Michigan Law Review

Volume 39 | Issue 2

1940

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DEEDS — EXCEPTIONS AND RESERVATIONS — USE OF EXTRINSIC EVIDENCE TO INTERPRET UNCERTAIN EXCEPTIONS — EXCEPTION TO GRANT DESCRIBED IN DOCUMENT TO BE DRAWN — In anticipation of becoming the owner of a tract of land, *S* agreed to convey to a water company that portion of the land which the company would require for its reservoir. On acquiring the land, *S* conveyed the tract to *F* "except about 25/100 acres on the westerly side to be deeded to the Centralia Water Works Co." Ten days later, *S* conveyed to the water company "all that part . . . that is now or shall hereafter be, covered by water in the reservoir of said . . . company to high water mark in flood time . . . as said reservoir is located, surveyed and staked out. . . ." *P* held under a lease from *F*'s grantee. Later *S* conveyed to *D* the west 16½ foot strip of this same tract and *D* entered thereupon and drilled. *D* contended that the deed of *S* to *F* should be construed as excepting a uniform strip off the west end of the tract, which strip remained in *S* until the grant to *D*. *D* also contended that the deed from *S* to the water company was too indefinite to be valid. *P* sued to enjoin *D* from entering any part of the land. *Held*, for *P*, *S* having parted with all his title by the conveyances to *F* and the water company, and therefore having nothing to convey to *D*. The exception in the deed to *F*, while too uncertain to warrant the construction asked by *D*, is valid since it constitutes a means of determining the excepted part so that extrinsic evidence is admissible to locate and describe the excepted part. *Texas Co. v. Wall*, (C. C. A. 7th, 1939) 107 F. (2d) 45.

An exception acts to exclude from the operation of a conveyance some part of the interest conveyed and the interest must be described with such certainty as to be identifiable.[1] The English courts have closely followed this requirement of certainty, on the principle that an exception must operate immediately or title to the whole of the property passes to the grantee.[2] Thus an election by the grantor after the grant to have an indefinite exception apply to a particular portion of the conveyed premises cannot operate to revest title in him except by

[1] 2 TIFFANY, REAL PROPERTY, 2d ed., 1605, 1615 (1920); WASHBURN, REAL PROPERTY, 6th ed., § 2352 (1902): "it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted. . . ."

[2] Cooper v. Stuart, 14 App. Cas. 286 at 290 (1889), stating: "A valid exception operates immediately, and the subject of it does not pass to the grantee."

agreement of the grantee.[3] An act or condition to be performed in the future cannot operate at common law to create an estate in the grantor.[4] And it is pointed out that the ambiguous exception and subsequent election cannot ordinarily operate under the statute of uses as a shifting use, for the grantee usually does not hold to the use of the grantor.[5] Another objection of the English courts is the indefinite time wherein the grantor may exercise his election.[6] The necessity of certainty is complied with to the satisfaction of most American courts if the uncertainty is cured by the election of the grantee, or by extrinsic evidence locating the excepted interest.[7] The theory under which the uncertainty is cured is the easily stated maxim, "That is sufficiently certain which can reasonably be

[3] Cooper v. Stuart, 14 App. Cas. 286 (1889); Savill Bros. v. Bethell, [1902] 2 Ch. 523 at 539, noted in 16 HARV. L. REV. 225 (1902). In Pearce v. Watts, 20 Eq. 492 (1875), the contract vendor excepted "necessary land for a railroad." The court said this is too uncertain to grant specific performance and added a dictum that if the conveyance were executed in this form, the whole land would pass to the grantee, the exception being void for uncertainty. The case of Jenkins v. Green, 28 L. J. (Ch.) 817 (1858), was cited by plaintiff but ignored by the court. There the lessor was allowed to select land excepted from a lease, being restricted by the court in his choice to such lands as would not prevent beneficial use of the farm. It was argued in Savill Bros. v. Bethell, supra, at 528, that authorities on leases do not apply, for there is no difficulty in granting leases to commence at a future time but a freehold estate cannot be granted to commence at a future time except after determination of a precedent estate.

[4] Savill Bros. v. Bethell, [1902] 2 Ch. 523 at 540 (land necessary to build a road from point *A* to the nearest road). The nearest road was to be built by grantor. This was the act or condition creating the estate in futuro.

[5] Id., at 540.

[6] Id., at 540. Assuming the conveyance operates under the statute of uses, "then the exception is equally bad as infringing the rule against perpetuities." The exception must be ascertained within the time limited by the rule of perpetuities or it fails. In London & S. W. Ry. v. Gomm, 20 Ch. D. 562 at 573 (1882), a deed providing that the grantee reconvey land when grantor requested was held void, as against the rule of perpetuities, by creating a present right to an interest in property which may arise at a period beyond the legal limit. But if a present interest is created in the land conveyed, then the exception of a certain acreage is not void for uncertainty, or because of the rule of perpetuities. Heyward's Case, 2 Coke 35a at 36a, 76 Eng. Rep. 489 (1595). The reasoning of this old case is referred to and approved in Savill Bros. v. Bethell, [1902] 2 Ch. 523 at 539.

It is interesting to note that the law in England was not always resolved on this question of validity of subsequent elections. BACON, ABRIDGMENT, "Grants," (H) (3), states that in order to make a grant valid, "the election must be made in the lifetime of the parties, and cannot be made by the heir or executor." 14 VINER, ABRIDGMENT, 2d ed., "Grants," 49 (1793), states that uncertainty at date of the grant may be made good by later election. Also COKE ON LITTLETON 145a, 19th London ed. (1832). SHEPPARD, TOUCHSTONE 79, states: "if the exception be set down uncertainly . . . these exceptions are void." In Justice Buckley's opinion in Savill Bros. v. Bethell, supra, at 530, he states, after citing the Touchstone, "I think I am entitled to guide myself by some more recent authorities." Sheppard's query quoted above is closely similar to the present American qualification of certainty in exceptions.

[7] 2 TIFFANY, REAL PROPERTY, 2d ed., 1615 (1920).

made certain." [8] In the American cases, the uncertain exceptions may be classified into four general groups. (1) Where a small limited portion is excepted from a larger tract, e.g., "excepting one acre to be selected by grantor." This group presents the clear question whether an election by the grantor will make the exception certain.[9] The cases giving an affirmative answer proceed on the theory that the grantor retains a present interest in the land at the time of the conveyance.[10] The grantor and grantee are then tenants in common until the grantor exercises his right of election. (2) Where the grantor excepts "land necessary" for a road or a structure, e.g., "excepting land for a road." This group adds to the question of election the problem whether the description is too indefinite to leave any present interest in the grantor at the time of the conveyance. The few cases on this point are at variance on the question of certainty.[11] (3) Where the

[8] BROOM, LEGAL MAXIMS, 8th Am. ed., 623 (1882); SHEPPARD, TOUCHSTONE, 1st Am. ed., 250 (1808); Smith v. Furbish, 68 N. H. 123, 44 A. 398 (1894). The advantages of using this old saying are obvious, for the difficulties of a creation of a present interest, the passing of title and the effect of subsequent acts of election which perplexed the English courts are neatly disposed of. However, we still need to know when the uncertainty must be made certain and how certain it must be made. 13 CYC. 679 (1904) is authority that "election within a reasonable time, followed by acts in pais" cures the uncertainty. Also, 8 R. C. L. 1097 (1915).

[9] Butler v. Gosling, 130 Cal. 422, 62 P. 596 (1900) (four square miles in two separate parts); Thruston v. Masterson, 9 Dana (39 Ky.) 228 at 250 (1839) (1,000 acres to be selected by grantor from any part of the tract); Smith v. Furbish, 68 N. H. 123, 44 A. 398 (1894) (right to build a dam at place of selection, and one acre in immediate vicinity of dam); De Roach v. Clardy, 52 Tex. Civ. App. 233, 113 S. W. 22 (1908) (three acres on which house now stands and is to be surveyed). In King v. King, 80 W. Va. 371, 92 S. E. 657 (1917), the exception of two small tracts not to exceed in all 300 acres was held void for lack of words to identify land, which lack could not be supplied by extrinsic evidence. Likewise Seavey v. Williams, 97 Ore. 310, 191 P. 779 (1920) (twelve acres in section lying south of river; actually there were 100 acres).

[10] Smith v. Furbish, 68 N. H. 123, 44 A. 398 (1894). This case cites the reasoning of Heyward's Case, 2 Coke 35a, 76 Eng. Rep. 489 (1595), and also quotes the English authorities of Bacon's Abridgment, Viner's Abridgment, Coke on Littleton, Sheppard's Touchstone, cited in note 6, supra. The relation of tenancy in common with a right of selection in the grantee is commonly applied to deeds conveying a definite amount of land out of a larger tract. Hodge v. Bennett, 78 Miss. 868, 29 So. 766 (1901); Ransome v. Watson's Admr., 145 Va. 669, 134 S. E. 707 (1926); Darling v. Crowell, 6 N. H. 421 (1833) (one and one-half acres for flowing of water from mill; held void, but the court said, at 425, that if plaintiff had excepted one and one-half acres to be located at his election he might have maintained the action by locating the land before suit).

[11] Butcher v. Creel's Heirs, 9 Gratt. (50 Va.) 201 (1852), exception of right to build a mill on opposite end of the dam held void, though the court said this might have been identified by an entry and possession, but since there was no such identification plaintiff cannot recover; Dygert v. Mathews, 11 Wend. (N. Y.) 35 (1833) (land necessary for a grist mill); Consolidated Ice Co. v. City of New York, 166 N. Y. 92 at 99, 59 N. E. 713 (1901) (land to be laid out for public use). The result in the Darling case appears to be the best solution to this problem. There the grantor might have selected the excepted interest but in absence of that the court has no way of determining

land excepted is shown by entries in a land office, or on a survey, e.g., "excepting 5,000 acres entered by citizens." This type of exception is uncertain in the deed but refers to definite extrinsic evidence and may be made certain without further act of the parties.[12] Reference to this type of extrinsic evidence is permitted in all kinds of grants and the courts have uniformly held these exceptions certain. (4) Where the land excepted, sometimes shown by entries, is to be granted to the enterers or to other persons, e.g., "excepting land to be laid off and assigned as a homestead." This last group requires a further act of conveyance by the grantor or a third party and one of these two efforts to make the exception certain: (a) location by election, or (b) reference to extrinsic evidence.[13] The principal case falls in the fourth group, the deed referring only to land "to be deeded," thus calling for extrinsic evidence to locate the land and a later conveyance. The court made the description certain by using extrinsic evidence of the land to be excepted. This consisted of a land contract between the grantor and the water company, city maps on which the reservoir limits were shown, and stakes marking such limits. A deed operates to convey land referred to in the description therein.[14] The deed in the principal case does not refer to a specific tract. Can it be said that the description refers to extrinsic evidence by which the

what is "necessary" land and where the amount is to be located. Compare the English cases, Pearce v. Watts, 20 Eq. 492 (1875), and Savill Bros. v. Bethell, [1902] 2 Ch. 523, cited in note 3, supra.

[12] Brown v. Rickard, 107 N. C. 639 (1890) (5,000 acres entered by citizens); Rockafeller v. Arlington, 91 Ill. 375 (1878) (six lots sold by grantor); Mills v. Edgell, 69 W. Va. 421, 72 S. E. 574 (1911) (some small claims quit-claimed); Benn v. Hatcher, 81 Va. 25 (1885) (three-fourths of an acre for a burying ground); Houston Oil Co. v. Williams, (Tex. Civ. App. 1933) 57 S. W. (2d) 380 (one-half acre known as McCutcheon graveyard).

[13] These cases may be divided into two groups: (1) location to be selected by election—Ex parte Branch, 72 N. C. 106 (1875) (what may be laid off and assigned as a homestead); Manley v. Carl, 11 Ohio Cir. Dec. 1, 20 Ohio C. C. 161 (1900) (land dower to be assigned); (2) location by reference to extrinsic evidence, both present and future—Doe ex dem. Melton v. Monday, 64 N. C. 295 (1870), and Brown v. Rickard, 107 N. C. 639 (1890) (land entered by persons but not surveyed and granted until after this exception); Lumber Co. v. East Coast Cedar Co., 142 N. C. 411, 55 S. E. 302 (1906) (land now surveyed to be granted); Bartell v. Kelsey, (Tex. Civ. App. 1900) 59 S. W. 631 (600 acres heretofore conveyed or agreed to be conveyed to Joe McClung).

[14] To make the description certain in itself, an exact description must be found which will enable one to locate the property without aid from other descriptions. If the description refers to other deeds or descriptions, the description can be made certain through steps outlined in the deed. Another kind of indefinite description is that conveying "all my property on *X* street" or a tract "known as Smith's ranch." These words refer to land which a stranger would be unable to find by the words in the deed or by any steps outlined there. But to follow the process of reference the language refers to specific land which was intended to pass by operation of the deed. In such a case extrinsic evidence is not mentioned in the deed but it is a natural concomitant of the latent ambiguity and will be admitted to show a certain tract is the designated land.

description may be made certain?[15] This link between the description and the land is not expressly included, but the intention to convey a definite portion of the land is clear and a reasonable interpretation would call for a reference to expressions of intent by all the parties on the matter. Although the deed did not refer directly to extrinsic evidence by which the land could be identified, this necessary link in the description is present in the reasonable implications to be drawn from the words used. By this process it would seem that the holding of certainty was correct. However, the case is unusual in the extreme to which the court permitted extrinsic evidence to cure the uncertainty.

[15] In King v. King, 80 W. Va. 371, 92 S. E. 657 (1917), two small tracts not to exceed 300 acres in all were excepted. The court held that the exception was void for lack of words referring to the land and that the lack could not be supplied by extrinsic evidence.