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Can a Reservation or Exception of an Easement Be Made in Favor of a Third Person in Pennsylvania

Davis G. Yohe

CAN A RESERVATION OR EXCEPTION OF AN EASEMENT BE MADE IN FAVOR OF A THIRD PERSON IN PENNSYLVANIA

It has long been held to be a rule of common law that a reservation of an easement has to be to the grantor of the deed, and not to a stranger.[1] Although exceptions were not mentioned in the common law rule, it has been construed as including them.[2] It should be noted in passing that there is a technical difference between the words "reservation" and "exception" even though they are used interchangeably in many instances. An exception is a part of the thing granted which but for the excepting clause would pass to the grantee. It represents a *res in esse* which stays with the grantor. On the other hand, a reservation exists when a right is created in land described as granted. The title passes to the grantee and the right is retained by the grantor. This distinction is important only in determining the duration of the right, and therefore is immaterial for the purposes of this discussion.

The common law prohibition against the creation of an easement by the grantor in favor of a third person has a feudal origin, and the purpose of the reservation must be considered with this thought in mind. At common law a reservation of rent could not be made to operate in favor of a person other than the lessor or grantor. Since the rental income was a return for the land granted, the one who granted the land was the only person entitled to the reservation of rent. Where the reservation of rent was made to a stranger to the deed the danger of failing to sufficiently maintain the lord's estate would arise.[3] The facts being thus, the rule that an easement cannot be reserved to a third person to the deed was a natural consequence. With the passing of centuries rules of law are subject to change. This fact gives rise to three questions: (1) What is the prevailing rule in the United States as to whether an easement may be reserved or an exception made to a third person in a deed? (2) What view does the American Law Institute take on this subject? (3) What is the law in Pennsylvania in regard to this matter?

In examining the cases of all jurisdictions, one finds that there is still much adherence to the old common law rule. The general rule undoubtedly is that a reservation in a deed of any right cannot operate in favor of any person other than the grantor. The reservation must be for the benefit of the grantor. He has an interest in the thing granted and logically may reserve for himself any right from the operation of the grant.[4] If the rights of third persons were already existent, the reservation or exception in their favor will merely act as a confirmation of those rights. *Ruling Case Law* lends its support to these views:

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1 SHEPPARD'S TOUCHSTONE, p. 80; 20 L. R. A., N. S. 221.
2 8 R. C. L. 1093.
3 4 Tiffany, REAL PROPERTY, 51 (3rd ed. 1939).
4 Note, Seron, 20 B. U. L. REV. 559 (1940).

> "Neither a reservation nor an exception can be made in favor of a stranger, and the grantee is not estopped to so assert by acceptance of the deed, but an exception may recognize and confirm rights already existing in strangers."[5]

This represents the prevailing view in the United States. Jurisdictions which hold that an easement or an exception may be made in favor of a third person to a deed are in a decided minority.

It is interesting to note that the American Law Institute did not hesitate to express an opinion on this point. There are no "caveats" on this. The *Restatement of Property* very clearly expresses its view:

> "By a single instrument of conveyance, there may be created an estate in land in one person and an easement in another."[6]

To illustrate this view, the following facts are given: An easement may be created in *C* by a deed by *A* which purports to convey Blackacre to *B* in fee reserving an easement in *C*. This view taken by the American Law Institute represents the more liberal stand on this subject and may eventually become the majority rule. Perhaps the best reason for the majority rule is that by limiting the class of persons to whom such easements may be reserved it tends to reduce somewhat the number of resulting encumbrances on land titles. Otherwise it has no foundation except its historical precedence.

In examining the cases in Pennsylvania on this subject one finds that they are few in number. Not only are they few in number, but the opinions of the courts do not state definitely what the law is in regard to a reservation or exception in favor of a stranger to the deed. *Corpus Juris Secundum*[7] cites a fairly recent Pennsylvania case as supporting the view that an easement cannot be reserved to a person who is a stranger to the deed. This case, *Pribek* v. *McGahan*,[8] in the opinion of the author does not support this view. This decision was based on other reasons not deemed pertinent to the subject matter herein. The only statement of the court that might have been construed to so hold was this:

> "This warning [exception] to the grantees in deeds in the defendant's chain of title, cannot enure to plaintiff's benefit, since neither they nor anyone through whom they claim, was a party to any of these deeds."

While this is undoubtedly a correct statement of the law, it is not deemed lucid or definite enough to support a holding that a reservation of an easement in favor of a third person is invalid.

In an earlier case, *Pearson* v. *Hartman*,[9] the owner conveyed a certain lot to trustees to be used as a graveyard, reserving "the right and privilege to the grantor

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[5] R. C. L., supra.
[6] RESTATEMENT, PROPERTY, §472 (1932).
[7] 28 C. J. S. 686.
[8] 314 Pa. 529, 172 A. 709 (1934).
[9] 100 Pa. 84 (1882).

and *every member of his family and their offspring* to mark off within boundaries of said lot.....for burial of the dead."[10] This was held to be an easement in gross, personal to the grantor and his family. The court did not state, nor is it certain from the facts in the case, that they would have upheld the easement had it been only in favor of the children. At most, this case furnishes an inference that a reservation of an easement in favor of third persons is valid in Pennsylvania.

In *Ehret* v. *Gunn*,[11] *A* conveyed part of his land to *B*. *B* sold the said land to *C*. *C* divided it into lots and sold the lots to *D*, *E* and *F*, who are the defendants in this case.[12] *A*, the original owner, later laid out a twelve foot (12') alley on his land, the said alley bordering on one of the defendants' lots. *A* then conveyed the remaining part of his tract to *P*, the plaintiff in this case. In the deed to *P*, the alley was recited as having been "laid out for the use of the lots (*D*, *E*, *F*) and other lots bordering on the alley." It was stated that the defendants were to have free use and privilege of the alley in common with *A*. The court held that they were entitled to use the alley even though they had obtained titles to their property prior to *A*'s conveyance to *P* in which he excepted the use of the alley to defendants *et alii*. It is believed that this case gives strong support to the view that a reservation or exception of an easement can be in favor of a stranger to a deed. The court said that it was the plain intention of *A* in laying out the alley to reserve the use of it to those whose lots bordered on it. This is what he attempted to do and the right of way created in favor of third persons (*D*, *E*, *F*) was held valid. The only fact which would cause one to doubt that this case supports the view that an easement may be reserved in favor of a third person is that the exception was made in favor of the other owners of the lots *in common* with the grantor. Nevertheless, it is believed that this case gives much support to the view.

In a similar case, *Duross* v. *Singer*,[13] the owner of the land granted title to the soil in fee to one person but with a reservation to owners of other lands nearby to use the said alley. In this case the validity of the reservation in favor of third persons was not questioned. This case is cited by Tiffany as an authority for the view that a reservation of an easement in favor of a stranger to the deed is valid.[14]

The last Pennsylvania case to be considered, *Strycker* v. *Richardson*,[15] is deemed to give added weight in support of the last mentioned view. In this case the grantor was the owner of two adjoining lots. The grantor wished to reserve a right of way to the grantee of the west lot over a certain part of the land owned by the grantee of the east lot. The purpose was to enable the owner of the west lot to travel to and from his premises without encountering a deep ravine. The deed to Edward Ward, the grantee of the servient land — the east lot — contained this language:

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10 Italics supplied.
11 166 Pa. 384, 31 A. 200 (1895).
12 The letters are used to represent the various parties for convenience and simplicity.
13 224 Pa. 573, 73 A. 951 (1909).
14 Tiffany, supra.
15 77 Pa. Super. 252 (1921).

> "Reserving and excepting out of the land hereby conveyed such reasonable right of way for teams and wagons over and across the said land as will enable the *owner of land lying next adjacent on the west*.....to pass from the Lake road to land north of a certain ravine....."[16]

This deed to the servient owner in which a right of way was reserved for the benefit of the owner of the lot on the west would support, *pro tanto,* the view that a reservation of an easement or exception can be made in favor of a stranger to the deed. The only fact that would cause one to be hesitant in so holding is that the deed to the owner of the dominant land (the west lot) contained a grant of this right of way. Was the granting clause in the dominant owner's deed mandatory? Was the grantor merely transferring a right which he had excepted in the servient owner's deed? Had the deed to the servient owner been made first, such might be the interpretation; however, the deeds were made at the *same time.* The court expressed no opinion as to the necessity of the granting clause in the dominant owner's deed.

Considering the cases available on this subject in Pennsylvania, it appears that although the courts have not dogmatically expressed what the law is on this point, the few cases existing on this subject lend strong support to the view that a reservation of an easement or an exception can be made in favor of a third person to a deed. The courts have not indicated that they would hold otherwise.

In conclusion, (1) it is found that the majority view in the United States is that a reservation or exception of an easement cannot be made in favor of a stranger to a deed. (2) the *Restatement of Property* is *contra* to the majority view and expressly declares that by the same instrument an easement can be created in favor of one person and a conveyance of the same estate in fee be made to another. (3) While the courts of Pennsylvania have not definitely expressed what the law is in this jurisdiction, the cases which concern this subject give strong support to the belief that reservations or exceptions of easements in favor of third persons will be held valid.

Davis G. Yohe

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16 Italics supplied.