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Easement Draftsmanship and Conveyancing

*Robert Kratovil**

IN LAND transactions within recent years, there has been a tendency to place increasing emphasis on easements. Particularly in the acquisition of industrial sites, attorneys for the purchaser have subjected the easements servicing the site to the same meticulous scrutiny given the title to the site itself. Proceeding on the incontestable assumption that the site is valueless unless adequate means of access are available, such attorneys have often insisted upon title insurance guaranteeing the validity of the easements. Even in transactions involving single-family dwellings, under the prod of the requirements of mortgage lenders, property owners have been discarding their informal verbal understandings with neighbors in favor of formal easement arrangements for party driveways and the like. In these circumstances it seems probable that some practical suggestions and observations on some of the drafting and conveyancing problems involved might be welcomed by the profession, and this article is offered with that end in view. Since easements in gross present special problems, the discussion is largely confined to appurtenant easements.

The modes of creating private easements, other than by implication or prescription, include the following:¹

1. Formal grant.
2. Reservation or exception in a conveyance of land.
3. Covenant.²
4. Unsealed agreement based on valuable consideration.³
5. Conveyance by reference to a plat which depicts easements.
6. Conveyance referring to a recorded declaration of easements.
7. Deed of conveyance otherwise sufficient to convey fee title but which includes language construed to reduce the estate granted to a mere easement.⁴

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¹ In its broad sense the word "grant" includes all but the second of the listed modes. To the draftsman, however, the formal differences are important.

² *Hogan v. Barry*, 143 Mass. 538, 10 N. E. 253 (1887); *Beck v. Lane County*, 141 Ore. 580, 18 P. 2d 594 (1933).

³ *Ashelford v. Willis*, 194 Ill. 492, 62 N. E. 817 (1902).

⁴ *Pellissier v. Corker*, 103 Cal. 516, 37 Pac. 465 (1894) (deed of land "for the sole purpose of an alleyway"); *Magnolia Petroleum Co. v. West*, 374 Ill. 516, 30 N. E. 2d

8. Mortgage containing grant or reservation of easement, where such mortgage is subsequently foreclosed.
9. Informal documents of various kinds bearing little resemblance to formal easement grants, but which are construed as easement grants in the interests of justice, usually to prevent revocation by the grantor.⁵

The formal requisites for the creation of an easement by conveyance *inter vivos* are, in general, the same as those required in a conveyance of an estate in land of like duration.⁶

CONSIDERATIONS RELATING TO MODE OF CREATION

Inclusion of Grant of Easement in Deed Conveying Land

Where *R* owns Blackacre and adjoining Whiteacre and *E* contracts for the purchase of Blackacre and an easement over adjoining Whiteacre, one of two devices may be resorted to for the purpose of carrying such a contract into execution: (1) *R* may execute his deed conveying Blackacre to *E*, thereby creating the separate ownership of dominant tenement and servient tenement indispensable to the existence of appurtenant easements, and may contemporaneously execute a separate grant to *E* of an easement over Whiteacre; or (2) in view of the structural similarity of the two instruments, the grant of the easement may be incorporated into the deed itself.⁷ The latter course is by far the more common method of procedure in situations involving simple easements, such as driveways or roads servicing properties such as single-family dwellings or farms. In industrial easements, where the easement description often requires a lengthy legal description, and where detailed covenants are inserted outlining the rights and duties of the parties, inclusion of the easement grant in a deed will usually prove unwieldy; hence the separate grant is resorted to. Other factors, however, enter into the choice between the two

24 (1940) (deed of land "to be used for road purposes"); *Maxwell v. McCall*, 145 Ia. 687, 124 N. W. 760 (1910) (deed of land "for road purposes"). The authorities are conflicting. Notes, 132 A. L. R. 142 (1941) and 136 A. L. R. 379 (1942). In many of these cases one may surmise that the easement was created through inadvertence and that the parties actually intended a conveyance of the fee. A similar problem is encountered in interpretation of exceptions which include language descriptive of intended use or purpose. See note 19 *infra*.

⁵ Conard, *Words which will Create an Easement*, 6 Mo. L. Rev. 245 (1941).

⁶ 5 RESTATEMENT, PROPERTY § 467 (1944).

⁷ Where the grant is incorporated in the deed, it often reads somewhat as follows: "For the consideration aforesaid, the grantor grants to the grantee, his heirs and assigns, as an easement appurtenant to the premises hereby conveyed, an easement for ingress and egress over (here describe servient tenement)."

methods, among these the factor of constructive notice. It is elementary that a bona fide purchaser of land without actual knowledge or constructive notice of the existence of an easement takes a title relieved of the burden or charge of the easement.⁸ The weight of authority is to the effect that if a deed or a contract for the conveyance of one parcel of land, with a covenant or easement affecting another parcel of land owned by the same grantor, is duly recorded, the record is constructive notice to a subsequent purchaser of the latter parcel, a rule that stems from the principle that a grantee is chargeable with notice of everything affecting his title which could be discovered by an examination of the records of the deeds or other muniments of title of his grantor.⁹ Put more simply, under prevailing methods recorded documents relating to land are indexed according to the name of the grantor and grantee;¹⁰ hence during the period that a tract of land is owned by *R* his name must be searched for every document executed by him, since the document, though a conveyance of land other than that under search, may contain a grant of easement over the land under search. There is, however, some authority suggestive of a contrary point of view.¹¹ Under the latter decisions it might be hazardous to assume that a purchaser of Whiteacre would be charged with notice of an easement thereover contained only in a deed conveying Blackacre. The point is of fundamental importance, since although a purchaser is charged with notice of all apparent and obvious easements, such as driveways,¹² the existence of many easements, such as underground pipes or conduits, will not be apparent from an inspection of the premises. In jurisdictions where the minority rule is followed or where the rule is in doubt, inclusion of the easement grant in the deed may involve some risk.

Inclusion of the easement grant in the deed involves other hazards. In some states the index of recorded documents is regarded as an essential part of the record, and lack of indexing, or a material defect therein, causes the record to be ineffective to impart constructive notice. The law in these states proceeds upon the theory that a searcher locates the pertinent records from the alphabetical indices, and that he should not be bound by any records to which he is not

⁸ *Backhausen v. Mayer*, 204 Wis. 286, 234 N.W. 904 (1931); Note, 41 A. L. R. 1442 (1926), supplemented 74 A. L. R. 1250 (1931).

⁹ *Finley v. Glenn*, 303 Pa. 131, 154 Atl. 299 (1931); Note, 16 A. L. R. 1013 (1927).

¹⁰ PATTON, *LAND TITLES* 188 (1938).

¹¹ *Backhausen v. Mayer*, *supra* note 8; Note, 16 A. L. R. 1013, 1015 (1922).

¹² *Bird v. Smith*, 8 Watts 434 (Pa. 1839).

directed by official indices.¹³ In these jurisdictions, where a deed or mortgage describes two parcels of land, but the document is indexed as a conveyance or mortgage of but one of the parcels, the record is not constructive notice as to the omitted tract.¹⁴ It would seem to follow that where a deed conveys one tract of land and an easement over another tract of land, and the deed is indexed only as a deed of the land conveyed, the record would not impart constructive notice of the creation of the easement. Such a risk is avoided by resort to a separate document for the creation of the easement.

Inclusion of Reservation or Exception of Easement in Deed Conveying Land

Where a deed conveying land is also employed as a means of creating an easement over the premises conveyed for the benefit of other premises owned by the grantor, the rules relating to exceptions and reservations come into play. By the common law of England, an exception in a conveyance merely withdrew from the operation of the conveyance a part of the thing conveyed, and the term reservation referred only to interests "issuing from" the land in a legal sense, such as rents.¹⁵ An easement in the land conveyed was regarded as neither a part of the land nor issuing therefrom, and consequently, an attempted reservation or exception of an easement could, under the English doctrine, take effect only as a re-grant of the easement, and it was therefore necessary that the grantee join in the execution of the deed.¹⁶ In this country it has generally been held that an easement may be created by reservation.¹⁷ One difficulty inherent in this mode of creating easements is the tendency of inexperienced draftsmen to omit words of inheritance, an omission that may have unfortunate consequences in jurisdictions that require such language if the easement is to endure beyond the life of the grantor.¹⁸

¹³ *Rice v. Taylor*, 220 Cal. 629, 32 P. 2d 381 (1934); *Haggerty v. Building Investment Co.*, 111 Wash. 638, 191 Pac. 760 (1920); 23 CALIF. L. REV. 107 (1934); Note, 63 A. L. R. 1057 (1929).

¹⁴ *Noyes v. Horr*, 13 Ia. 570 (1862).

¹⁵ 3 TIFFANY, REAL PROPERTY 249, 250 (3rd ed. 1939); 36 CALIF. L. REV. 470 (1948).

¹⁶ 3 TIFFANY, REAL PROPERTY 250 (3rd ed. 1939). By statute, at present, a reservation operates in England as a re-grant, even though the deed is not executed by the grantee. 36 CALIF. L. REV. 470, 471 (1948).

¹⁷ 36 CALIF. L. REV. 470 (1948).

¹⁸ 3 TIFFANY, REAL PROPERTY 251 (3rd ed. 1939). It is best to use a form somewhat along the following lines: "The grantor excepts and reserves to himself, and his heirs, as an easement appurtenant to (here describe dominant tenement) an easement for ingress and egress over and across (here describe servient tenement)."

Whether an easement may be created by exception rather than reservation has been the subject of much discussion.¹⁹ Convincing theoretical argument has been offered for the affirmative of this proposition, on the ground that a grantor may except from his conveyance rights in the land conveyed as well as part of the soil.²⁰ In jurisdictions where words of inheritance are needed to create an easement that will continue beyond the life of the grantor, there has been some tendency to construe clauses creating easements as exceptions rather than reservations, since words of inheritance are not needed in an exception.²¹ Other jurisdictions requiring words of inheritance permit construction of the easement clause as an exception only where at the time of the execution of the deed there is a way in existence corresponding to that described in the deed.²² Under this curious doctrine the easement ends with the life of the grantor where words of inheritance are lacking and no way is in existence at the date of the deed. To avoid this obvious frustration of the intention of the parties such easements are now protected as perpetual rights if so intended on the theory that they are equitable servitudes, binding on all purchasers with notice.²³

The authorities are conflicting as to the propriety of creating an exception or reservation in favor of a stranger to the title, the prevailing view being that a reservation or exception cannot be made in favor of a stranger.²⁴

It is preferable, though probably not necessary,²⁵ that the deed be signed, sealed, and acknowledged by the grantee.

In jurisdictions that still adhere to the doctrine that a fee simple created by the granting clause of a deed cannot be cut down in the

¹⁹ Bigelow and Madden, *Exception and Reservation of Easements*, 38 HARV. L. REV. 180 (1924-1925); Madden, *Creation of Easements by Exception*, 32 W. VA. L. Q. 33 (1925-1926). Ordinarily, of course, an exception withholds part of the fee title from the operation of the deed. Thus a deed of Blackacre "except the north fifteen feet thereof" excepts the fee title to the north fifteen feet. However, language descriptive of intended use or purpose may reduce an apparent exception of the fee title to a mere reservation or exception of an easement. Thus a deed of Blackacre "except the north fifteen feet thereof to be used as a roadway" passes the fee title to all of Blackacre but creates an easement in favor of the grantor over the north fifteen feet. *Rall v. Purcell*, 131 Ore. 19, 281 Pac. 832 (1929).

²⁰ 36 CALIF. L. REV. 470, 471 (1948).

²¹ *Hall v. Hall*, 106 Me. 389, 76 Atl. 705 (1910).

²² *Clafin v. B. & A. R. R.*, 157 Mass. 489 (1892).

²³ *Childs v. Boston & M. R. R.*, 213 Mass. 91, 99 N. E. 957 (1912); Madden, *Creation of Easements by Exception*, 32 W. VA. L. Q. 33 (1925-1926).

²⁴ 36 CALIF. L. REV. 470, 472-473 (1948); 53 DICK. L. REV. 151, 154 (1949).

²⁵ See, however, text *infra*, at note 112.

habendum, an exception or reservation occurring in the habendum may not be valid.²⁶

Creation of Easement by Means of Subject Clause

Rather frequently one will encounter a deed in which the draftsman has attempted to create an easement by including a provision that the premises conveyed are "subject to" an easement. No doubt courts can usually be counted on to come to the rescue in such cases lest clients be penalized for the ineptitude of their attorneys,²⁷ but the slightest reflection will reveal that a poor tool has been selected for the task in hand. The chief office of the "subject clause" in a warranty deed is to avoid liability for breach of the covenants of warranty²⁸ for, in general, the covenant against encumbrances will impose liability on the grantor for all encumbrances not enumerated in the subject clause. It is therefore evident that in a warranty deed of land that is subject to an *existing easement*, the grantor will usually insist on mentioning the easement in the subject clause, but when a warranty deed is selected as a means of *creating* an easement over land of the grantor other than that conveyed by the deed, the proper method is by means of a separate clause granting such easement, as above described, or if the grantor is reserving an easement not theretofore in existence, the proper method is by reservation, as above outlined.

Declaration of Easements

In recent land developments one will frequently encounter a rather complex scheme of easements, including easements for driveways, play areas, walks and the like. Often the only feasible method of describing the easements in question is by recourse to a plat or map. The plat or map depicts, usually by means of dotted lines, the boundaries of the easement areas. The full scope of the easement rights intended to be created is usually set forth in an accompanying "declaration of easements." This document is placed of record, and in subsequent conveyances of lots in the development in question a standard clause is included incorporating the declaration by reference.²⁹

²⁶ *Mason v. Jackson*, 194 Ark. 236, 106 S.W.2d 610 (1937). *Contra*: *Freudenberger Oil Co. v. Simmons*, 75 W. Va. 337, 83 S.E. 995 (1914).

²⁷ *Johnson v. Sherwood*, 34 Ind. App. 490, 73 N.E. 180 (1905).

²⁸ *Freeman v. Foster*, 55 Me. 508 (1868); *Klauser v. Reeves*, 226 Wis. 305, 276 N.W. 356 (1937).

²⁹ Such a clause is often somewhat as follows: "Subject to Declaration of Easements by Grantor dated May 9, 1949 and recorded in the Office of the Recorder of Deeds of Cook County, Illinois, as Document No. 1,000,000, which is incorporated herein by

The authorities amply sustain this mode of creating easements. Where a landowner subdivides his land into building lots by means of a map or plat which depicts easements, the purchasers of the lots acquire, as appurtenant to their lots, the easements so delineated,³⁰ a situation precisely analogous to that in question.

Occasionally documents such as these are entitled "Dedication of Easements." Technically this is a misnomer, for there is a distinction between a dedication to the public and a grant of a private easement.³¹ Where the intention is clear, however, a "dedication" will be construed as a grant of a private easement.³²

Conveyances of Land Abutting on Private Ways

A way depicted on a plat may be a private way or easement, either because the plat so characterizes it³³ or because the public fails to accept the offer of dedication, where the streets were intended as public streets.³⁴ It is unnecessary to refer to such easements in any conveyance of a lot abutting on the way, since, being appurtenant easements, they pass by the conveyance even though not mentioned therein.³⁵ The fee title to the land falling within the private way is another matter, however. The general rule is that a conveyance of land which is bounded by a private way carries title to the center of the way, unless there is a clear expression to the contrary.³⁶ There are

reference thereto. Grantor grants to the Grantees, their heirs and assigns, as easements appurtenant to the premises hereby conveyed, the easements created by said Declaration for the benefit of the owners of the Parcel of realty herein described. Grantor reserves to himself, his heirs and assigns, as easements appurtenant to the remaining Parcels described in said Declaration, the easements thereby created for the benefit of said remaining Parcels described in said Declaration, and this conveyance is subject to said easements and the right of the grantor to grant said easements in the conveyances of said remaining Parcels or any of them."

³⁰ *Zearing v. Raber*, 74 Ill. 409 (1874); *Smith v. Heath*, 102 Ill. 130 (1882); Note, 7 A. L. R. 2d 607 (1949).

³¹ *Fieder v. Terstiege*, 56 N. Y. S. 2d 837 (1945).

³² *Seaboard Air Line Ry. v. Dorsey*, 111 Fla. 22, 149 So. 759 (1932).

³³ *Smith v. Heath*, 102 Ill. 130 (1882).

³⁴ 3 *TIFFANY, REAL PROPERTY* 312 (3rd ed. 1939). A plat showing public streets is a mere offer of dedication, which the authorities may accept or reject, and if the offer is declined, the streets obviously are not public streets, and yet the lot purchasers retain their private easements thereover. *Kaatz v. Curtis*, 215 Mass. 311, 102 N. E. 424 (1913).

³⁵ *Erit Realty Corp. v. Sea Gate Assn.*, 249 N. Y. 52, 162 N. E. 581 (1928).

³⁶ *Tagliaferri v. Grande*, 16 N. M. 486, 120 Pac. 730 (1911) (applying rule to irrigation ditch); *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. 2d 1080 (1932) (applying rule to deed of land bounded by railroad right of way); *PATTON, LAND TITLES* 317 (1938); Note, 24 L. R. A. (N.S.) 539 (1909). Where the way has been made from and upon the margin of the grantor's land, so that he owns no land on the farther side

authorities which adopt a contrary view.³⁷ It is therefore preferable that any conveyance of such a lot make specific reference to the private way adjoining. For example, following the property description of the lot itself one might add a phrase like: "also the east half of the private alley lying west of and adjoining said lot."

Mortgages

A landowner who mortgages a portion of his land may create an easement in favor of the mortgagee over the premises not mortgaged. It will usually be found that a mortgagee who needs an easement to service the mortgaged land will insist that the easement grant be included in the mortgage itself.³⁸

Where a mortgage is made conveying land that enjoys the benefit of a previously created easement, reference to the easement in the mortgage is, of course, unnecessary, since an appurtenant easement is inseparably connected to the dominant tenement and whoever acquires title to the dominant tenement through foreclosure of the mortgage will also acquire the easement although no mention thereof is made in the mortgage³⁹ or foreclosure proceedings.⁴⁰ However, mortgage lenders often insist that a mortgage of a dominant tenement contain a description of the easement, and there is no objection to complying with such a request. This can conveniently be done by setting forth the mortgaged land and the easement in separate para-

of the way, his deed of land abutting on the way carries title to all of the way. *Haberman v. Baker*, 128 N. Y. 253, 28 N. E. 370 (1891). *Contra*: *Gould v. Wagner*, 196 Mass. 270, 82 N.E. 10 (1907). The decisions are conflicting as to what expression of intent is sufficient to exclude the way from the operation of the deed. *Compare* *Woolf v. Pierce*, 209 N. Y. 344, 103 N. E. 508, 2 A.L. R. 1 (1913) with *Salter v. Jonas*, 39 N. J. L. 469 (1877). There is also a conflict as to the operation of the rule upon deeds conveying land abutting on unopened roads. 26 MICH. L. REV. 690 (1928).

³⁷ *Seery v. Waterbury*, 82 Conn. 567, 74 Atl. 908 (1909). *Stuart v. Fox*, 129 Me. 407, 152 Atl. 413 (1930). *But cf.* *Center Bridge Co. v. Wheeler & Howes Co.*, 86 Conn. 585, 86 Atl. 11 (1913).

³⁸ Usually such a clause is in form somewhat as follows: "And as further security for payment of the debt above described, the mortgagor mortgages and grants to the mortgagee, his heirs and assigns, as an easement appurtenant to the premises above described, an easement for ingress and egress over and across (here describe servient tenement)."

³⁹ *Union Cent. Life Ins. Co. v. Albrethsen*, 50 Ida. 196, 294 Pac. 842 (1930); *Swedish-American Nat. Bank v. Conn. M. L. I. Co.*, 83 Minn. 377, 86 N.W. 420 (1901); *Yellowstone V. Co. v. Asso. Mtg. Investors*, 88 Mont. 73, 290 Pac. 255 (1930). Consult Note, 70 A.L.R. 1008 (1931) (shares of stock in ditch company as passing by mortgage of dominant tenement). The rule also applies to an easement created subsequently to the execution of the mortgage. Note, 116 A.L.R. 1078 (1938).

⁴⁰ *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 Pac. 858 (1908); Note, 116 A.L.R. 1078 (1938).

graphs, captioning the first "Parcel A," and the second, "Parcel B."

Where, in mortgaging a portion of his land, the landowner finds it necessary to reserve an easement thereover in favor of his remaining land, this may be done by way of reservation or exception, and the suggestions heretofore advanced with respect to such clauses in deeds are again applicable.

A mortgage placed upon a servient tenement is, of course, subject to the easement whether or not this fact is recited in the mortgage. Nevertheless in mortgages that contain covenants of warranty or where the words of conveyance import the usual covenants of warranty, good conveyancing requires the inclusion of a "subject" clause which mentions the easement, since technically such covenants are breached if such a clause is not included.

Where the owner of mortgaged land creates an easement thereover, the easement is subject to the mortgage, and foreclosure of the mortgage will extinguish the easement. Hence, from the viewpoint of the owner of the dominant tenement, it is desirable that arrangements be made at the time the easement is created to obtain a subordination of the mortgage to the easement.

Provisions of the Contract of Sale

The form and contents of the deed and other documents that are delivered at the closing of a real estate deal are determined by the provisions of the contract of sale. It is therefore important that all the easement requirements of both vendor and purchaser be determined in advance of the execution of the contract of sale and that appropriate provision be made therein for such easements.

Grantor

FORMAL REQUISITES

The formal requisites with respect to the grantor of an easement are basically identical with those applicable to a deed of conveyance of land, thus bringing into play the familiar learning with respect to legal capacity of the grantor, necessity of spouse's joinder, misnomer, necessity of appropriate corporate action in connection with corporate grants, powers of fiduciary grantors, and the like.⁴¹ A few points of difference exist. In states having homestead laws the spouse's signature is quite generally required on a deed of conveyance, but there are decisions holding such signature unnecessary where only a grant of easement is involved, since this involves no transfer of possession.⁴²

⁴¹ PATTON, *LAND TITLES* 636 *et seq.* (1938).

⁴² Note, 45 A. L. R. 395, 408 (1926).

Also, while a tenant in common may make a valid sale of his interest or any undivided fraction thereof, he cannot be allowed to sell his interest in a specific part of the premises, because this would interfere with his cotenants' right of partition. Hence it has been held that less than all the tenants in common cannot create an easement in the common property, nor convey such easement to another.⁴³ There are, however, occasional decisions to the effect that if a cotenant does grant an easement, the grantee can demand a partition in order that the easement may be established upon that part of the land allotted to his grantor.⁴⁴

Grantee

With respect to the grantee, the deed rules again prevail, but again there are a few points of difference. The chief pitfall to be avoided is the inadvertent creation of an easement in gross rather than an easement appurtenant. Thus where a wife owned a tract of land, and an easement over adjoining premises ran to her husband as grantee, it was held that the easement was in gross, for an appurtenant easement must run to the owner of the dominant tenement.⁴⁵ No doubt some courts less fettered by the old doctrines could surmount this technical obstacle and give effect to intention of the parties, but a good draftsman should avoid placing his client in the position of a supplicant for mercy. Where the dominant tenement is owned by *A* and *B* in joint tenancy, the easement should run to both, as joint tenants. These considerations underscore the need for a title search of both dominant and servient tenements as a prerequisite for the creation of a proper easement.

Words of Limitation

Since incorporeal rights in land have applied to them the same idea of duration or quantity that is applied to corporeal hereditaments, all the familiar estates in corporeal property find their counterparts in easements in land.⁴⁶ Consequently thought must be given to the estate to be created, whether in fee simple, for life, for years, determinable fee, estate upon condition subsequent, etc.⁴⁷ Statutes dispensing

⁴³ *Forrest Mill Co. v. Cedar F. Mill Co.*, 103 Ia. 619, 72 N.W. 1076 (1897).

⁴⁴ 3 TIFFANY, REAL PROPERTY 244 (3rd ed. 1939).

⁴⁵ *Waller v. Hildebrecht*, 295 Ill. 116, 128 N.E. 807 (1920). If an easement in gross is created, it is not assignable under the prevailing rule. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND 70 (2d ed. 1947).

⁴⁶ *Tallman v. E. I. & P. R. R.*, 379 Ill. 441, 41 N.E. 2d 537 (1942); *Conard, Easement Novelties*, 30 CALIF. L. REV. 125, 138 (1942).

⁴⁷ Note, 154 A.L.R. 5 (1945).

with the ancient requirement of the word "heirs" in conveyances of fee title to land have been quite universally adopted, but it is not always certain that the language of these acts is broad enough to cover easement grants.⁴⁸ A number of jurisdictions adhere to the rule that words of heirship are necessary in a reservation of an easement,⁴⁹ though not in an exception or grant thereof. Again, where his purpose is to create a perpetual easement, the careful draftsman will skirt the danger area by making all his grants run to the grantee "and his heirs" and all his reservations to the grantor "and his heirs."

Words of Grant

The generally accepted doctrine is to the effect that no particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement which is by law grantable are sufficient to effect that purpose.⁵⁰ Occasional decisions, however, lay down the doctrine that since an easement can only be created by grant, the word "grant" must appear in the instrument.⁵¹ The corollary of this strange holding seems to be that in the absence of the word "grant" only a license is created, and a license is revocable.⁵² While it is unlikely that this view will ever command any considerable support, the careful draftsman will heed the warning and use the word "grant" in creating his easement.

Recital of Consideration

Historically, the factors that made a recital of consideration necessary in a deed of land never obtained with respect to easement grants.⁵³

⁴⁸ 12 VA. L. REV. 256 (1926).

⁴⁹ Note, 34 A. L. R. 695 (1925).

⁵⁰ Title & Tr. Co. v. Wabash-Randolph Corp., 384 Ill. 78, 51 N. E. 2d 132 (1943).

⁵¹ Conard, *Words which will Create an Easement*, 6 Mo. L. REV. 245 (1941) (criticizing the doctrine).

⁵² *Ibid.*

⁵³ Prior to the Statute of Uses (27 HEN. VIII, c. 10 [1536]), legal title to land was transferred by livery of seizin. A charter of feoffment usually accompanied the ceremony, but it had only evidential value and was not necessary to the effectiveness of the transfer. French v. French, 3 N. H. 234 (1825). After the enactment of the Statute, the consideration recited in a deed of bargain and sale raised a use which the Statute executed, thereby transferring the legal title to the grantee. Hence the often-repeated statement that a deed of land must recite a consideration. Redmond v. Cass, 226 Ill. 120, 80 N. E. 708 (1907). Livery of seizin was always impossible with respect to incorporeal hereditaments. Baseball Publishing Co. v. Bruton, 302 Mass. 54, 18 N. E. 2d 362 (1938). A distinction was always made between corporeal hereditaments, which lie in livery, and incorporeal hereditaments, which lie in grant. Co. LRR. *9a. It is evident that valid grants of incorporeal hereditaments were made during a long period of time before the recital of consideration came into vogue.

Nevertheless, since equity will enforce an unsealed agreement based on valuable consideration,⁵⁴ it seems desirable that a recital of consideration be included, particularly in those states that have abolished the significance of the seal.

Characterization of Easement as Easement Appurtenant

The law recognizes two categories of easements, namely, easements appurtenant and easements in gross.⁵⁵ An appurtenant easement need not be so characterized in the instrument of grant,⁵⁶ and whenever possible, courts will construe an easement as an easement appurtenant rather than an easement in gross.⁵⁷ However, since a good draftsman leaves as little as possible to construction, he will include in his easement grant a provision characterizing the easement in question as an easement appurtenant.

Do not characterize the easement as a "covenant running with the land." There are, of course, points of similarity between easements and covenants. Like an appurtenant easement, a covenant may run with the land, both as to benefit and burden.⁵⁸ Just as covenants in order to run must touch and concern the land, an easement to be appurtenant must contribute to the direct physical benefit of the dominant tenement.⁵⁹ An appurtenant easement may be created by covenant.⁶⁰ Nevertheless, an easement is not a covenant.

Statement of Right of Enjoyment Created

By definition, an easement is an interest in land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists.⁶¹ Inexperienced draftsmen, who tend to think of all easements as easements of ingress and egress, have been known to draft easement grants that omitted all mention of the limited rights intended to be created. It is, of course, necessary that the grant define the permitted use, as a right of passage, right to lay and maintain pipes, or the like. Otherwise stated, an easement must confer privileges of doing particular things, not of

⁵⁴ Ashelford v. Willis, 194 Ill. 492, 62 N. E. 817 (1902).

⁵⁵ Stockdale v. Yerden, 220 Mich. 444, 190 N. W. 225 (1922).

⁵⁶ Tusi v. Jacobsen, 134 Ore. 505, 293 Pac. 587 (1930).

⁵⁷ Lindenmuth v. Safe Harbor W. P. Corp., 309 Pa. 58, 163 Atl. 159 (1932); Note, 89 A. L. R. 1187, 1188 (1934).

⁵⁸ 3 TIFFANY, REAL PROPERTY 443, 445 (3rd ed. 1939).

⁵⁹ Garrison v. Rudd, 19 Ill. 558, (1858); Conard, *Easement Novelties*, 30 CALIF. L. REV. 125, 145 (1942).

⁶⁰ Goodwillie Co. v. Commonwealth Co., 241 Ill. 42, 89 N. E. 272 (1909).

⁶¹ 5 RESTATEMENT, PROPERTY § 450 (1944).

doing anything from fishing to farming. This is not because the law is opposed to unlimited rights in land, but because a grant of unlimited use is a grant of ownership, not a grant of an easement.⁶²

Habendum and Premises

By analogy to the rule relating to deeds of conveyance, it has been held that the habendum clause in an easement grant cannot enlarge or decrease the estate created by the granting clause.⁶³

Execution, Attestation, Acknowledgment, and Recording

In general, the formal requisites for the creation of an easement are the same as those required for the conveyance of an estate in land of like duration.⁶⁴ Local statutes imposing requirements of signing, witnessing, and acknowledgment upon conveyances inter vivos of estates in land apply equally to easements and estates in land where both are of like duration.⁶⁵ In many states the requirement of a seal on an easement grant has been eliminated.⁶⁶ In equity, an easement supported by consideration does not require a seal.⁶⁷ Naturally, the grantee of the easement will wish his grant to be recorded in such a manner as to impart constructive notice of the rights thereby created, and in many states attestation or acknowledgment is essential to entitle the instrument to recording.⁶⁸

Evidence of Title

All prudent purchasers of land insist upon an abstract of title, title insurance, or other satisfactory evidence of title to the land to be purchased, and the same, of course, is true with respect to mortgage lenders who contemplate the making of a loan on the security of land. Often the use contemplated by the purchaser will be wholly impossible without full enjoyment of an easement, as where an otherwise landlocked industrial site is serviced by a spur track easement. Beyond all controversy, the title to the easement is frequently as important to the purchaser as the title to the land itself, and he is there-

⁶² *Caldwell v. Fulton*, 31 Pa. 475 (1858); Conard, *Easement Novelties*, *supra* note 59 at 138.

⁶³ *Sellick v. Jersey Central Power & Light Co.*, 124 N. J. L. 110, 11 A. 2d 137 (1940).

⁶⁴ 5 RESTATEMENT, PROPERTY § 467 (1944).

⁶⁵ *Ibid.*

⁶⁶ Conard, *The Requirement of a Sealed Instrument for Conveying Easements*, 26 IOWA L. REV. 41 (1940).

⁶⁷ *Baseball Publishing Co. v. Bruton*, 302 Mass. 54, 18 N. E. 2d 362 (1938).

⁶⁸ PATTON, LAND TITLES 671, 678 (1938).

fore justified in insisting upon proper evidence of title to the servient estate. Where the transaction involves a purchase of part of the grantor's land and the grant of an easement over remaining land owned by the grantor, the additional expense will usually be trifling, for his abstract or other evidence of title will cover both the dominant estate and the servient estate down to his date of purchase, and all that is required is a continuation of the abstract as to both tenements. In transactions of considerable magnitude, attorneys for purchasers have, in recent times, insisted upon the issuance of title insurance covering the easement as well as the title to the dominant tenement.

Escrow

For the protection of both vendor and purchaser, there is a growing disposition on the part of attorneys for the parties to insist that the deal be closed in escrow. Indeed, in many jurisdictions the risk of loss cannot wholly be eliminated without resort to escrow.⁶⁹ All the reasons for escrow in land sales apply with equal cogency to sales involving easement grants.

THE DOMINANT AND SERVIENT TENEMENTS

The Dominant Tenement

An easement appurtenant cannot possibly exist without a dominant tenement to which it is appurtenant.⁷⁰ It is not necessary, however, that the dominant tenement be described in the easement grant. The fact that the easement is an appurtenant easement, and the dominant tenement which it serves, can be ascertained from the attendant circumstances.⁷¹ Again, anything left to construction is of necessity left in some uncertainty. Suppose, for example, that *R* owns a tract of land west of and adjoining Blackacre, owned by *E*. *E* also owns Whiteacre, which lies east of and immediately adjoining Blackacre. *R* grants to *E* an easement for ingress and egress over *R*'s land, which easement has its terminus at the west boundary of Blackacre. Nothing is said in the grant regarding the dominant tenement intended to be benefited. Is the easement intended for the benefit of both Blackacre and Whiteacre, or for the benefit of Blackacre only? If an existing path or driveway services both tenements, the solution is relatively free from doubt, but if the easement has not yet been physi-

⁶⁹ Mann, *Escrows—Their Use and Value*, LAW FORUM No. 3, pp. 402-405 (1949).

⁷⁰ Goldstein v. Raskin, 271 Ill. 249, 111 N. E. 91 (1915).

⁷¹ Goldstein v. Raskin, 271 Ill. 249, 111 N. E. 91 (1915); Tusi v. Jacobsen, 134 Ore. 505, 293 Pac. 587 (1930).

cally laid out, a controversy may well arise as to the intention of the parties. It is therefore preferable that the easement grant characterize the easement as an easement appurtenant and describe the dominant tenement, preferably by legal description. The importance of the point will be better appreciated if one keeps in mind the rule that an easement must not be used to service property other than the dominant tenement.⁷²

In view of the authorities last cited, it is manifestly of the utmost importance that the draftsman anticipate and provide for subsequent acquisition by the dominant tenant of additional land that will require the use of the easement. For example, if *E* owns Blackacre, and *R* who owns land adjoining to the west, grants *E* an easement over such adjoining land, Blackacre will probably be regarded as the dominant tenement intended to be benefited. Suppose, however, that *E* later acquires Whiteacre, which adjoins Blackacre to the east. Orthodox legal reasoning teaches us that the dominant tenement must exist and must be determined as of the time of the creation of the easement,⁷³ and therefore only Blackacre enjoys the benefit of the easement. Under the prevailing view, use of the easement to service Whiteacre, is a trespass⁷⁴ and such use may be enjoined.⁷⁵ Other authorities adopt a more realistic view and permit the easement to service after-acquired property where this gives effect to the intention of the parties,⁷⁶ and it is clear that effect will be given to a clause in the easement grant to the effect that any other property thereafter acquired by the owner of the dominant tenement will become part of the dominant tenement and be entitled to the benefit of the easement.⁷⁷

Occasionally one will encounter an easement created for the benefit of a structure, as in the party wall cases. The structure, not the land on which it rests, is the dominant tenement. Here the weight of

⁷² *C. F. Lott Land Co. v. Hegan*, 177 Cal. 169, 169 Pac. 1035 (1917); *Miller v. Weingart*, 317 Ill. 179, 147 N. E. 804 (1925); *Goodwillie Co. v. Commonwealth Co.*, 241 Ill. 42, 89 N. E. 272 (1909); *Adams v. Winnett*, 25 Tenn. App. 276, 156 S. W. 2d 353 (1941); *Raven Red Ash Coal Co. v. Ball*, 185 Va. 534, 39 S. E. 2d 231 (1946); 23 ILL. BAR J. 234 (1935).

⁷³ 5 RESTATEMENT, PROPERTY § 453, Comment *a* (1944).

⁷⁴ *Raven Red Ash Coal Co. v. Ball*, 185 Va. 534, 39 S. E. 2d 231 (1946) (railroad easement used to haul coal not mined on dominant tenement).

⁷⁵ *Miller v. Weingart*, 317 Ill. 179, 147 N. E. 804 (1925); *Man v. Vockroth*, 94 N. J. Eq. 511, 121 Atl. 599 (1923) (servient tenant's failure to object to construction of improvements on non-dominant land does not create an estoppel).

⁷⁶ 23 ILL. BAR J. 234, 235 (1935).

⁷⁷ *Wells v. North East Coal Co.*, 255 Ky. 63, 72 S. W. 2d 745 (1934); 42 YALE L. J. 1134, 1136 (1933).

authority supports the doctrine that destruction of the building destroys the easement, for the dominant estate itself has ceased to exist.⁷⁸ In all cases it would seem preferable that the parties reach an agreement as to the effect of demolition of the structure and incorporate such agreement in the easement grant. Also, care should be exercised to avoid the inadvertent creation of an easement in favor of a structure, as by granting a right of ingress to and egress from a dwelling house located at a certain street address. Should the house be demolished and a store building erected on its site, it would certainly be arguable that the easement could not be used to service the new structure.⁷⁹

It will usually be found convenient to include recitals in the easement grant, among them a recital describing the dominant tenement by legal description, characterizing it as "Parcel A" and a further recital describing the servient tenement by legal description, characterizing it as "Parcel B." In the granting clause the easement is granted "as an easement appurtenant to Parcel A."

The Servient Tenement

Where *R* owns a large tract of land and grants to *E* an easement thereover, manifestly it is not *R*'s entire tract that comprises the servient tenement, for it is not intended that *E* shall wander aimlessly over the premises, but rather it is the intention of the parties that some small part of the tract shall become the easement tract. In many instances the grant fails to specify the precise location of the easement. Occasional decisions will be found applying the rule applicable to deeds that the grant is void for uncertainty,⁸⁰ but the overwhelming weight of authority supports a far more liberal doctrine. Where an unlocated easement of way is created by grant, it is well settled that the owner of the servient tenement has, in the first instance, the right to designate the location thereof, provided he exercises such right in a reasonable manner, having regard to the suitability and convenience of the way so located to the rights and interests of the owner of the dominant tenement, and if the owner of the servient

⁷⁸ 357 E. 67th St. Corp. v. Knickerbocker Ice Co., 263 N. Y. 63, 188 N. E. 158 (1933); Hopkins The Florist v. Fleming, 112 Vt. 389, 26 A. 2d 96 (1942); Note, 85 A. L. R. 288 (1933). *Contra*: Frisbie v. Bigham Masonic Lodge, 133 Ky. 588, 118 S. W. 359 (1909).

⁷⁹ Man v. Vockroth, 94 N. J. Eq. 511, 121 Atl. 599 (1923), 22 MICH. L. REV. 167 (1924); Allan v. Gomme, 11 Ad. & E. 759 (1840) (right of way to woodshed held not to give right of way to cottage built on same spot); GALE, LAW OF EASEMENTS 343-344 (11th ed. 1932).

⁸⁰ Thompson v. Umberger, 221 N. C. 178, 19 S. E. 2d 484 (1942).

estate fails or refuses to locate the way, the owner of the dominant tenement acquires the right to make his own selection of a location, having due regard to the interests, rights, and convenience of the other party.⁸¹ Where the parties, for lack of agreement or other reasons, fail to locate the way, a court of equity, in a proper action, has jurisdiction to locate the way.⁸² Disputes and litigation can be avoided through the simple device of employing a surveyor to locate and monument the easement tract on the ground, whereupon a legal description can be prepared by the attorneys acting in concert with the surveyor, which legal description should be included in the easement grant. This will also avoid controversies as to the width of the way.

Once located, the line of the easement cannot be changed unless both parties agree, even though the grant confers upon the dominant owner the right to "alter, repair, or renew."⁸³ Particularly in the case of industrial property, failure to foresee a need to alter the course of an easement may prove a costly blunder. Construction of additional plants, tracks, roads and other facilities on the servient tenement may be blocked by the existence of the easement. Such contingencies may be provided for by inclusion of a provision giving the servient owner the right to change the location of the easement tract to an equally suitable location and at his own expense, without, however, interruption of the dominant owner's operations.

The servient estate may be a structure rather than the land itself.⁸⁴ Thus the grant of a right of access through the stairway or hallway of a building creates an easement in the building and not in the soil of the servient estate.⁸⁵ Involuntary destruction of the servient tenement, as by fire, terminates the easement even though a new building identical with the former structure is built and even though the easement was characterized in the grant as a "perpetual" easement.⁸⁶ A few decisions permit the easement to be asserted in the new structure.⁸⁷ It has been held that the servient owner may voluntarily demolish the building, thus terminating the easement, on the theory that the parties did not intend to create a right of any greater per-

⁸¹ *Ballard v. Titus*, 157 Cal. 673, 110 Pac. 118 (1910); Note, 110 A. L. R. 174 (1937). Under the prevailing rule it is not necessary that the servient tenement adjoin the dominant tenement. 30 MICH. L. REV. 308 (1931).

⁸² *Ballard v. Titus*, 157 Cal. 673, 110 Pac. 118; Note, 110 A. L. R. 174, 180 (1937).

⁸³ *Ford v. White*, 179 Ore. 490, 172 P. 2d 822 (1946).

⁸⁴ 31 CALIF. L. REV. 102 (1942).

⁸⁵ *Hopkins The Florist v. Fleming*, 112 Vt. 389, 26 A. 2d 96 (1942).

⁸⁶ 31 CALIF. L. REV. 102 (1942); Note, 34 A. L. R. 606 (1925); supplemented 154 A. L. R. 82 (1945).

⁸⁷ *Frisbie v. Bigham Masonic Lodge*, 133 Ky. 588, 118 S. W. 359 (1909).

manency in the use of the building than was assured by the character of the structure and the likelihood that the owner would not for a considerable time change the manner of the use of his premises.⁸⁸ On the other hand it has been held that so long as obsolescence of the building has not proceeded to the point that it is operating at a loss, the servient owner may not demolish the structure in order to erect a more profitable one.⁸⁹ Indeed, the servient tenant must not alter or change the structure in such a way as to impair enjoyment of the easement.⁹⁰ These authorities lay bare the hazards inherent in structure easements. From the standpoint of the servient tenant, it is a monstrous injustice that ties him down to operation of a decaying rooming house when a highly profitable super-market could be erected on the site. On the other hand, from the standpoint of a dominant owner who desperately needs a means of ingress and egress over the servient estate, loss of such a right through destruction of the servient building may also be disastrous. Obviously both of these contingencies should be provided for.

CHANGE OF USE AND INCREASE OF BURDEN

In General

Every good draftsman appreciates that we do not live in a static society. Change takes place, often swiftly, and it is the draftsman's duty to foresee such changes as seem probable and provide against them. In this way much litigation regarding increase of burden on an easement can be avoided.

Use of Easement to Service Non-dominant Land

"Increase of burden" is a phrase having no precise significance. Among the many situations courts have dealt with in terms of increase of burden is that previously discussed, where an attempt has been made to use the easement to service non-dominant land. As we have seen, the prevailing doctrine prohibits such use.⁹¹

Division of Dominant Tenement

According to the well-settled rule, upon division of the dominant tenement the easement passes an appurtenant to each part of such tenement, even though the number of users is thereby increased.⁹² This doctrine, however, can be pressed to a harsh and illogical ex-

⁸⁸ Union Nat. Bank of Lowell v. Nesmith, 238 Mass. 247, 130 N. E. 251 (1921).

⁸⁹ Rothschild v. Wolf, 20 Cal. 2d 17, 123 P. 2d 483 (1942).

⁹⁰ Note, 101 A. L. R. 1292 (1936).

⁹¹ See text *supra*, at note 71.

⁹² Seidler v. Wein, 266 Pa. 361, 109 Atl. 643 (1920); Note, 8 A. L. R. 1368 (1920).

treme. Suppose, for example, that *R* and *E* own adjoining farms, and *R* grants *E* an easement for ingress and egress. Should *E* die leaving a will dividing his farm among his three sons, use of the way by the three new dominant owners will probably not prove objectionable to *R*. Suppose, however, that the brothers join in a conveyance of the dominant tenement to a land developer, who erects one hundred single-family dwellings upon the dominant tenement. The resulting parade of motor cars and delivery trucks over the easement might prove objectionable indeed. The decisions on this point are far from harmonious.⁹³ Since many of the authorities tend to sustain rather substantial increase of burden by division of the dominant tenement,⁹⁴ it seems desirable from the viewpoint of the servient owner that a provision be included in the easement grant prohibiting use of the easement substantially in excess of the use contemplated at the date of creation of the easement.

Change of Use of Dominant Tenement

Even without a division of the dominant tenement, a change of use may occur which will incidentally increase the burden upon the easement, as where a single-family dwelling is converted into a tourist home, or where tourist cabins are built on farm land. A grant of a way in general terms will ordinarily be construed as creating a general right of way capable of use for all reasonable purposes, and the purposes are not to be restricted to such as were reasonable at the date of the grant.⁹⁵ With respect to easements for ingress and egress,

⁹³ Two recent decisions from the same jurisdiction are illustrative. In the first of these, plaintiffs were purchasers of certain lots shown on a plat. Each purchaser was given an easement right to use the beach, which was to be for the exclusive use of the lot owners. The defendants purchased three lots and subdivided them into twenty-six smaller lots. At the same time they constructed a paved roadway through the lots to the beach, and sold these lots with "beach privileges to all owners." On appeal, a decree enjoining use of the beach in this manner was granted. *Bang v. Forman*, 244 Mich. 571, 222 N. W. 96 (1928), 14 IOWA L. REV. 481 (1929). In the second case, a defendant who owned a lot which enjoyed the benefit of an easement for access to a lake conveyed the north half of his lot to five individuals. The servient owner challenged the right of the five grantees to use the easement, alleging increase of burden, but their right to use the way was sustained. *Henkle v. Goldenson*, 263 Mich. 140, 248 N. W. 574 (1933), 13 MICH. ST. BAR J. 143 (1934). The increase in burden did not differ substantially in the two cases, and yet the holdings are diametrically opposed.

⁹⁴ CLARE, *REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND* 76 (2d ed. 1947).

⁹⁵ *Parsons v. New York, N. H. & H. R. R.*, 216 Mass. 269, 103 N. E. 693 (1913) (right of access to trotting park sustained where dominant tenement was originally used for farming); *Matteodo v. Capaldi*, 48 R. I. 312, 138 Atl. 38 (1927) (use by automo-

the argument so frequently advanced, that what is a reasonable use must be considered in the light of the situation existing when the easement was granted, has consistently been rejected.⁹⁶ The very creation of an easement implies a contemplation of the future by those participating in the creation, and such future use must be made under conditions somewhat different from those existing at the time of the grant.⁹⁷ Since in fixing the price to be charged for the easement the parties are usually concerned primarily with the present situation, it may be possible to procure the consent of the dominant tenant to the insertion of a clause prohibiting substantial increase of use, as suggested in the previous paragraph.

Grant in General Terms Limited by User of Servient Tenement

With respect to easements other than easements of way, the courts have been less liberal in bestowing approval upon increased user of the easement, a tendency well illustrated by the cases involving pipe line grants. *Winslow v. City of Vallejo*⁹⁸ involved a grant in general terms of the right to lay and maintain "water-pipes or mains" over the servient tract, and pursuant thereto the city constructed a ten-inch iron main pipe line through the servient tenement. Later, when the original pipe line became inadequate for the needs of the inhabitants, the city undertook to lay an additional pipe, fourteen inches in diameter, within three feet of the original line. The city's right to lay the additional line was challenged, and the issues were resolved in favor of the servient owner on the ground that where a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right, with the acquiescence and consent of both parties in a particular course or manner fixes the right and limits it to the particular course or manner in which it has been enjoyed. There is much support in the authorities for this view.⁹⁹ The doctrine derives from the rule applicable to grants of undefined ways, where, if the grantee selects a particular route, and his choice is acquiesced in by the grantor, change of location of the way will

biles permitted although easement was created when horse-drawn vehicles were customary); *White v. Grand Hotel* [1913] 1 Ch. 113 (use for hotel purposes sustained where easement originally serviced a private dwelling); Note, 130 A. L. R. 768 (1941).

⁹⁶ *Sakansky v. Wein*, 86 N. H. 337, 169 Atl. 1 (1933). *But cf.* *Man v. Vockruth*, 94 N. J. Eq. 511, 121 Atl. 599 (1923), 22 MICH. L. REV. 167 (1924).

⁹⁷ 5 RESTATEMENT, PROPERTY § 484, Comment *a* (1944).

⁹⁸ 148 Cal. 723, 84 Pac. 191 (1906).

⁹⁹ *Snodgrass v. Crane*, 57 Cal. App. 2d 565, 134 P. 2d 862 (1943); *Hosiery Co. v. Pitman Co.*, 63 N. H. 500, 3 Atl. 641 (1886); *Lynchburg v. Smith*, 166 Va. 364, 186 S. E. 51 (1936), 35 MICH. L. REV. 1011 (1937).

not be permitted.¹⁰⁰ There is well-considered authority to the effect that the scope of a general grant will not be restricted by limited user.¹⁰¹ The latter view is in keeping with the liberal view applicable to right of way easements discussed above, and seems to be preferable in principle.¹⁰² In any event it is evident that the attorney for the grantee should have a clear understanding of his client's future requirements and should include specific provisions covering such anticipated future needs, for where the terms of a grant are specific, a grantee's use of less than he is entitled to does not limit the easement.¹⁰³

COVENANTS IN EASEMENT GRANTS

The Problem

A common fault in draftsmanship is the tendency to focus attention on the immediate parties to the contract and their immediate problems. In easement grants, in particular, attorneys habituated to contract drafting prepare elaborate sets of promises by each of the parties to the grant without adequate consideration of the binding force of those promises after ownership of the dominant and servient estates has passed from the original parties. It is evident that the situation calls for a careful appraisal of all such promises in the light of the property rules relating to covenants running with the land. Unfortunately, almost every aspect of this field has been and is the subject of bitter controversy.¹⁰⁴

The Running of Benefit and Burden—"Touching and Concerning" the Land

For a covenant to run, it must "touch and concern" the land,¹⁰⁵ a rule easy to state but extremely difficult to apply. Fortunately,

¹⁰⁰ 31 CALIF. L. REV. 442 (1943). The rule relating to prescriptive easements rests upon a very different foundation. *Baldwin v. Boston & Maine R. R. Co.*, 181 Mass. 166, 63 N. E. 428 (1902).

¹⁰¹ *Standard Oil Co. v. Buchi*, 72 N. J. Eq. 492, 66 Atl. 427 (1907), 17 YALE L. J. 200 (1908).

¹⁰² 31 CALIF. L. REV. 442 (1943).

¹⁰³ *Id.* at 444.

¹⁰⁴ CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND (2d ed. 1947) *passim*; Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L. Q. 1 (1944). As to the running of party wall covenants, see Aigler, *The Running with the Land of Agreements to Pay for Party Walls*, 10 MICH. L. REV. 186 (1912).

¹⁰⁵ Where a subsequent owner of either the dominant or servient tenements is, by reason of his succession to the ownership of such land, permitted to enforce a covenant contained in the grant, the benefit of such covenant may be said to run with the land. Where a subsequent owner by reason of his succession to such ownership becomes liable

most of the covenants the parties will see fit to include in an easement grant will, from the very nature of the situation, touch and concern, both as to benefit and burden.

Privity of Estate

In order that the burden of a covenant may run with the land, there must be, it is generally stated, a "privity of estate" between the covenantor and covenantee.¹⁰⁶ Whether the benefit of a covenant may run where privity of estate is lacking is a question on which the authorities are divided.¹⁰⁷ The decisions are also conflicting as to the meaning to be given the phrase "privity of estate."¹⁰⁸ Whatever the correct doctrine may be with respect to privity of estate, the cases uniformly hold that the requirement of privity is satisfied if the covenant accompanies a grant by the owner of land of an easement therein.¹⁰⁹

Intention

It has been said that while a covenant cannot run with the land even if the parties so intend unless the legal requirements are fulfilled, yet in any event the parties must intend such running or else the covenant is merely personal.¹¹⁰ Certainly the parties to the covenant may, by indicating an intention to that effect, prevent the covenant from running, although it is such that otherwise it would run.¹¹¹

upon a covenant contained in the grant, it may be said that the burden of such covenant runs. An important test for distinguishing a real or running covenant from a merely personal or collateral one, is whether or not the covenant so closely relates to the land or estate granted or its use, occupation, or enjoyment, that it may be said to "touch and concern" it. 3 TIFFANY, REAL PROPERTY 455 (3rd ed. 1939). Ordinarily a covenant is regarded as touching and concerning the land if it is of value to the covenantee by reason of his occupation of the land or by reason of an easement which he has in the land, or if it is a burden on the covenantor by reason of his occupation of the land. *Ibid.* The question arises whether both benefit and burden must touch and concern the land in order that the covenant may run, or whether, if either one alone touches and concerns the land, that one may run when the other does not, a proposition on which the authorities are unsatisfactory. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND (2d ed. 1947) 101, 107; Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law*, 27 TEXAS L. REV. 420, 430 (1949).

¹⁰⁶ 3 TIFFANY, REAL PROPERTY 448 (3rd ed. 1939).

¹⁰⁷ *Id.* at 444. See CLARK, *op. cit. supra* note 105, at 131.

¹⁰⁸ CLARK, *op. cit. supra* note 105, at 111; Williams, *supra* note 105, at 440.

¹⁰⁹ 165 Broadway Bldg. Inc. v. City Investing Co., 120 F.2d 813 (2d Cir. 1941); Walsh, *Covenants Running with the Land*, 21 N. Y. U. L. Q. REV. 28, 34, 43, 55 (1946).

¹¹⁰ CLARK, *op. cit. supra* note 105, at 96.

¹¹¹ 3 TIFFANY, REAL PROPERTY 461 (3rd ed. 1939).

If it is desired that a particular covenant run, it is desirable that such covenant be expressly characterized as a covenant running with the land.

Formal Requirements

As to form, a running covenant must be in writing; signed and sealed by the promisor. Where an easement grant is incorporated in a deed of conveyance, it is necessary to take cognizance of the rule followed by a minority of the states that mere acceptance of the deed by the grantee will not suffice to make the covenants therein binding on him.¹¹² In such jurisdictions the grantee should also sign and seal the instrument. So far as concerns covenants in leases, *Spencer's Case*¹¹³ laid down the principle that where the promise is to do acts concerning something not *in esse*, as to build a wall on the leased premises, "assigns" must be expressly named. While it is not clear that this doctrine is applicable to covenants contained in grants of easements,¹¹⁴ it is certainly preferable in drafting a running covenant to include the standard provision that the covenant shall enure to the benefit of and be binding on the heirs, successors, and assigns of the parties.

Affirmative Covenants

One of the principal points of controversy in the law of running covenants is the question of the extent to which an affirmative obligation, such as an obligation to keep in repair or to pay charges for water rights, may be made to run with the land.¹¹⁵ It would certainly be rash to assume that any given affirmative covenant runs unless a careful review of the authorities in the jurisdiction in question warrants that assumption. Particularly with respect to affirmative covenants, it is desirable to include a provision negating liability of a party for breach occurring after he has conveyed his land, for it is by no means certain that a transfer of his property will relieve the original covenantor of liability thereon.¹¹⁶

¹¹² 3 TIFFANY, REAL PROPERTY 442.

¹¹³ 5 Co. 16a, 77 Eng. Rep. 72 (Q. B. 1583), criticized in *Purvis v. Sherman*, 273 Ill. 286, 112 N. E. 679 (1916).

¹¹⁴ CLARK, *op. cit. supra* note 105 at 95; 28 ORE. L. REV. 180 (1949).

¹¹⁵ *Neponsit P. O. Assn. v. Emigrant Ind. Sav. Bank*, 278 N. Y. 248, 15 N. E. 2d 793 (1938); CLARK, *op. cit. supra* note 105, Appendix I; Note, 41 A. L. R. 1363 (1926), supplemented 102 A. L. R. 781 (1936), 118 A. L. R. 982 (1939).

¹¹⁶ 3 TIFFANY, REAL PROPERTY 447 (3rd ed. 1939).

Enforcement of Covenant

The traditional remedy for breach of covenant is an action for damages. No doubt in appropriate cases equitable remedies will be allowed.¹¹⁷

Equitable Servitudes

The enforcement of restrictive covenants, that is, covenants not to do a particular thing, has been pretty largely taken over by courts of equity. Since the decision in *Tulk v. Moxhay*,¹¹⁸ equity has enforced such covenants against all persons taking with notice thereof, regardless of whether or not the covenant was one which could technically run with the land.¹¹⁹ With respect to covenants of this character, whether or not the covenant runs is of importance only when it is sought to enforce personal liability for breach. However, a number of jurisdictions that have adhered too rigidly to the technical requirements relating to running covenants have sought release from such confinement by extending the doctrine of equitable servitudes to affirmative covenants. Under this doctrine, a promise of the grantee may impose upon the granted premises a servitude enforceable in equity against the premises in the hands of a subsequent owner taking title thereto with actual or constructive notice of the obligation of the original grantee, and this is true even where the equitable servitude calls for the performance of a positive act and the positive act is the payment of money.¹²⁰ With respect to mode of enforcement of these equitable servitudes, it is to be noted that a personal liability is not thereby created, but resort must be had to an injunction restraining use of the premises without making the stipulated payments or performing the other affirmative acts required by the covenant.¹²¹

Use of Conditions Subsequent and Determinable Easements in Connection with Affirmative Obligations

Where it is doubtful that an affirmative obligation could be enforced against a subsequent dominant owner, either as a running covenant or under the equitable servitudes doctrine, resort may be had to other coercive devices. For example, provision may be included for *ipso facto* termination of the easement in the event of non-performance of the obligation, or a condition subsequent may be included,

¹¹⁷ *VanSant v. Rose*, 260 Ill. 401, 103 N.E. 194 (1913); CLARK, *op. cit. supra* note 105, at 180.

¹¹⁸ 2 Phillips 774 (1848).

¹¹⁹ 3 TIFFANY, REAL PROPERTY 472 (3rd ed. 1939).

¹²⁰ *Everett Factories v. Oldetyme Distillers*, 300 Mass. 499, 15 N.E. 2d 829 (1938).

¹²¹ *Ibid.*

providing for termination by some affirmative act in the event of non-performance of the obligation.¹²² These devices may be used merely as added strings to the bow, for the same affirmative duty may be made a condition and a covenant.¹²³ A condition subsequent is subject to the objection that only the grantor or his heirs may take advantage of a breach of condition, and in most states the right of entry is not alienable either before or after breach.¹²⁴ Under statutes making such rights alienable it has apparently been assumed that a deed of the dominant tenement would pass the right of entry.¹²⁵ A similar result has occasionally been reached in the absence of statute.¹²⁶ If it be assumed that the correct doctrine is expressed in the cases last cited, namely, that a condition subsequent for the benefit of the servient tenement runs with the land, difficulties may be encountered in instances where ownership of the servient tenement is divided. An analogous situation is presented in the case of conditions in leases, which run with the reversion. Here the division of the reversion by act of the parties, as where the lessor conveys part of the reversion to another, results in a destruction of the condition, because the condition, being entire, is not apportioned by assignment but destroyed.¹²⁷ A wholly different case is presented where the reversion passes into co-ownership by descent, for the rule forbidding apportionment of conditions has never been applied to an apportionment by act of the law.¹²⁸

Provision may be included for automatic termination of the easement on failure to perform an affirmative obligation, since it is well settled that an estate may be made determinable on the happening of a collateral event.¹²⁹ Such a limitation avoids some of the difficulties peculiar to conditions subsequent, for even a stranger may take advantage of the termination of a determinable estate.¹³⁰

It is evident that the two devices last suggested impose drastic penalties for non-performance of easement covenants. Where the investment at stake is substantial, it is improbable that attorneys for the dominant tenant will consent to the inclusion of such clauses.

¹²² Note, 154 A. L. R. 5, 22 (1945).

¹²³ *Sanitary Dist. v. Chi. Title & Tr. Co.*, 278 Ill. 529, 116 N. E. 161 (1917).

¹²⁴ Note, 60 L. R. A. 750, 754 (1902).

¹²⁵ *Ninth St. Pier Co. v. Ocean City*, 109 N. J. Eq. 366, 157 Atl. 568 (1931).

¹²⁶ *Reichenbach v. Washington Short-Line Ry.*, 10 Wash. 357, 38 Pac. 1126 (1894); *Pinkum v. Eau Claire*, 81 Wis. 301, 51 N. W. 550 (1892).

¹²⁷ *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801 (8th Cir. 1905).

¹²⁸ 1 *TIFFANY, REAL PROPERTY* 348 (3rd ed. 1939).

¹²⁹ *Predestinarian Baptist Church v. Parker*, 373 Ill. 607, 27 N. E. 2d 522 (1940).

¹³⁰ *Storke v. Penn Mutual Life Ins. Co.*, 390 Ill. 619, 61 N. E. 2d 552 (1945).

CONCLUSION

Enough has been said to underscore the importance of proper understanding of the draftsman's role in a situation fraught with thorny technicalities. Too often attorneys merely reduce to legal-sounding jargon the notions that happen to occur to their clients, when what is needed is a clear picture of the existing physical situation, patient probing for potential present and future sources of trouble and adequate research into the local law governing the desired contract. There is no short cut to a good easement.