "LESS, SAVE AND EXCEPT an undivided one-half (½) of all royalties from the production of oil, gas and/or other minerals that may be produced from the above described premises which are now owned by Grantor." (Incidentally, the court held the phrase "which are now owned by grantor" modified "premises," not "one-half (½) of all royalties"). Recall that the deed in *Griswold* recited that the excepted interest was outstanding in a third party when it really wasn't. Ben's deed didn't recite that the excepted interest was outstanding in a third party – it was actually then vested in Ben; indeed, as previously stated, Ben then owned the entire surface and mineral estate. In citing *Pich*, the Texas Supreme Court said "And because [Ben] owned all of the fee-simple interest in the entire estate at the time of the grant, the … interest excepted from the grant necessarily remained with [Ben], rather than passing to the grantees or remaining outstanding in another. Although Ben's Deed did not expressly 'reserve' the … interest for himself, '**the legal effect** of the language excepting [the excepted interest] from the grant was to leave it to the grantor.'" (emphasis added) *Gary Don Perryman et al. v. Spartan Texas Capital Partners, Ltd. et al.* 546 S.W.3d 110 (Tex. 2018). The court said that an exception to conveyance is not a reservation – it is something not included in the conveyance. It also said a reservation can only be reserved by the grantor, unto the grantor. In the case of Ben's deed, even though there was no reservation by Ben unto Ben, the excepted interest morphed into a reservation by virtue of the fact that Ben, owning 100 percent of the surface and 100 percent of the minerals, and having excluded the ½ royalty from the conveyance, left the ½ royalty no place to go but to Ben. In this respect, the result is essentially the same as in *Griswold* other than the fact that the excepted interest was not erroneously thought to be outstanding in a third party. However, to use the words of the *Perryman* court, "the trouble began" when Ben's grantees conveyed Whiteacre. In that deed, Ben's grantees replicated the LESS, SAVE AND EXCEPT language which appeared in Ben's deed. To make a long story short, the *Perryman* court held that in Ben's grantees' deed, there was no reservation by Ben's grantees - and the excepted interest in Ben's grantees' deed was the interest which Ben had "reserved" (by default) in Ben's deed. The upshot then of the excepted interest in Ben's grantees' deed was to exclude such interest, thus limiting the quantity of the estate.

TAKEWAYS

A few observations.

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Insofar as the expectations of the parties are concerned, I suppose that if a grantee takes a deed which excepts out a portion of the estate from the conveyance, albeit erroneously reciting that such portion is outstanding in another, it probably makes sense that the grantee's expectation is that the conveyance will not include the excepted portion (in other words, both grantor and grantee mistakenly believe the excepted interest is outstanding in a third party). Moreover, where the excepted portion (with the erroneous recitation that such portion is outstanding in another) first rears its head in the deed in question, the grantor would validly argue that the grantor should be entitled to the "windfall-by-error" by virtue of the fact that the grantor had paid his remote grantor consideration for such portion in question. And I think that is what *Pich* is saying. That seems straight forward enough. In any event, the law is telling us that where the parties are mistaken as to what appears to be a prior reservation, or where the words "less, save, and except" are used (in error) to describe what the grantor intends to be a reservation of a portion of the larger estate, irrespective of the fact that one of the rules of construction is that a deed is construed against the grantor and in favor of the grantee, including reservations and exceptions, grantor wins.

In the situation where the grantor owns the entire estate, and simply incorrectly uses the words of exclusion (*i.e.*, the usual form being "save and except") rather than the words of reservation (*i.e.*, "grantor hereby reserves, for grantor, grantor's [heirs] [successors] and assigns"), it follows that the result will be that the excluded portion will default as a "reservation" to the grantor. In the situation where the grantor is mistaken in his belief that there is an outstanding interest in another person, the *Pich* rule will save the grantor, but the preference is to "get it right" to avoid any confusion. In the first situation, it is simply an issue of proper draftsmanship. In the second situation, it is taking the time to look at the exception documents to determine whether an item listed on Schedule B of the title commitment is still "valid and subsisting." If one determines it is not, this is a contract issue as to exactly what the parties are intending to be included in the conveyance under the purchase and sale agreement, and whether or not the agreed upon consideration supports (or not) the interest in question.

But when dealing with deeds and conveyancing, there is another "exception" which creeps into the real estate conveyancing vernacular. The language of exclusion - "save and except," "excepting however," "save, less, and except", "less, save and except," and "exception to conveyance" – is used when a portion of the entire estate described in the deed is to be excluded from the conveyance. Thus, this category of "exception" (from conveyance) impinges on the quantity of estate being conveyed. The term "exception" is also used in the context of an "exception to title" or "exceptions to title," primarily because when the real estate lawyer looks at a title commitment, he or she focuses on Schedule B which is entitled "Exceptions from Coverage"; the resulting terminology is that the Schedule B lists "exceptions to title" – either to be cured by grantor, or accepted by grantee. This category of "exceptions" impinges on the quality of the estate being conveyed (more on that below).

PRE-POSITIONING DOES MATTER

If there is a portion of the estate which is being reserved, or if such portion has been previously severed and is thus being excluded, such reservation or such exclusion should appear immediately following the description of the property being conveyed (*Cf.* 17 Herbert S. Kendrick · John J. Kendrick Jr. *Texas Transaction Guide: Legal Forms* § 73.21[8][b] and [c] - (2020) (LexisNexis). When dealing with drafting a deed with reservations from and exceptions to a conveyance, one treatise recommends (and good practice dictates) that the scrivener insert the words "'subject to the exceptions and reservations hereinafter stated' immediately following the use of the words 'grant, sell and convey' and preceding the description of the [property]." (*Cf.* 4 Aloysius A. Leopold *Texas Practice Series; Land Titles and Land Title Examination* § 16.9 (3rd ed. 2005). As a matter of practice, the foregoing language should also be inserted at the end of the habendum/warranty clause in order to ensure that the grantor's warranty is appropriately limited. The deed forms in Chapter 5 of the *Texas Real Estate Forms Manual* take the guesswork out of the equation, and remove the art of drafting from the conveyance exercise by doing the pre-positioning for you. There is a "Reservations from Conveyance" heading in the general warranty deed form wherein a **reservation** is to be described. Likewise, there is an Exceptions to Conveyance and Warranty heading wherein not only **exclusions from conveyance** (*i.e.*, interests previously reserved by or conveyed to third parties as distinguished from reservations by a grantor – see *infra*) would be described, but also **exceptions to the grantor's warranty**. Consistent

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with the best practices mentioned above, the general warranty deed form in Chapter 5 of the *Texas Real Estate Forms Manual* likewise inserts the phrase "subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty" both before the grant sell and convey language, **and** at the end of the habendum/warranty paragraph.

DIFFERENT USES OF THE TERM "EXCEPTIONS"

Finally, even though the general warranty deed form in Chapter 5 of the *Texas Real Estate Forms Manual* lumps them into the same heading, I want to emphasize the distinction between "exceptions to conveyance" and "exceptions to warranty." I have spoken about the fact that an "exception to conveyance" impinges on the quantity of the estate – think interests previously reserved or conveyed. I also have spoken about the fact that what we commonly refer to as "exceptions to title" impinge on the quality of the estate – think encumbrances. These "exceptions to title" appear, in deeds other than the *Texas Real Estate Forms Manual* forms, in the "subject to" clause. The phraseology generally reads something like "The conveyance of the Property is made by Grantor and accepted by Grantee subject to the following…" The "subject to" provision then goes on to either itemize the exceptions to warranty, or to describe those exceptions in broad terms. These exceptions impinge on (and reduce) the quality of the estate; thus reducing the quality of the estate has the effect of limiting grantor's warranty of title. (*Cf.* 17 Herbert S. Kendrick · John J. Kendrick Jr. T*exas Transaction Guide: Legal Forms* § 73.21[7][c] - (2020) (LexisNexis) Many times you will see the "subject to" provision also listing prior mineral severances (the language will read something like "The conveyance of the Property is made by Grantor and accepted by Grantee subject to the following exceptions") – and that probably does the trick. But since a prior severance reduces the quantity of the estate, the recommended practice is not to use the "subject to" provision to carve out previously severed portions of the fee simple (whether as to the mineral estate, or the surface estate in the case where the land described encompasses the tract of land previously severed), but to pre-position such prior severances as excluded portions of the larger estate described in the pecking order previously described. (*Cf.* 17 Herbert S. Kendrick · John J. Kendrick Jr. *Texas Transaction Guide: Legal Forms* § 73.221[1][a] - (2020) (LexisNexis). The problem with this approach is that in most cases, the title commitment may not list (if it lists at all), and the practitioner will not have, all of the documents affecting mineral title.

The bottom line is that the form of the deed and the language used in preparing the deed do matter! Next time you hear someone yell "Don't spend a lot of time on this thing – it's just a deed!" you can respectfully demur. Terminological Inexactitude, indeed!

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With 45 years of legal practice focused on partnering with companies in the real estate industry, Robbie Morris has the experience and know-how to help clients structure real estate deals and solve the numerous problems impacting their businesses. Board Certified in Commercial Real Estate by the Texas Board of Legal Specialization, his practice is primarily focused on guiding both sellers and buyers through a variety of commercial real estate transactions, farm and ranch transactions and high-end residential transactions. Robbie is a trusted resource for clients of all types and sizes, including publicly-traded corporations, developers, lenders, landowners and entrepreneurs.