Creation of Easements by Exception

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In a recent issue of another legal periodical the writer participated in an effort to show that, in a conveyance of land, it should be legally permissible for the grantor to save to himself, by the process of exception, an easement, profit, or other servitude in the land conveyed. The specific problem of that discussion was to determine by what process, based upon what theory, A, the owner of land, could convey a part of his land to B, and keep for himself an easement or other servitude in the land. It was pointed out that this purpose could not be accomplished by a technical reservation, since a reservation properly applies only to cases of things issuing out of the land, such as “rents, heriots, suits of mill, and suits of court,” and does not apply to the servitudes most commonly created, such as easements and profits. It was also pointed out that the legal requirements of a re-grant from B to A of the interest in question are not, ordinarily, satisfied by the parties. For example, it would be necessary that the conveyance be signed by the grantee, which is not often done, and also, except where the rule has been changed by statute, that the word “heirs” be used in order to give the grantor an interest more permanent than for his own life. The conclusion was reached, that if the desired result could be accomplished by treating the interest in question as the proper subject of an exception, the intent of the parties could nearly always be given full effect, and dangerous pitfalls in conveyancing would be avoided.

A theory was then proposed upon the interest which A sought for himself could be treated as the proper subject of an exception. Suppose the interest were a right of way. While A still owned all the land, he could of course, pass over it wherever he pleased. That was one of the many incidents of his ownership.
recall that the law is not concerned with land as a physical thing, but only with the legal incidents which attach to the land, would it not be possible for the law to permit one to pass, by his conveyance, all of those legal incidents except the one in question, keeping that one in himself, as of his former estate in it, untouched by his conveyance, just as a physical part of the land excepted out of the conveyance, would be untouched by it? Upon this theory, if A should by a deed poll convey Blackacre to B "excepting (or reserving) a right of way ten feet wide along the north side of the tract conveyed," A would have without question the easement in fee which was plainly intended by the parties.

The previous discussion of the subject made no attempt at an examination of the decided cases. The purpose of this discussion is to examine the cases which have arisen in Massachusetts, the jurisdiction where, in the opinion of the writer, the cases have occurred in such numbers and in such variety as to their facts, that they furnish a fairly complete subject upon which to test the operation of the rule proposed in the former discussion. The fact that in several of the cases decided in Massachusetts, a limited application of the suggested rule has been made, also tends to make the Massachusetts cases especially suitable as a basis for this discussion.

The earliest case which an examination of the Massachusetts Reports has disclosed is that of White v. Crawford. In that case White, by a deed poll conveyed to Swanton a tract of land, the deed containing the following language:

"N.B. It is agreed, before signing, that the said White or his heirs is forever to have privilege of a road to pass and re-pass from the highway, (indicating the route), across to his own land."

The court held that the plaintiff, a devisee of all of White's real estate, had the way after White's death. The court noticed the fact that there was a way in use by White before his grant and construed the words quoted above as an exception. The court was not required to decide whether the right was appurtenant to the premises retained by the grantor, or in gross, but was prepared to hold, if necessary, that it was appurtenant. At other points in the case the court speaks of the words as constituting a reservation, an exception, or a grant, using the words without discrimination.

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2 The courts do not hesitate to translate the word "reserve" into the word "except" where the subject matter is proper for an exception. Whitaker v. Brown, 46 Pa. 197 (1863); Freelon v. White, 67 W. Va. 278; Freudenberger Oil Co. v. Simmons, 82 S. E. 995 (W. Va. 1914).

3 10 Mass. 183 (1813).
In *Atkins v. Bordman*, the grantor in a deed-poll, "reserves to himself, his heirs, and assigns forever," a right of way by a specified route over the premises granted to other land of the grantor. The way had been in use before the conveyance. It was held that the plaintiff, who was a successor in title of the grantor, had the right of way, and could enforce it against the defendant, a successor in title of the original grantee. The court in these cases uses the word "reservation," but this language should be noted: "He (the grantor) may reserve out of the estate granted, and annex to his own estate retained, such easements as he may deem proper." It is submitted that the court was thinking in terms of exception, when it used that language.

In *Mendell v. Delano*, the owner of a fractional interest in a wharf conveyed that interest to B, "Reserving to myself, my heirs and assigns, to pass to and from said wharf to my tract on the north side of said wharf." The interest of B passed to H, and the land on the north passed to J. In an action by J against H for obstructing the way the judgment was for the plaintiff. The court speaks of the words quoted as a reservation, throughout the opinion.

In these several early cases it was held, without discussion, that an easement, such as a right of way, might in the circumstances here under discussion be created in favor of the grantor, by words of reservation in a deed not executed by the grantee. The court did not determine whether the easement arose by way of exception, in the manner suggested in this discussion, or by way of reservation, through a broadening of the scope of the word "reservation," to include the creation of easements as well as rents and the limited number of other rights to which the word is limited by the English courts.

In the case of *Bowen v. Conner*, the defendants and plaintiffs were tenants in common of a lot and, upon a division, the plaintiff quitclaimed to the defendant the southerly portion of the lot "reserving forever a right of way" by a specified route over the portion conveyed. No words of perpetuity were used in the reservation, except the word "forever." The plaintiff later sued the defendant, in an action on the case, for the obstruction of the way. The court held that, under the circumstances, without any express words of reservation, the plaintiffs would have had a way of necessity over the tract conveyed. But the court further said:

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5 7 Met. (Mass.) 176 (1843).
6 38 Harv. L. Rev. 150.
7 6 Cush. (Mass.) 132 (1850).
The court reasoned thus:

"Upon principle it appears to us that this right, plainly intended by both parties to be secured to the plaintiffs, can be legally secured in the manner adopted in this deed, treating the right reserved as an exception."

"Prior to those deeds, the plaintiffs, as tenants in common, had a right to pass over every part of this land at their pleasure. And each tenant in common had the entire right, though he had not the entire fee. When, therefore, the grantors conveyed the front lot, they restricted themselves from any further right to pass over the whole and every part, and limited themselves to the strip thirty feet wide, specially described. This was a part of the right previously enjoyed, and this they excepted out of the grant."

The court said, in an earlier part of the opinion:

"As to the nature of that right (the right of way claimed by the plaintiffs), if one was well created, considering the circumstances, and construing the deeds together, we think it was a right secured to the plaintiffs, and their assigns, as owners of the rear lot, and therefore was a right of way annexed to the estate before owned in common, but then set off in severalty to the plaintiffs."

This last quoted statement is dictum, since the grantors themselves were plaintiffs, but it indicates plainly that the court considered that a right of way in fee simple, appurtenant to the tract retained, had been created by exception. It should also be observed, in connection with a later part of the discussion, that the way in question was not in use at the time of the severance, it appearing that the obstruction complained of was in place at the time of the conveyance.

In the case of Stockbridge Iron Company v. Hudson Iron Company, the grantor, in a deed poll of land containing an ore-bed, "reserved" "the right of mining on the granted premises" a certain quantity of ore annually, at a certain duty per ton. It was claimed by the grantee that the parties intended to insert in the deed a limitation of the grantor's right to mine to an amount of ore sufficient to supply certain furnaces, but that by mutual mistake such limitation had been omitted, and the grantee filed a bill praying for a declaration of the rights of the parties under the deed. The defendant, the grantor, pleaded the statute of frauds. The court took the position that if the words relating to the mining right were words of exception, then it was not covered by the writing at all, and hence the statute of frauds would pre-

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8 See 6 Cush. (Mass.) 132 at 136.
9 See 6 Cush. (Mass.) 132 at 134.
10 107 Mass. 290.
vent a court of equity from broadening the deed to include the additional subject. But if the words in question were words of reservation, then the effect of the reformation would be to narrow the re-grant from the grantee to the grantor, and the statute of frauds would be no obstacle. The court, at page 321, said:

"The court are of opinion that the clause in the deed from the defendant to the plaintiff corporation must be construed as a reservation of new rights to the grantor, out of the granted premises; or else as the creation of such new rights by force of words of reservation, taking effect either by way of estoppel, or as a grant from the grantee by implication of law from the acceptance of the deed."

The court held that the statute of frauds was no bar to the plaintiff's contention. It should be noted that, at the time of the conveyance in question, the grantor was taking ore from the premises, and manufacturing it in the furnaces, to the supply of which the grantee sought by his bill to limit the grantor. It should also be noted that the "reservation" was only to the grantor, (a corporation) and contained no words of succession or limitation. If the suit had been against an alienee of the grantor this last point would have been of importance, as we shall see.

Is the mining right involved in this case to be treated differently from the right of way involved in *Bowen v. Conner*? To paraphrase the language of that case:

"Prior to this deed the grantors had the right to mine ore from every part of this land at their pleasure . . . . This was a right previously enjoyed, and this they excepted out of the grant."

To support the clause in question as a reservation it is necessary to extend the common law meaning of reservation, since, by the English law, the only subjects of reservation were "rents, heriots, suit of mill and suit of court." However, it is not logically impossible to bring easements and profits within the scope of the ancient definition of a reservation as vesting "in the grantor in the deed some new right or interest not before existing in him." though it seems rather late in the day for this innovation. If this change in the law would solve any considerable proportion of the cases and bring about the fulfillment of the intent of the parties, the historical inaccuracy could be overlooked. But it is doubtful whether such a broadening of the scope of the term

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11 *Supra*, n. 6.
12 *Supra*, n. 8.
13 *Simp. Touchstone* 80.
“reservation” would satisfactorily solve many of the cases, and it would certainly raise troublesome questions about the necessity for the term “heirs,” or similar words to indicate the durability of the estate.

In *Dennis v. Wilson*, A conveyed land to B, “excepting and reserving a right of way to pass and repass over said land, with teams and otherwise, on the northerly side of said premises, not exceeding eight rods from said old Worcester road.” A retained premises adjoining the granted premises, which retained premises he later sold to C. During the life of A, B obstructed the way, and C sued B in tort because of the obstruction. The court held that the way “excepted and reserved” was appurtenant to the premises retained by A and later conveyed to C, the plaintiff, because that was the “apparent purpose” of the way. The court did not find it necessary to decide whether the way was created by exception or reservation, since the original grantor was still living, and even though the way would expire with his life, for want of words of limitation in the “reservation” as it would according to the Massachusetts rule if it should be considered as a reservation, still the plaintiff could recover. It does not appear whether or not the way in question was in use at the time of A’s conveyance to B.

In the case of *Ashcroft v. Eastern Railroad*, Lovejoy in 1837 conveyed to the defendant railroad a strip of land, and inserted in the deed this language:

“Reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever through a culvert six feet wide and rising in height to the super structure of the railroad to be built and kept in repair by said company.”

The deed further specified the location of said culvert. The culvert was built and the right enjoyed by Lovejoy and his grantees of his adjoining land until 1870, when the culvert was obstructed and the aqueduct destroyed by the defendant. Lovejoy died in 1876. In 1878, the plaintiffs, who were grantees of Lovejoy’s adjoining land previously served by the aqueduct, filed a bill in equity, praying that the defendants might be ordered to remove the obstruction, and to restore the aqueduct to its usual and former condition, and for an injunction against further obstruction, and damages. The court dismissed the bill, saying that the clause quoted from the deed must take effect “as a reservation, or by

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14 107 Mass. 591 (1871).
15 126 Mass. 186 (1879).
way of implied grant," since it would "vest in the grantor in the
deed some new right or interest not before existing in him." The
court said:

"The clause we are considering does not merely reserve to
Lovejoy a right of way and of maintaining aqueduct logs
through the land granted. The privilege which the parties in-
tended should invest in him was the right of passing and re-
passing, and of maintaining his aqueduct logs through a culvert
to be built and kept in repair by the grantee. The provision
that the grantee shall build and keep in repair the culvert is an
essential part of the grant, and clearly indicates that the in-
tention of the parties was to confer upon the grantor a new right
not previously vested in him, and which, therefore, could not
be the subject of an exception."

The court then held that, to make a reservation effectual for
a longer time than the life of the grantor, words of limitation
were necessary.

In holding that the "right" claimed could not be the subject
of an exception, the court was right. During the common owner-
ship, Lovejoy had no right that the defendants or anyone else
should build and keep in repair a culvert on his land. No such
legal incident was in esse at the time of his grant, which could
be withdrawn from the operation of the grant. Therefore if
Lovejoy had any such right, after the conveyance, it would have
to be by some means given to him by the grantee. By the English
rule this could be done only by a re-grant, and would require the
execution of the deed by the grantee. The Massachusetts court
said that it could be done by reservation, but that the reservation
must contain words of limitation to make the right last longer
than the grantor's life. Concerning this last statement, two
things should be noted. First, that this view is a remarkable ex-
pansion of the scope of a reservation, as has been hereinbefore
pointed out. Second, assuming that an easement is the proper
subject of a reservation, the court was probably in error in hold-
ing that words of limitation, such as "heirs" were necessary to
make the easement last beyond the grantor's life.16 Apparently
it is not necessary to use the word "heirs" in order to reserve
a rent in fee simple. But the cases involving easements, in juris-
dictions allowing easements to be created by reservation, are in
conflict upon this question.17

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16 2 TIFFANY ON REAL PROPERTY, 2nd ed., § 362, p. 1269, citing Co. Litt. 47a;
2 PLATT, LEASES, 88; GILBERT, RENTS, 64; Jacques v. Gould, 4 Cush. (Mass.) 384.
17 Koehle v. Knecht, 99 Ill. 396; Dawson v. Western Md. R. R. Co., 107 Md. 70,
1 L. R. A. (N. S.) 809, 126 Am. St. Rep. 357, 16 Am. Cas. 678, 68 Atl. 301;
It should be observed that it has recently been called in question in England whether the word "heirs" has ever been necessary to the valid creation of a durable easement by grant.\textsuperscript{18} As to the law in the American jurisdictions, a learned American writer\textsuperscript{10} says:

"In this country it has occasionally been assumed that they (words of limitation) are necessary for this purpose, . . . ."

The only actual decisions cited by the learned author are cases of reservation of easements, and not of the grant of easements, but it may be safely assumed that no court would require words of limitation in a reservation, unless it required such words in a grant. The reverse of this statement would not necessarily be true, however.\textsuperscript{20}

In Bean v. French,\textsuperscript{21} Merrifield conveyed to Cobleigh a lot, "reserving however to myself the privilege of a bridle road in front of the house." Merrifield retained other land adjoining the lot sold. Merrifield was dead and his adjoining land was now owned by the defendant, who used the bridle path and was sued in trespass by a successor in title of Cobleigh. It did not appear whether or not the bridle path was used by Merrifield before his conveyance to Cobleigh. Morton, C. J., held that the easement expired with Merrifield's life, because no words of limitation were inserted in the "reservation." The learned Chief Justice said:

"When a clause in a deed is strictly an exception, taking out of the grant some portion of the grantor's former estate, as if one should convey his farm excepting the wood lot, the part excepted would remain in the grantor as of his former title, because not granted. But when the effect of the clause is to create some right or easement not before existing, it is, properly speaking, a reservation, and is generally considered as operating by way of implied grant."

In the case at bar, Merrifield, while he was the owner of the lots now held by the plaintiff and the defendant, had the right to pass and repass over any part of his estate, but no right of way, properly speaking, existed over the plaintiff's lot. This easement or servitude in favor of the lot retained by Merrifield

\textsuperscript{18} See an article by Charles Sweet, in 24 L. QuAR. Rev. 28 at p. 28, in which he states that English conveyancers have for generations been of the impression that the word "heirs" is necessary. But see 24 L. QuAR. Rev. 189, where Arthur Underhill argues that the practice of inserting the word "heirs" has been followed merely "ex abundanti cautela." And see 24 L. QuAR Rev. 259, where Mr. Sweet admits that Mr. Underhill is probably right, but says that the question is not free from doubt. See also WILLIAMS ON VENDORS AND PURCHASERS, p. 1110. Hewlins v. Shippam, 5 B. and C. 221, at p. 228, contains a dictum to the effect that such words are necessary.

\textsuperscript{19} TIFFANY ON REAL PROPERTY, 2nd ed., Vol. 2, § 361 at p. 1259.

\textsuperscript{20} See supra, n. 15.

\textsuperscript{21} 140 Mass. 229 (1885).
was a new interest in real estate, created by the reservation and its acceptance by the grantee in the deed. As the reservation contains no words of inheritance, it follows, according to the authorities cited above, that Merrifield had only a life estate in the easement; and that the ruling of the Superior Court was correct.

The result of this case was a palpable violation of the intent of the parties, which could easily have been avoided by following the reasoning of the earlier case of Bowen v. Conner and construing the words in question as words of exception, rendering unnecessary the use of the word "heirs" to make the easement durable.

In Wood v. Boyd, the question was, in substance, as follows: A conveys Blackacre to B, but in the conveyance A reserves to the owner of adjoining lands the right of passageway through Blackacre, as the same is now enjoyed. C had, before this conveyance, an existing legal easement which was in use. The deed from A to B also contained a covenant against incumbrances. B sued A for the breach of the covenant, alleging the existence of C’s easement as a breach, and said:

"His (A’s) deed contains a covenant that the granted premises are free from all incumbrances, and the question in this case is, What are the granted premises? . . . "Construing the clause in the plaintiff’s deed as an exception, it qualifies and limits the estate granted. ‘The granted premises,’ which are covenanted to be free from incumbrances is not the land in fee, but the fee diminished by existing easements, which are excepted out of the grant. Such easements are not incumbrances upon ‘the granted premises.’"

It will be observed that the court had no difficulty in thinking of a conveyance of land as passing a large proportion of the legal incidents which make up complete ownership, yet as leaving some incidents entirely outside the scope of the conveyance, by the process of exception, so that the covenants in the deed did not attach to the incidents left out, any more than the covenants in a deed would attach to an acre of land expressly excepted out of the description in the deed.

In White v. New York, etc., Railroad Company, it appeared that Partridge conveyed land to the Norfolk County Ry. Co., for a railroad, "Reserving the passway at grade over said railroad where now made." Partridge retained land on both sides of the railroad, which he later sold to Ware, who sold it to the plain-
tiff. Partridge died, and the defendant company, the successor in title of the Norfolk company obstructed the way and attempted to justify its act on the ground that "Partridge could create a perpetual easement only by a reservation in the nature of an impiled grant, in which case the word 'heirs' was necessary, and its omission was fatal. The court held, however, that the right of way was excepted from the conveyance, and said:

"We think it is evident from the situation of the land, and from the surrounding circumstances and those attending the giving of the deed, that it was the intention of the parties that the passageway should be annexed as a perpetual right to the larger tract. It was clear that the larger tract would be wholly inaccessible unless Partridge and his successors in title were to have the right to use this or some other way. The way had been used before the railroad was laid out. . . . Whether, in a given case, the language shall be construed to create an exception or a reservation, will depend upon the situation of the property and the surrounding circumstances, in the absence of a declaration in the deed by the parties of their intention as to the nature of a way."

In this case it will be observed that the crossing had been used before the railroad was laid out. It is fairly apparent from the facts that the way was a way of necessity. Yet the court decided the case on the assumption that the conveyance omitted, or excepted, some of the normal legal incidents of ownership, which therefore remained in the grantor.

Clafin v. B. & A. R. R. Co.,26 was a case in which P conveyed to a railroad corporation a strip of land by a deed containing the following clause:

"Reserving also to myself and my representatives forever the right of passage, etc."

The railroad company obstructed the crossing, and the plaintiff, who had succeeded to the ownership of P's land adjoining the strip conveyed, brought an action of tort on account of the obstruction. The court held that the word "heirs" being omitted, a reservation in fee was not created, and that the plaintiff had P's rights; that these rights would cease on P's death, and that the burden of proof was on the plaintiff to show that P was living. The court noticed the English rule that a right of way could not be the subject of either an exception or reservation, but said:

"In this Commonwealth, however, an easement may be created by way of exception or reservation. . . . If created by way of

26 157 Mass. 489 (1892).
reservation, the word "heirs" is necessary to create an easement in fee. . . . . But if created by way of exception, the word "heirs" is not necessary to create an easement in fee, if the grantor owned the fee at the time of the conveyance. . . . As an exception may be created by words of reservation, little reliance can be placed upon the language used in determining whether the right is by way of exception or by way of reservation."

The court says that since there was no evidence of an existing way across the land, "the right of way must be taken to have been acquired by way of reservation and not by way of exception."

The court took the view that the case was concluded by Bean v. French, although the court in that case does not notice the question of whether there was an existing way in the sense of a user by the owner of both tracts of a particular route for passage before the severance, or not. In fact, it would seem fairly inferable from the report of Bean v. French that there was such a user, and that Chief Justice Morton, in his statement that there was no existing way, had reference to a legal right in the lands of another, and not to a mere physical user.

Here again we find an able court defeating the plainly expressed intent of the parties by an unreasoned decision based upon a fact that would seem to have been both logically and legally immaterial.

In Hamlin v. New England Railroad Company, A, in 1851 conveyed a strip of land to the defendant railroad corporation "reserving the right to cross the track of said railroad on grade near the westerly line of our said lands at such place as said company can most conveniently provide, said crossing to be made with cattle guards on the sides and maintained at the expense of said company. The railroad company established a crossing at a place substantially identical with a cart path which had formerly been used by A, the owner, in crossing the land. The grantor, A, died. The railroad company obstructed the crossing, preventing A's successor in title of the land benefitted by the crossing from using it, whereupon they sued in tort for the obstruction. The court gave judgment for the plaintiffs, and, in the course of the opinion, said:

"The grantors except from the grant, and retain as of their former estate, the perpetual right of crossing the railroad by the present cart path or way, and the grantee on its part agrees to plank and maintain the crossing, and make and keep cattle guards, and shall have the privilege of removing the crossing
to a more convenient spot, not destroying the identity of the path as a way,'"—then the right of crossing was, without interruption, and as of their former estate, in the grantors, and never sprang from any implied contract or grant of the railroad company, although new incidents not essential to it were annexed to it by the implied contract. Such a construction of the clause does violence neither to the language used nor to the intention of the parties, when the words are read and the intention is sought in the light of the circumstances under which the deed was made. The crossing having been already constructed by the railroad company at a place substantially identical with that where the old way or cart path crossed its location, it cannot reasonably be contended that the providing of a place, the planking of the crossing, or the making of cattle guards became, by the delivery of the deed, conditions precedent to the further use of the crossing by the grantors.""

The fact that the location of the crossing was not required by the deed to be on the route of the old cart path, and that the crossing was in fact laid out only "substantially identical" with the old way, was disposed of by the court in the following language:

"The possible change of the place of crossing was merely a privilege given the railroad company to deal with a portion of the grantor's estate which they had not granted. . . . ""

The Ashcroft Case was distinguished on the ground that in the Hamlin Case the right of the grantors to cross was independent of the agreement of the railroad to maintain the crossing and cattle guards at its own expense, while in the Ashcroft Case the right of crossing could only be exercised in and through a culvert to be built and maintained by the railroad company. Presumably in the Hamlin Case there would be no duty on the railroad company to maintain the crossing, but only to permit the plaintiffs to cross. The case seems plainly right, but the distinction between this case and the previous ones, except the Ashcroft Case in which the intent of the parties was defeated, is not satisfactory.

In Simpson et al. v. Boston & Maine Railroad, the plaintiff filed a bill in equity to restrain the defendant from obstructing a crossing. The plaintiffs had inherited land from Jesse Simpson, who had conveyed a strip of land, adjoining the land now owned by the plaintiffs, to the predecessor in title of the railroad, "reserving a crossing or right of way to be maintained and kept in repair at the expense of said railroad corporation" at a specified location. Jesse Simpson had crossed the land conveyed to the

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29 176 Mass. 359 (1900).
railroad, before the conveyance but at no particular location, until after the deed to the railroad was made. During Jesse Simpson's life and for many years after his death, the crossing specified in the deed was used, and then the defendant railroad closed it. The court held that the clause quoted above could not constitute an exception because "it was a new right of way," and that as a reservation, it expired at the death of Jesse Simpson, for want of the word "heirs" in the reservation. The bill was dismissed.

In the case of Walker Ice Company v. American Steel & Wire Company, A leased to B, a manufacturing company, an artificial pond "to be used for flowage purposes only . . . . with the exclusive right to flow, store and use water in said pond." The lease contained the following clause:

"The said lessor for himself, his heirs, executors, administrators and assigns, reserves the exclusive right to cut, harvest, sell or store for sale, ice"

from the pond in question. The lease was an indenture. A question arose as to whether the lessee's right to flow hot water from its factory into the pond, and destroy the ice was superior to the lessor's right to cut ice from the pond. The majority of the court held that the right of the lessor to cut ice was the superior right, saying:

"The reservation is in the nature of an exception and should be so construed."

The court apparently made this observation, in order to escape the doctrine that a deed should be construed most strongly against the grantor. Presumably the argument would be that if the privilege of cutting ice is excepted out of the operation of the deed, then the deed does not touch it, and consequently rules of construction applicable to a deed are not applicable to this language. This reasoning seems unsound, as is ably shown by Loring, J., in his dissenting opinion. But it shows that the court could think of a conveyance which would pass most of the legal incidents of ownership in the land, but leave untouched other incidents which

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185 Mass. 463 (1904).

20 "But in determining whether the right retained by a grantor is superior to the grant or subordinate to it, it makes no difference whether the deed by which an easement is retained in the grantor operates by way of exception or by way of a grant back from the grantee, which is usually spoken of as a reservation. The correlative rights of an abutter on a railroad and of the railroad company in a private way over the railroad location are precisely the same, whether the deed retaining in the abutter a right to use the private way operates by way of exception or by way of reservation. The general rule of construction is equally applicable in both cases, that a deed shall be construed against the grantor, Ashley v. Pease, 18 Pick. 266, 276; Palmer v. Evangelical Baptist Benevolent & Missionary Society, 166 Mass. 143; and what is retained by the grantor shall be construed so as not to be repugnant to the grant. Pychon v. Stearns, 11 Me. 304, 312. Dexter v. Munley, 4 Cush. 24, 25. Corbin v. Heavy, 20 Pick. 513," Loring J., dissenting, 185 Mass. at 481.
were excepted from the conveyance. The clause in question could have been construed as one of reservation without limiting its duration since words of limitation were used. It could have been construed as a clause of re-grant, since the leave was an indenture.

In the case of Bailey v. Agawam National Bank, Moore conveyed to Henry a lot, the deed containing this language:

"A passageway is to be kept open and for use in common between the two houses, ten feet in width, five feet of said passageway to be furnished by said Henry and five feet by me from land lying east of the land here conveyed."

There was no passageway in existence at the time of the deed. In an action for breach of a covenant against incumbrances between successors in title of Henry, the question of whether the right to the passageway had continued beyond the life of the grantor, Moore, became material. Loring J., speaking for the court, said that it was the plain intent of the parties to create a passageway in perpetuity; and if the court construed the clause quoted above, as one of reservation, that intent would fail for want of the "heirs" in the clause; that the clause could not operate by way of exception, "because it is a new way not existing in law or in fact (that is to say, physically on the ground) at the date of the conveyance."

The learned judge then holds that the clause in question constituted a valid contract between the parties to the deed, binding in equity upon purchasers with notice from the original grantee, Henry, in perpetuity. The doctrine of equitable servitudes or restrictions was invoked, the learned judge saying:

"The so called equitable restriction results from the fact that equity will enforce the agreement against those taking with notice, in favor of the then owner of the land to be benefitted."

The court held that the covenant against incumbrances had been breached. The learned judge explains why this beneficent doctrine had not been applied in the earlier Massachusetts cases, by stating that in the Claflin Case the action was in tort for obstructing a right of way, which action would not lie unless there was a legal easement; that in the Simpson Case there was nothing to show that the "reservation" was intended to be perpetual. The Ashcroft Case was more troublesome, however. Concerning that case, the learned judge said:

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23 Claflin, etc., supra, n. 24.
"We need not now determine whether that case is to be distinguished on the ground that the doctrine now laid down was not then contended for, or is to be supported on the ground that the court will not help out a conveyance defective for lack of the word 'heirs,' by letting it operate as an agreement. It is settled that the word 'agree' may be read 'grant,' and an 'agreement under seal' construed to be a 'grant.' Hogan v. Barry, 143 Mass. 538, 10 N. E. 253; Ladd v. Boston, 151 Mass. 585, 24 N. E. 858, 21 Am. St. Rep. 481. But it is another matter to hold that what is defective as a grant is valid as an agreement, where the parties have undertaken to make a grant. As we have said, that need not be determined now."

Upon the question of whether that which is in form a conveyance can be construed as a contract to convey, if it fulfills the requisites of a contract, but fails to meet the requisites of a grant, there should be no serious doubt. The well recognized doctrine that an unsealed deed may be the basis of a suit in equity for specific performance, on the ground that the deed constitutes a contract to convey the land, would seem to be quite analogous. Doubtless the first ground of distinction advanced by the court, viz., that the doctrine of equitable servitudes did not occur to counsel nor court in the Ashcroft Case, is the true one.

In Foster v. Smith, the doctrine that where there is an existing way in use by the common owner, it may be made the subject of an exception, and hence will be permanent without the use of the word "heirs" was again applied.

In Childs v. Boston & M. R. R., the facts were that in 1846 David Childs conveyed land to a railroad company by a deed containing this language:

"And it is understood and agreed that the said company are to make me a good and sufficient crossing for carting across said railroad near my bar place, or such other place as we can agree upon."

No crossing existed at this time, but one was made later, which was used until 1907, when it was closed by the defendant company, the successor in title of the original grantee. The plaintiffs were successors in title to David Childs' land adjoining the railroad, and they sued at law for the obstruction. The defendant contended that the right of crossing had expired upon the death of David Childs, the original grantor. The court held that the clause quoted above could not operate by way of exception "be-
cause it created a new right of way before used or existing, the burden of fashioning which was placed upon the railroad company;" that because the word "heirs" was not used it could operate as a reservation only for the life of David Childs; that because it was not sealed by the grantee it was not a technical "covenant running with the land" hence no one could sue upon it as a contract, except the original parties. But the court found an intent that the right of crossing should be permanent, and that an equitable servitude was created, as in the case of Bailey v. Agawam National Bank, which, in a suit in equity, would be protected, and damages given for its violation. But since the actual proceeding was an action at law, the plaintiffs failed. The court suggested that the plaintiff might amend into a suit in equity, and succeed there.

We have reviewed the decisions in an enlightened jurisdiction and we submit that they leave the law in needless and intolerable confusion. The intent of the parties has been defeated oftener than it has been upheld, in spite of an apparent effort on the part of the court to fulfill that intent, even by stretching the law. The obstacle has been faulty analysis. If the courts of Massachusetts had carried the idea suggested in Bowen v. Conner that a pre-existing right could be excepted out of the operation of a conveyance, to its logical conclusion instead of stopping at the wholly irrelevant question of whether or not there was a pre-existing user, every case reported in the Massachusetts reports would have been decided in accordance with the intent of the parties, except possibly the Ashcroft Case. Even in that case a partial fulfillment of the parties' intent would have been possible. And in no case would it have been necessary to "go into equity," and become involved in the uncertainties and confusions of equitable restrictions and servitudes.

The Massachusetts doctrine that a user of the easement during the common ownership will make it the proper subject of an exception when a severance occurs, doubtless had its origin in the doctrine that, under certain circumstances, a so called quasi-easement exercised by the common owner of two tracts over one of the tracts for the benefit of the other is converted into a true easement by the sale of the quasi-dominant tract. This doctrine is ordinarily limited to situations in which the quasi-easement is apparent and continuous and highly convenient to the quasi-dom-

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40 Supra, n. 61.
41 Supra, n. 6.
42 Supra, n. 14.
The quasi-easement must be in actual existence at the time of the separation in order to be converted into a true easement because the doctrine is that a grant is implied from the probable intent of the parties that the easement should go with the land for the benefit of which it was formerly used. Of course, there would be no basis for such an implication unless there should actually have been a user before the severance of the two estates. Therefore the fact of a previous user is always significant in the cases involving the question of an implied grant. In these cases the pre-existing user creates an appearance of a valuable appurtenance to the land sold, which the vendee thinks he is getting with the land and without which he probably would not buy the land. Hence the law supplements the terms of the conveyance by this implication of a grant.

In the cases where there is an express reservation or exception, however, nothing hinges upon the appearances at the time of the conveyance. The intent of the parties as to what should pass by the conveyance, and what should remain in the grantor, are perfectly plain. The only question is, whether under the legal requirements of conveyancing, that intent can be made effective. The purely physical, and legally unimportant fact of whether the privilege which the common owner had before the conveyance, was exercised by him, would seem to have nothing to do with that question.

43 See e.g., Buss v. Dyer, 125 Mass. 287 (1878); Wheeldon v. Burrows, L. R. 12 Ch. D. 31 (1879).
44 See TIFFANY, REAL PROPERTY, 2nd ed., § 263, for a learned discussion of the doctrine of implied grants as related to easement. See also GALE on EASEMENTS, 8th ed., page 153 and following.