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EXCEPTION AND RESERVATION OF EASEMENTS.

THE exact relation in our law between the functions of the reservation and the exception in the creation of easements, where one of two tracts or a part of one tract is conveyed by the owner to a third person, is the subject of marked differences of opinion on the part of the courts. It is the purpose of this paper to examine historically and analytically some of the problems raised in such a case.

Chief Justice Tindal said: "It is to be observed that a right of way cannot, in strictness, be made the subject either of exception or reservation."¹ If this were an accurate statement of the law, there would, of course, be nothing to discuss under the title of this paper. But conveyancers and laymen have, in numerous instances, attempted to create easements in the manner suggested in the title, and the courts have frequently used language in flat contradiction to that quoted.

Lord Coke, in his commentary on Littleton, says:

"Note a diversity between an exception (which is ever a part of the thing granted, and of a thing *in esse*) for which, *exceptis, salvo, praeter*, and the like, be apt words; and a reservation which is alwaies of a thing not in *esse*, but newly created or reserved out of the land or tenement demised."²

¹ *Durham Ry. Co. v. Walker*, 2 Q. B. 940, 967 (1842).

² Co. Litt. 47a. See *Doe d. Douglas v. Lock*, 2 A. & E. 705, 743-746 (1835), *per* Lord Denman, C.J. In that case the learned Chief Justice further says (p. 744): "In *Sheppard's Touchstone*, p. 80. 'A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, &c. doth reserve some new thing to himself out of that which he granted before: ' and, afterwards, 'This doth differ from an exception, which is ever of part of the thing granted, and of a thing in *esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not in *esse* before; so that this doth always reserve that which was not before, or abridge the tenure of that which was before.' And afterwards, 'It must be of some other thing issuing, or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing.' And afterwards, 'If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing; this is a good reservation: but if the reservation be of the grass, or of the vesture of the land or of a common, or other profit to be taken out of the land; these reservations are void.' In *Brooke's Abridgment*, tit.

The early writers, then, held the view that the word "reserve" and its variations could be used with strict verbal accuracy only in relation to "some other thing, issuing or coming out of the thing granted and not a part of the thing itself, nor of something issuing out of another thing." In the year 1835 Lord Denman said:

"The rents, heriots, suit of mill, and suit of court, are the only things which, according to the legal sense and meaning of the word, are *reservations*."³

Regardless of their reasons for so doing, the fact is that the English courts have, as Lord Denman said, treated the interests named by him as in a class by themselves, and have appropriated the word "reserve" as the accurate word by which to create those interests.

It was difficult, however, even in the time of Coke, to keep the use of the word "reserve" within the limits set for it by the courts and law writers, and it became necessary to interpret the word to mean what the parties using it plainly intended it to mean, if the subject-matter with relation to which it was used offered no legal obstacle. Grantors before the time of Coke had used the word "reserve" when the plain intent was to take out of the operation of the conveyance some part of the property which would otherwise have fallen within the description used in the conveyance. Here the subject-matter was, of course, proper for an exception, and the strictly accurate words would have been, according to Coke, "*exceptis, salvo, praeter*, and the like." But in the case of such a misuse of the word "reserve," no harm is done, since no legal problem is presented except a problem of interpretation, or of determining intent, and the intent is usually quite plain. Accordingly the courts have interpreted the word "reserve" to mean "except," when the

Reservation, pl. 46, it is said, that if a man leases land, reserving common out of it, or the herbage, grass, or profits of the land demised, this is a void reservation, for it is a parcel of the thing granted, and is not like where a man leases his manor and the like, except White Acre, for there the acre is not leased; but here the land is leased; therefore the reservation of the herbage, vesture, or the like, is void."

³ Doe d. Douglas v. Lock, *supra*, at p. 743.

subject-matter to which the word is directed is the proper subject-matter of an exception. Coke says of the word *reserve*:

"And sometime it hath the force of *saving* or *excepting*. So as sometimes it serveth to reserve a new thing, viz., a rent, and sometimes to except part of the thing in *esse* that is granted."⁴

The view that "*reserve*" may be interpreted to mean "*except*" has been followed in numerous cases and undoubtedly represents the law.⁵

The great number of cases where the parties have used the word "*reserve*" to save out of the operation of a conveyance "*part of the thing in esse that is granted*," shows that the technical meaning of the word is not its natural or popular meaning. One court has pointed out that the technical meaning is not even the dictionary meaning, nor the "*primary and natural*" meaning.⁶ But even though some courts have been willing to recognize that technically the word "*reserve*" has been definitely appropriated to the narrow use already referred to, yet the liberality with which the courts have allowed the interchange of the words "*reserve*," and "*except*," when the question has been *merely one of words*, has prevented the forced construction from doing harm.⁷

Speaking only in a general way and subject to a more careful analysis later on, we may say, as the courts customarily do, that the effect of an exception is to eliminate the subject-matter of

⁴ Co. Litt. 143a.

⁵ *Earl of Cardigan v. Armitage*, 2 B. & C. 197 (1823); *Doe d. Douglas v. Lock*, 2 A. & E. 705, 4 Nev. and Man. 807 (1835); *McIntire v. Lauckner*, 108 Me. 443, 81 Atl. 784 (1911); *Smith v. Furbish*, 68 N. H. 123, 44 Atl. 398 (1894); *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538 (1874); *Gill v. Fletcher*, 74 Ohio St. 295, 78 N. E. 433 (1906); *Shoenberger v. Lyon*, 7 Watts and Ser. (Pa.) 184 (1844); *Freudenberger Oil Co. v. Simmons*, 75 W. Va. 337, 83 S. E. 995 (1914); *Preston v. White*, 57 W. Va. 278, 50 S. E. 236 (1905).

⁶ In *Smith's Ex'or v. Jones*, 86 Vt. 258, 260, 84 Atl. 866, 867 (1912), Munson, J., said: "The primary and natural meaning of the word [*reserve*] is inconsistent with the effect given it in the law of this subject. To reserve is to keep in reserve, to retain, to keep back, not to deliver or make over."

⁷ But see *Fancy v. Scott*, 2 Man. & Ry. 335 (1828), where the defendant pleaded a *reservation* to himself of all pits in the close, etc., and Mr. Justice Bayley said it was not a *reservation*, but an *exception*, and held the plea bad. No other case has been found making the purely verbal distinction.

the exception from the operation of the conveyance, just as if the description of the premises in the conveyance had carefully passed around the subject-matter of the exception and had not mentioned it at all. The consequence is, of course, that the grantor still has the same estate in the subject of the exception, which he had before the conveyance. No necessity for the execution or sealing of the conveyance by the grantee, on the theory that a grant back is taking place, nor for the use of the word "heirs" in order to indicate an estate in the grantor more durable than a life estate, could be urged.⁸

We have seen what is the proper subject-matter of a reservation, when used in its strictly technical sense, and that easements are not included within this subject-matter. We have also seen that, when applied to a thing in being or part of the soil, the word "reserve" may be used to mean "except," and that when it is so used, the courts will give to it its intended meaning. The obvious question then arises, whether an easement may be created by the process of exception out of the operation of a conveyance. This is not a question of words, but of logic, and of the application of the legal requirements of conveyancing. It would seem to be logically impossible to "cut out" or to "keep back" or to "withhold" from the operation of a grant something which is non-existent before the grant, or which would not be included within the grant even though there were no words of exception. It is evident that if A, the owner of Whiteacre and Blackacre, conveys Blackacre to B, excepting a right of way along the east ten feet of Blackacre, he cannot "cut out" or "keep back" or "withhold," as of his former estate, or as of any estate whatever, something which he did not have before he conveyed Blackacre. The question would seem to be, then, had A, at the time he conveyed Blackacre to B, the legal interest which he, after the conveyance, seeks to assert in Blackacre? Does A now have the privilege

⁸ *Chappell v. N. Y. N. H. & H. R. R.*, 62 Conn. 195, 24 Atl. 997 (1892); *Smith v. Ladd*, 41 Me. 314 (1856); *Winthrop v. Fairbanks*, 41 Me. 307 (1856); *McIntire v. Lauckner*, 108 Me. 443, 81 Atl. 784 (1911); *White v. Crawford*, 10 Mass. 183 (1813); *Emerson v. Mooney*, 50 N. H. 315 (1870); *Smith v. Furbish*, 68 N. H. 123, 44 Atl. 398 (1894); *Gill v. Fletcher*, 74 Ohio St. 295, 78 N. E. 433 (1906); *Whitaker v. Brown*, 46 Pa. St. 197 (1863); *Keeler v. Wood*, 30 Vt. 242 (1858). See *SHEP. TOUCH.*, Preston ed., 79.

of crossing Blackacre along the specified route; or are we to say that, since the right that A now claims is an easement, a right in the land of another, it can be created only by the act of that other, and since the deed was not also signed and sealed by B so as to constitute a grant back to A, A does not have the easement?

Two English cases give direct support to this contention. In *Wickham v. Hawker*⁹ the facts were these: A and B, as the trustees of the land in question, and C, as the beneficiary, conveyed the land by indenture to D, "excepting and always reserving" to A, B, and C, liberty to hunt upon the said land. This privilege, together with the manor to which it was intended to be appurtenant, came by mesne conveyance to the defendant, who is sued in trespass *quare clausum fregit* by the now owner of the servient tenement. The court said:

"The liberty 'of hawking, hunting, fishing, and fowling,' is, by the terms of that deed, 'excepted and reserved to Widmore, Vidler, and Cox;' but so far as related to Widmore it could not be a good exception or reservation, because he was not a conveying party to the deed; nor is such a liberty, whether it be a mere easement or a profit à prendre, properly and in correct legal language, either an exception or a reservation. . . . As the indenture was executed by Wade, the words of reservation and exception operated as a grant by him to the three—Widmore, Vidler, and Cox, and the plea properly stated the legal effect of those words as a grant by him."¹⁰

This view never has received, and it is safe to say that it never will receive, the approval of the courts in this country.

⁹ 7 M. & W. 63 (1840).

¹⁰ At pp. 76, 77. To the same effect is *Durham Ry. Co. v. Walker*, 2 Q. B. 940 (1842), discussed *supra*, p. 180. There is much evidence in the English reports, however, that the courts do not really think of the creation of an easement in favor of a grantor, in terms of a re-grant. In the numerous cases involving the creation of such easements by necessity, or by implication from the fact of an existing user at the time of the severance of two tracts from common ownership, the English courts invariably use the word "reserve." They thus leave with the reader the misleading inference that they would sanction the "reservation" of an easement if the intent were made plain. For examples of such misleading language, see *Clark v. Cogge*, Cro. Jac. 170 (1607); *Pinnington v. Galland*, 9 Ex. 1 (1853); *Richards v. Rose*, 9 Ex. 218 (1853); *Suffield v. Brown*, 4 De G. J. & S. 185 (1863); *Wheeldon v. Burrows*, 12 Ch. D. 31 (1879).

On this theory, in order to maintain the right in A which he claims after the conveyance, we must show that A has obtained that "right in the land of another" from the only one who could possibly convey it to him, namely, B, who is now the general owner of Blackacre. But a conveyance from B to A must satisfy the legal requisites of conveyancing as to form and content, such as writing, signature, seal, and the use of proper words of limitation to denote the durability of the interest created. The almost universal use of the deed poll in conveying the title to land would alone make an application of the above theory operate to defeat the intent of the parties in the overwhelming majority of the cases in which the question would arise.

There remain, then, two methods of dealing with this case. One is to make a definite departure from the language of the *Touchstone*, Coke, and the English decisions, and to say that an easement is sufficiently like a rent or a heriot or suit of mill so that it may also be made the subject of a reservation. There are a number of American decisions that with more or less definiteness do take this position, although there is a marked difference of opinion as to whether words of inheritance are necessary in order to create a fee.¹¹ The other solution is to say that there is no reason on principle why an easement should not be the subject of an exception, or of a reservation when that word is used (as has already been pointed out to be frequently the case) in the sense of exception. There are also a fair number of cases that take this position.¹²

The question is now definitely before us as to which of these solutions is legally the sounder.

Perhaps the most helpful effort to differentiate and define the incidents of ownership is that of the late Professor Wesley Newcomb Hohfeld in his well-known discussion of "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning."¹³ His table of the fundamental legal relations is as follows:

“ {	Jural	rights	privilege	power	immunity
	Opposites	no-rights	duty	disability	liability”

¹¹ The cases are collected in 2 TIFFANY, REAL PROPERTY, 2 ed., 1606, 1609.

¹² See 2 TIFFANY, *op. cit.*, 1267, 1607-1609.

¹³ 23 YALE L. J. 16, especially p. 28.

A concise statement by Professor Hohfeld of the application of his table of jural relations to the ownership of land will be more valuable than any attempt to paraphrase it.

"Suppose, for example, that A is fee-simple owner of Blackacre. His 'legal interest' or 'property' relating to the tangible object that we call *land* consists of a complex aggregate of rights (or claims), privileges, powers, and immunities. *First*: A has multital legal rights, or claims, that *others*, respectively, shall *not* enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties. *Second*: A has an indefinite number of legal privileges of entering on the land, using the land, harming the land, etc., that is, within limits fixed by law on grounds of social and economic policy, he has privileges of doing on or to the land what he pleases; and correlative to all such legal privileges are the respective legal no-rights of other persons. *Third*: A has the legal power to alienate his legal interest to another, i.e., to extinguish his complex aggregate of jural relations and create a new and similar aggregate in the other person; also the legal power to create a life estate in another and concurrently to create a reversion in himself; also the legal power to create a privilege of entrance in any other person by giving 'leave and license'; and so on indefinitely. Correlative to all such legal powers are the legal liabilities in other persons, — this meaning that the latter are subject, *volens volens*, to the changes of jural relations involved in the exercise of A's powers. *Fourth*: A has an indefinite number of legal immunities, using the term immunity in the very specific sense of non-liability or non-subjection to a power on the part of another person. Thus he has the immunity that no ordinary person can alienate A's legal interest or aggregate of jural relations to another person; the immunity that no ordinary person can extinguish A's own privileges of using the land; the immunity that no ordinary person can extinguish A's right that another person X shall not enter on the land, or, in other words, create in X a privilege of entering on the land. Correlative to all these immunities are the respective legal disabilities of other persons in general.

"In short, A has vested in himself, as regards Blackacre, multital, or *in rem*, 'right—duty' relations, multital, or *in rem*, 'privilege—no-right' relations, multital, or *in rem*, 'power—liability' relations, and multital, or *in rem*, 'immunity—disability' relations. It is important, in order to have an adequate analytical view of property, to see all these various elements in the aggregate. It is equally important, for many reasons, that the different classes of jural relations should

not be loosely confused with one another. A's privileges, e.g., are strikingly independent of his rights or claims against any given person, and either might exist without the other. Thus A might, for \$100 paid to him by B, agree in writing to keep off Blackacre. A would still have his rights or claims against B, that the latter should keep off, etc.; as against B, A's own privileges of entering on Blackacre would be gone. On the other hand, with regard to X's land, Whiteacre, A has, as against B, the privilege of entering thereon; but, not having possession, he has no right, or claim, that B shall not enter on Whiteacre."¹⁴

Taking this analysis of Professor Hohfeld, let us apply it to a concrete situation. A is the owner of two adjoining tracts, Blackacre and Whiteacre, and B is the owner of a third adjacent tract, Greenacre. As a matter of the normal relation of owners of these adjacent tracts, A has almost no privileges of action upon the soil of Greenacre. He may not, for example, walk or drive over it; or impound water upon it; on the contrary he is under a duty to B to do none of these things. Again he does not have any right against B that B shall not so build on Greenacre as to cut off the light from a house on Blackacre. All these simply represent certain aspects of the norm of property rights in land. If now B creates in A, with respect to Greenacre, the group of rights crystallized in the phrase "right of way" or "easement to build a reservoir," what happens as a matter of precise statement is that B extinguishes his own right that A shall not walk or drive over Greenacre or build a reservoir on it, and creates in A the privilege of doing these things upon the specified part of Greenacre, perhaps with certain limitations as to his termini when he exercises the privilege of walking or his purpose in using the water when he impounds it. He also creates in A the privilege of engaging in other actions on Greenacre that may be regarded as "incidental" to the easement granted, such as the privilege in certain circumstances of paving the right of way. A also gets new rights, such as that B, *inter alios*, shall not interfere with him in the exercise of the privileges that have been created in him. If B grants A an easement of light, he extinguishes his normal privilege of building anywhere on his land

¹⁴ Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," 26 YALE L. J. 710, 746-747.

that he sees fit, and creates in A a right and correlatively in himself a duty that he shall not build in a certain place or in a certain way. The result of the one or the other transaction is that A gets new privileges or rights, or both, that he did not before have, and B's privileges or rights, or both, are correspondingly diminished, with a correlative increase in his duties or "no-rights." Of course, except as modified by the transactions that we are considering, B's group of rights in the broad sense with regard to Greenacre remains as before. The accepted method at common law of creating these rights with regard to the land of B was by grant from B to A.¹⁵

Let us now consider another aspect of the relations between A and B with regard to their respective lands. A does not, as one of the normal incidents of his ownership of Blackacre, have the right that B or anyone else shall pay him \$100 a year, for instance, if he occupies Blackacre; he does not have the privilege and the power, on B's death, of taking possession of, and vesting in himself the title to, B's "best beast"; he does not have the right that B should grind his grain at A's mill. If he gets any of these rights or privileges they will be just as new, just as much additions to his normal group of rights that we call title, as were the rights mentioned in the first group. Yet it seems clear that at common law if A conveyed Blackacre to B, *i.e.*, extinguished all or part of his group of rights with regard to Blackacre, depending upon what estate was conveyed to B, he could at the same time by a reservation create in himself these new rights, powers, and privileges instanced above, which means, of course, that he subjected B to correlative duties or liabilities or no-rights. This could be done by a one-party deed. It was not essential that B should execute a grant to A. No operative fact on his part was necessary other than the acceptance of the deed executed by A, which contained the apt words of reservation. As has been stated in an earlier part of this discussion, the only rights that could be created in this fashion are those just illustrated, with, under the older law, the suit of court.

Let us now proceed to a consideration of A's rights with regard

¹⁵ For present purposes other ways of creating these rights, as by prescription or executed license, may be ignored.

to the two tracts, Blackacre and Whiteacre, of which he is the owner. Without an attempt to perform the impossible task of cataloguing all A's privileges with regard to Blackacre, it is sufficient to say that he has, *inter alia*, the privilege of walking along the east ten feet of that tract, for instance, for any reason he sees fit and at any time that he desires; he has the privilege of paving that strip; he has the privilege of impounding water on Blackacre (subject, perhaps, to certain limitations of not creating a dangerous nuisance). To touch for a moment on some of his rights, he has the right, good against an indefinitely large number of persons, including B, that no one of them shall interfere with his exercise of these privileges; he also has against them the right that they shall not physically intrude on or under this ten feet, regardless of any question of damages to the soil or interference with the exercise by A of any of his privileges with regard thereto. Of course, in addition to these rights and privileges of which particular mention has been made, A has the entire group of rights, powers, privileges, and immunities, with regard to this ten foot strip and the entire tract of which it is a part, that go to form the title to or ownership of the land. Suppose that A wishes to convey Blackacre to B but to keep his entire group of rights (in the broad sense) with regard to the east ten feet. This is the typical case of an exception, and it is well settled that a one-party deed by A to B of Blackacre excepting the east ten feet will be effective to accomplish the desired result. It is ordinarily expressed by the statement that

"An exception in a deed withholds from its operation some part or parcel of the thing which but for the exception would pass by the general description to the grantee."¹⁰

This language, while common enough, seems to be fundamentally unsound and therefore likely to mislead. The law is not concerned with the land, the physical object, as such; it is concerned only with certain relations between individuals — in our case, relations between them with regard to this soil — and these

¹⁰ *Spencer v. Wabash R. R. Co.*, 132 Ia. 129, 132, 109 N. W. 453, 454 (1906). The cases are collected in 2 TIFFANY, REAL PROPERTY, 2 ed., 1605, 1614-1617.

relations constitute their rights in the broad sense. It is these rights and only these that can be the subject of a "conveyance," or of an "exception." As a matter of precise statement, what A does when he conveys Blackacre to B excepting the east ten feet is that he extinguishes in himself all his rights, powers, privileges, and immunities with regard to the area known as Blackacre except the east ten feet thereof, and creates identical rights, powers, privileges, and immunities in B. As to the east ten feet, A retains his rights, powers, privileges, and immunities unchanged. But it cannot be too definitely stated that what he excepts is not the east ten feet of soil but the rights that relate to the east ten feet, and it is as a consequence of the fact that he does retain these rights that he may still deal as he will (within legal limitations) with regard to this physical soil. And furthermore, it is because all he does is to retain them that he needs no conveyance from B.

An interesting case in this connection is *Brown v. Anderson*.¹⁷ The facts were these: A was the owner of a farm; he conveyed that farm to B by an ordinary deed of conveyance which contained the following clause, "excepting and reserving one half acre of land of said tract, being the old family graveyard of the grantor, together with the right of way to said graveyard." B conveyed to C. A died, and his interests descended to D. D was attempting to use the half acre otherwise than as a graveyard for family purposes. A decree of the court below enjoined C from interfering with D's use of the way or of the lot, so long only as he was using them for family burial purposes. The Court of Appeals sustained the decree. The court said:

"The consequence of his *excepting* it [the half acre] was, if that word is to have its technical meaning without any qualification, that the thing excepted remained with him, 'with like force and effect' as if no grant had been made. . . . The extent to which and by whom it [the way] can be fairly and legitimately enjoyed depends upon the purpose for which the half acre was intended to be used, and the character of estate therein excepted from the grant.

"The main inquiry, then, is whether the word *excepting* is to be understood and applied with or without qualification."¹⁸

¹⁷ 88 Ky. 577, 11 S. W. 607 (1889). ¹⁸ 88 Ky. at 579, 11 S. W. at 608.

The court pointed out that the intent of the grantor must have been to use the land only as a family burying-ground. The court then said:

"Though the fee simple title may be in appellants, about which it is not necessary to decide, the parties to the deed had the right to annex a condition of the use and enjoyment by the grantor and his descendants of the estate in the half acre, and that they did intend to limit the use of it and the right of way to it for the sole purpose of a family graveyard, and for the sole benefit of the persons mentioned, we are satisfied. And, such being the case, the right to license others to use it is repugnant as well to the language used as to the manifest intention of the parties, and, therefore, can not be implied."¹⁹

Was the land itself, to use the ordinary phrase, excepted or not in this case? It is obviously impossible to answer this question categorically, and the case affords a neat illustration of the proposition that in any exception what is really excepted is rights, not the soil.

The court's reluctance to pass on the question of who had the title to the half-acre piece is quite understandable. The group of rights composing the title had been divided in a not common fashion. From the rights that we have previously mentioned as being some of those that compose the title, the grantor had, of his indefinite number of privileges, kept only those that could be implied in the idea of use for a family graveyard; of his rights, he had probably kept the right that no person should physically intrude on the half acre. Further than this it is not necessary to go, though many interesting questions suggest themselves. Had he, for example, retained the right that no one should send noxious odors or unreasonably loud noises over the land? What of his powers had he still retained? These questions need not detain us. The value of the case lies in the fact that it illustrates the point that even when the exception purports to be of "the land," one may except some of the rights that make up title and pass others, even with regard to a particular piece of soil.²⁰

Let us now change the case by assuming that when A conveys Blackacre to B, instead of excepting the east ten feet he excepts

¹⁹ 88 Ky. at 580-581, 11 S. W. at 608.

²⁰ See also *Pearson v. Hartman*, 100 Pa. St. 84 (1882).

a right of way over the east ten feet from Whiteacre to the highway. Is this situation more closely analogous on the one hand to that where A gets by grant from B a right of way over B's Greenacre, or by reservation a right to rent, heriot, or suit of mill out of Blackacre which he conveys to B, or on the other hand to the case of the exception of the east ten feet of Blackacre that we have just discussed? The analogy with the former group, with the consequence that an easement of this kind cannot be excepted, is vigorously contended for in *Reifler & Sons v. The Wayne Storage Water Power Co.*²¹ In that case a canal company, A, conveyed a tract of land to B in fee. The deed contained, among others, the following clause:

"Excepting out of the premises aforesaid, and hereby expressly reserving to the said President, Manager & Company of the Delaware & Hudson Canal Company, and their successors and assigns, the absolute and unqualified right to occupy so much of the land as they may consider necessary for a reservoir or reservoirs, or for any appendages to the same, or for repairing, improving, enlarging or maintaining the same, and to construct a dam or dams for such reservoir purposes and to overflow all the land that they may require for such purposes. Also reserving to the said party of the first part, their successors or assigns, the right at all times hereafter freely and without charge to have, take and use from the land or premises hereby conveyed to the parties of the second part, all the stones, earth, brush or other material of any kind whatsoever requisite or convenient for constructing, improving, altering, repairing, enlarging or maintaining the said reservoir and its appendages. . . ." ²²

There were on the lands conveyed two ponds, one enlarged by a dam; these ponds the grantor utilized until it discontinued operations as a canal company. It then executed a conveyance to C of all its interests in the lands in question, which it had as a consequence of the exception in the original conveyance. B's interests were now vested in the plaintiffs; the interests under the deed to C were now vested in the defendant, a water company, which was in possession of the ponds. This action was brought to recover possession thereof. Justice Potter in speaking of the clause in question said:

²¹ 232 Pa. St. 282, 81 Atl. 300 (1911).

²² 232 Pa. St. at 285, 81 Atl. at 301.

"The first question thus brought squarely before us for determination is whether the clause in the deeds under consideration constitutes a reservation or an exception. The trial judge held that it was an exception. . . . In the recent case of *Sheffield Water Co. v. Tanning Co.*, 225 Pa. 614, our Brother STEWART said (p. 619): 'The essential characteristic of a reservation as distinguished from an exception is, that its subject is something that did not exist before but is created by and grows out of the transaction. An exception applies only where the subject already exists.' In the opinion in that case it is further shown, that in the deed then under consideration, 'nothing was excepted out of the general grant; the deed invested the grantee with the legal title to the whole of the premises described in the grant; it conveyed to the grantee every inch of land falling within the description, whether occupied by dam, reservoir, pipes, tannery or otherwise howsoever, subject only to the right of the grantors, their heirs and assigns, to do those things upon the premises which the grantors had expressly reserved the right to do.'

"This language seems to apply precisely to the terms of the present grant. The entire fee is conveyed by the deeds, and only certain rights are reserved to the grantors. The reservation is of 'the absolute and unqualified right to occupy' so much of the land as may be necessary for reservoirs and dams, and 'the right at all times hereafter freely and without charge to have, take and use from the land or premises hereby conveyed' stones, earth, brush or other material necessary for the construction and repair of these reservoirs, etc. No part of the thing granted is excepted from the effect of the grant, but a new right or interest in the grantors is created, which they retain. It is something which did not before exist apart from the ownership of the land. . . .

"Our examination of the clause satisfies us that the effect of the language was to create something new out of what was granted. That is, it created the right to maintain reservoirs upon the land conveyed, and to repair, improve and enlarge them, and to construct dams, and overflow all the land the grantor might require for that purpose, and to enter upon the land and take from it stone, earth, brush and other material requisite or convenient for construction or repair of the reservoirs. This right, as a thing separate and apart from the ownership of the land, was created by and grew out of the transaction between the parties to the deeds, and it did not exist before. The new right in this respect thus created by the transaction was from that time forth to be enjoyed apart from, and in no way dependent upon the ownership of the land. As it was not in existence prior to the making of the deeds,

it could not be made the subject of an exception, which must always be of something in existence at the time, as part of the whole of the grant, from which it is excepted.”²³

This reasoning, when analyzed, seems to embrace two conceptions.

The first is this: Some *thing* was conveyed by this deed, and no part of that *thing* was excepted, and the only purpose for which an exception can be used is to cut out part of the *thing* from the operation of the deed — as witness these phrases, “an exception applies only when the subject already exists;” “it [the deed] conveyed to the grantee every inch of land;” “No part of the thing granted is excepted from the effect of the grant;” “an exception . . . must always be of something in existence at the time.”

The objections to this proposition have already been sufficiently dealt with. A thing is never conveyed and never excepted; it is always a group of legal rights that forms the subject-matter of the conveyance or is excepted from the operation of the conveyance. The difference between an exception of the land occupied by the pond and an exception of a right to flood a certain amount of land is in the number of rights retained. In the first case we group them more or less loosely under the generic term “ownership” or “property” or “title”; in the second we group them under the term “easement.” A striking difference in them as a matter of exact statement is that in the first case the grantor, usually, at any rate, still has multital rights against any intrusion upon the physical soil regardless of damage; while in the second case he has multital rights only in so far as they are necessary for the protection of the privileges that he has retained with regard to the soil in question.

The second proposition that underlies the court’s conclusion is that the grantors had the right before the conveyance to build reservoirs upon the land in question, but they had it because they owned the land; now the land is owned by another person, and hence their right to build a reservoir there is a new and

²³ 232 Pa. St. at 287-289, 81 Atl. at 301-302. The same idea is expressed more briefly in *Brown v. Anderson*, *supra*, note 17, discussed *supra*, pp. 190, 191; *Bean v. French*, 140 Mass. 229, 3 N. E. 206 (1885).

different right and came into being only as a consequence of the conveyance.

The first objection to this reasoning is that it seems to regard ownership as a unit, with the consequence that if that unit, the ownership of any given area, has passed to B, the result must be that any right that A then has in that tract must be derived from B. As has been pointed out in the extract from Professor Hohfeld, such is far from being the case. Ownership is a congeries of various rights, powers, privileges, and immunities. Blackacre, the physical thing, may remain the same, but, because of restrictions imposed by the state upon its use and control, or incumbrances or servitudes imposed upon it by the act of A, or by the law, the aggregate of A's legal relations to the land may amount to much less than full and complete ownership, though he is still regarded both by lawyers and laymen as owner. For example, D, the owner of Blueacre in state X, may be the full and unincumbered and practically unrestricted master of that tract, while E, the "owner" of Greenacre in state Y, just across the line from Blueacre, may be subject to onerous restrictions imposed by the state upon his use of the land, may have granted to F the right to cross the land with a burdensome traffic, to G the right to take coal, oil, and gas from the land, to H the right to foul the air which passes over the land, and to I a heavy mortgage upon the land. In addition, J, by legal process, may have secured a mechanic's lien upon the land, and K the lien of a judgment. These are, of course, only a few of the numerous subtractions which might conceivably be made from the full and complete ownership of the land. Yet we might still speak of E as the "owner" of Greenacre, but the name would deceive no well-advised person. The real question would be, has E all of the incidents of full and complete ownership, and, if he has fewer than all, which ones are lacking. If it is possible to identify the lacking incidents by examination of the gap which they leave when they are lacking, it is equally possible to identify them even when they are not lacking, but remain in their normal places in the aggregate which makes up complete legal ownership.

The second objection to the court's idea is that even though, for the sake of argument, it may be admitted that there is a

group of rights, the exact size of which is uncertain, that can be called the title, the court's conclusion does not follow. The court's contention in this regard, put in different language, would seem to be this: Before the conveyance the grantor, *i.e.*, the canal company, had an indefinitely large number of privileges with regard to this land, as well as the other rights that go to make up ownership, including the privilege of building a reservoir, and B had few privileges or rights with regard to this land.²⁴ After the conveyance the grantee has such a preponderance of the rights, privileges, powers, and immunities with regard to this soil that he would be called the owner of it. The consequence of this is that A's privilege of building a reservoir, which he had before the conveyance and which he purported to keep out of the operation of the conveyance, has, nevertheless, disappeared, and now what A has is a new privilege to do the very thing which he had the privilege to do before the conveyance. The natural question seems to be, "Why is this so?" If A had attempted to enumerate in his conveyance the rights with respect to this land that he was conveying to B, and after ten pages of enumeration he had said, "and all other rights of all kinds except the privilege of building a reservoir and that I do not convey to you but retain in myself," would A have had a new privilege or the same one after the delivery of the deed to B?²⁵ It is clear that he would have had, after the conveyance, the same privilege and the same rights against B, so far as the exercise of this privilege is concerned, as he had before. It is true that before the conveyance this right is merely one of so many other incidents of ownership, that it is of itself practically unimportant, particularly if never in fact exercised by A, while, after the conveyance, it is the most pronounced right which A claims in Blackacre; and since all the other incidents of ownership are in B, the right which A claims is brought into sharp relief and becomes legally important. But this does not give any support to the position of the Pennsylvania court that the privilege excepted is a different one, and it is submitted that the foregoing analysis has shown its unsoundness.

²⁴ B had the right that A should abate any dangerous nuisance on his land that threatened B's land, and the privilege of entering on A's land and himself abating it if A did not do so.

²⁵ *Cf. Burr v. Mills*, 21 Wend. (N. Y.) 290 (1839).

Before we leave this part of the discussion, however, there is one difference between the use of the exception as laid down by Coke and the general language of the decisions and the use here made of it, to which attention should be called. The difference is that with them the exception seems to be used only when the so-called "possessory rights" with regard to the area excepted are kept out of the operation of the conveyance. This is what seems to be back of the phrase that an exception can be only of a thing in being. But while this distinction exists, it is clear that the keeping by A of a right of way in a given strip in land granted by him to B differs merely in degree from the so-called exception of the strip itself; whereas the difference between this and the grant to A of a right of way over B's land Greenacre, or the reservation by A of rights that before had no existence, is one of kind. Consequently the decisions of those courts which hold that an easement can be made the subject of an exception, or of a reservation where the word is used in the sense of exception, would seem justified as a matter of analogy, and desirable as a matter of accomplishing the intent of the parties. The decisions of some courts, that the easement may be excepted only if it has had a *de facto* user while the land was owned by the grantor, would seem a half-way position without any support in principle.

A totally different question is presented where A attempts in his conveyance to B to create in himself new rights or privileges that were no part of the group of rights embodied in his title to the land. No attempt is made in the present paper to deal with this aspect of the problem.²⁶ There are, however, certain incidental aspects of the problem that we have been discussing and the conclusion at which we have arrived to which attention may briefly be called.

When A conveys Blackacre to B excepting a right of way along the east ten feet of Blackacre, we have said that the effect of that exception is to keep in A the privilege that he already had as owner. While this form of statement has been sufficiently accurate for our purposes up to here, it now requires a more careful examination. When A was the owner of Blackacre, his

²⁶ See *Ashcroft v. Eastern R. R. Co.*, 126 Mass. 196 (1879). Compare the interesting case of *Childs v. B. & M. R. R.*, 213 Mass. 91, 99 N. E. 957 (1912).

privilege of crossing Blackacre was unlimited; he could walk over this ten feet entirely irrespective of what his reasons were for going over it, whence he came, or whither he was going. When A in his conveyance to B excepts a right of way, he may mean to except his privilege of crossing to the full extent outlined above, or he may mean to except that privilege only to the extent that he shall wish to make use of it in certain qualified fashions. Whether he does the one or the other is a question to be settled by all the circumstances of the case that may legally be taken into consideration for this purpose.

If A's intent is to retain in himself all the privileges of passage over the strip in question that he had as owner, the privileges are said to be held by him in gross. In this case it is to be noted that the law for reasons of policy may limit A's powers with regard to the privileges thus retained by him. Whether he is able to "transfer" these privileges to a third person, or whether they are personal to him, involves a consideration of the general nature of easements in gross that is apart from the scope of this discussion, for there is in this nothing peculiar to easements created by exception. The same result would follow if B owning Blackacre granted a right of way in gross to A, his heirs, and assigns forever.²⁷ Cases in which the easement excepted or reserved was held to be in gross are given in the footnote.²⁸

The circumstances of the exception may be such as to show that, while it was the intent of the grantor to retain in himself personally the privileges that he had as owner of the granted premises, it was his intent to retain them only to the extent that he should wish to use them for certain particular purposes.

²⁷ *Ackroyd v. Smith*, 10 C. B. 164 (1850); *Boatman v. Lasley*, 23 Ohio St. 614 (1873). Cf. *Standard Oil Co. v. Buchi*, 72 N. J. Eq. 492, 66 Atl. 427 (1907).

²⁸ In the following cases easements created by exception or reservation were held to be in gross: Privilege of maintaining a log boom, *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352 (1893); privilege of maintaining a log chute, *Ring v. Walker*, 87 Me. 550, 33 Atl. 174 (1895) (both held to be assignable); privilege of using a landing, *Jones v. De Lassus*, 84 Mo. 541 (1884) (held not to be limited to the original grantor-exceptor); privilege of using a burial ground, *Brown v. Anderson*, *supra*, note 17; *Pearson v. Hartman*, 100 Pa. St. 84 (1882) (held not to be assignable); right of way, *Wagner v. Hanna*, 38 Cal. 111 (1869); *Stockdale v. Yerden*, 220 Mich. 444, 190 N. W. 225 (1922); privilege of cultivating, *Pierce v. Keator*, 70 N. Y. 419 (1877); privilege of "using" land, *Field v. Morris*, 88 Ark. 148, 114 S. W. 206 (1908).

This was the situation in *Reifler & Sons v. The Wayne Storage Water Power Co.*,²⁹ above referred to.³⁰ The grantor in that case, as owner of the subsequently granted premises, had of course the privilege of maintaining ponds there and using the water therefrom for any purpose that he wished. But the fact that the owner was a corporation chartered for a particular purpose, coupled with other facts in the case, made it a natural and reasonable inference that the Canal Company, in making the conveyance of the land, intended to and did keep out from the operation of the conveyance the privilege of ponding water only so long as it should wish to do so for canal purposes. It is arguable that this privilege could have been transferred to a third person. But when the attempt was made to pond the water for other than canal purposes, the act was in violation of the rights of the then owner of the land, not because no such privilege was granted by the owner of the servient estate, but because, although the grantor of the land at the time when he owned it had the privilege as owner of ponding water no matter what he wanted to do with it, and although he might have retained this privilege to this same degree of fullness, in fact, as the circumstances show, he retained it only to this limited degree. Consequently the privilege that was actually retained by the grantor and transferred to the present defendant was not one of impounding water for use other than for canal purposes, and hence did not justify the conduct of the defendant.³¹

If the intent of the grantor in making the exception does not definitely appear to be to retain the privilege in himself as an individual, either as fully as possible, or qualifiedly, then the courts, following the same rule of policy which prevails in the case of easements newly created by grant, will hold the privilege to be appurtenant to the land still kept by the grantor,³² and

²⁹ 232 Pa. St. 282, 81 Atl. 300 (1911).

³⁰ See *supra*, p. 192.

³¹ See also *Stockdale v. Yerden*, *supra*, note 28. And see 32 YALE L. J. 813.

³² Water power privilege, *Kennedy v. Scovil*, 12 Conn. 317 (1837); right of way, *Karmuller v. Krotz*, 18 Ia. 352 (1865); *Brown v. Anderson*, 88 Ky. 577, 11 S. W. 607 (1889); *Mendell v. Delano*, 7 Metc. (Mass.) 176 (1843); *Bowen v. Conner*, 6 Cush. (Mass.) 132 (1850); privilege of getting water, *Borst v. Empie*, 5 N. Y. 33 (1851); privilege of flooding, *Burr v. Mills*, 21 Wend. (N. Y.) 290 (1839); privilege of occupying with a building, *Ruffin v. Seaboard Air Line Ry.*,

as such to pass with the dominant estate to a grantee thereof.³³

It may be interesting to examine as a matter of legal analysis the precise mechanics of this last-mentioned transaction. The situation is that A conveys Blackacre to B excepting or "reserving" a right of way. The circumstances are such that the court will find that it is appurtenant to Whiteacre, although nothing is said to that effect in the deed to B. The rights of the parties as to Blackacre have already been sufficiently set forth.³⁴ Coincidentally with the existence in A of this group of rights with regard to Blackacre, A still has the same group of rights with regard to Whiteacre that he formerly had, and which we call title. A now executes to C a conveyance of Whiteacre. The effect of this conveyance is to extinguish in A not only the group of rights that he had with respect to Whiteacre, which are expressly covered by the language of the conveyance, but also the group of rights that he still retained in Blackacre, which are not in terms mentioned in the conveyance, and to create in C two similar groups of rights. This is a result that could not have been produced in this way had A remained the owner of the complete group of rights with regard to both Whiteacre and Blackacre. It follows in the case in hand because the rights kept by A in Blackacre are "appurtenant" to Whiteacre, that is, that the easement was for the benefit of himself and his heirs as owners of Whiteacre. Of course this is nothing more than is done in the case where B, as the original owner of Blackacre, grants to A, as appurtenant to Whiteacre, a right of way over Blackacre. The difference is that in the latter case the power of A, the owner of the group of rights, thus to affect them, arises as a consequence of the creation of the rights in A by the transfer from B, while in the former case it arises as a consequence of a conveyance by A operating upon rights already owned and still retained by him.

To summarize, then, it may be said that if the above analysis is correct, an exception or reservation of an easement in a con-

151 N. C. 330, 66 S. E. 317 (1909); restriction against building, *Herrick v. Marshall*, 66 Me. 435 (1877); easement of light, *Hagerty v. Lee*, 54 N. J. L. 580, 25 Atl. 319 (1892).

³³ See cases cited in preceding note.

³⁴ *Supra*, pp. 191-196.

veyance of land is merely a keeping out of a small group of privileges that the grantor already had by virtue of his ownership of the land. The very act of excepting or reserving this small group may be sufficient to relate it to the rights possessed by the grantor with respect to another piece of land, that, without any specific mention of these reserved privileges, they may be transferred by an operative act sufficient to transfer the general group of rights relating to this second piece. An allied and equally interesting problem is the question whether it is or is not possible for the grantor, by the very act of reserving these privileges, so to annex them to the title of some third person in another piece of land that they will pass by a conveyance of that piece. This is a problem that will have to be left for further consideration.

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