Before these proceedings, Romala sold off various tracts to other people leaving it with a remainder of 18.4 acres. This remaining tract is bounded in part by a creek and has over 1,400 feet of road frontage. It is Romala's contention that since 1972, as a direct result of the maintenance of the road by the Commonwealth of Pennsylvania, (Department), of Transportation (Department); water has been discharged from the road onto the property causing regular and permanent flooding of certain portions of it.

The Commonwealth filed preliminary objections. The first was a demurrer alleging that the petition fails to state a claim or cause of action in eminent domain against the Department. The second is a petition raising the question of jurisdiction of the Court in eminent domain, arguing, in effect, that the intrusion alleged in the complaint represents a trespass or nuisance depending upon the permanency or the nature of it. The third preliminary objection is a motion for more specific pleadings.

We find the demurrer must be sustained. In a case very similar to this one, *Brewer v. Commonwealth*, 345 Pa. 144, 27 A.2d 53 (1942), our Supreme Court held that the claimant had no right to compensation under the Eminent Domain law. The Court went on to state:

> "Obviously, drainage is essential to the proper enjoyment of a street or country road: Lewis on Eminent Domain (1st Ed.) Sect. 127. The land in front of plaintiffs' property was taken long since for a particular public use. Changed conditions made it necessary, in the judgment of the highway department, that a new and better road should be constructed, and this required changes in the drainage system. This was a use of the land of the same character and for the same purpose for which it was originally taken. It was for that use that the owners were compensated when the land was taken originally for public purpose: 18 Amer. Juris., Eminent Domain, Sect. 180."

More recent cases in the Commonwealth Court have confirmed this rule established by the Supreme Court. In *Commonwealth v. Township of Palmer*, 16 Pa. Commonwealth Ct. 270, 171, 329 A.2d 871 (1974), a petition was filed alleging that as a result of highway construction, surface waters were "altered, collected, diverted and concentrated" upon some township roads which interfered with their use and maintenance thereby giving rise to a compensable damage. The Commonwealth Court ordered the trial court to dismiss the

petition for appointment of viewers as there was no "taking" in a constitutional sense but merely a nonsequential injury for which the Commonwealth was not liable. The case of *Berkshire Street*, 20 Pa. Commonwealth Ct. 601, 343 A.2d 67 (1975), found that the landowner was not entitled to recovery even if the damage came as a result of the exercise of the Commonwealth's right of eminent domain, because the landowners alleged only damages to their property and not a taking.

In the case of *Lehan v. Commonwealth*, 22 Pa. Commonwealth Ct. 382, 349 A.2d 492 (1975), where a petition for viewers alleging a "de facto taking" was dismissed, it was noted that the taking resulted from the Commonwealth permitting sewerage to be introduced into the highway drainage system which in turn produced the alleged injuries to the claimant's land. "We have reiterated the rule that acts not done in the exercise of the right of eminent domain and not the immediate, necessary, or unavoidable consequence thereof cannot be the basis of any claim in an eminent domain proceeding", the Court said.

Under all of these circumstances, we find that the demurrer must be sustained and we will not consider the other matters raised in the preliminary objections.

ORDER OF COURT

NOW, February 25, 1977, the demurrer of the Commonwealth of Pennsylvania, Department of Transportation, is sustained and the petition is dismissed at the cost of the petitioner.

RAILING v. RAMSEY, C.P. Franklin County Branch, Equity Docket Vol. 7, Page 8

Easements - By Prescription - Continuity of User Required - By Implication - Existence at time of severence and necessity to Beneficial Enjoyment - By Grant - Reference in Deed or Draft - Reservation in Stranger to the Deed - Dorand, Ozehoski Rationale

1. To establish an easement by prescription, adverse user must be for a continuous twenty-one period, and while the user need not have occurred every day or be constant, evidence of use during various periods of time over the twenty-one years, without clear and positive proof of continuity throughout the twenty-one years is insufficient.

2. To establish an easement by implication, the evidence must show that the user was in existence at the time of severence of the title to the tracts involved, and that the easement was meant to be permanent and was necessary to the beneficial enjoyment of the land granted or retained.

3. In Pennsylvania, a valid easement may be reserved and created in a deed in favor of a person not a party thereto by reference therein, on the theory that such a reservation can properly be considered an exception of an easement recognized by the parties already to be in existence.

Kenneth E. Hankins, Jr., Esq., Attorney for Plaintiffs

Joel R. Zullinger, Esq., Attorney for Defendants

ADJUDICATION AND DECREE NISI

KELLER, J., January 2, 1976:

This action in equity to establish the rights of the plaintiffs in a certain right of way or driveway was commenced by a complaint filed August 10, 1973, and served upon the defendants on August 10, 1973 by the Sheriff of Franklin County. An answer containing new matter was filed on December 27, 1973, and served upon counsel for the plaintiffs by counsel for the defendants on the same date. Preliminary objections to the answer were filed on January 3, 1974. Argument on the preliminary objections was continued until June 20, 1974 on which date the court en banc heard arguments on the matter. Counsel for the parties then requested the Court to defer action on the preliminary objections pending settlement negotiations. On October 10, 1974 the Court was advised that the settlement negotiations had not been fruitful, and on October 25, 1974 an Opinion and Order was filed and the defendants were granted leave to file an amended answer within twenty (20) days of that date. An amended answer as to new matter was filed on November 13, 1974, and served by counsel for the defendants upon counsel for the plaintiffs on the same date. A reply to new matter was filed by the plaintiffs on November 20, 1974, and on the same date served by counsel for the plaintiffs upon counsel for the defendants. Other pleadings and discovery proceedings were followed by the parties. A pre-trial conference was held on April 22, 1975, and the matter came on for trial and was heard by the Court on May 14 and 15, 1975. On June 16, 1975 the plaintiffs petitioned to re-open their case in chief. On June 23, 1975 the defendants filed an answer objecting to the opening of the case. On July 14, 1975 the Court approved a stipulation of counsel as to the testimony that W. B. Marshall, a former county surveyor, would have given had he been called by the

plaintiffs at the trial of the matter. By agreement of counsel and in lieu of continuing the trial, depositions of John H. McClellan, a former county surveyor, were taken and filed of record on August 18, 1975, and delivered to the Court on August 20, 1975. At the end of October 1975 counsel advised the Court that no further proceedings were contemplated and the matter was ready for disposition. We enter the following findings of fact:

1. The last common owner of the real estate here to be considered was Jacob Martin in 1890.

2. The chain of title from H. Gehr, assignee of Jacob Martin, to the plaintiffs is:

(a) H. Gehr, assignee of Jacob Martin, to Emanuel Martin; February 15, 1890.

(b) Decree of the Court of Common Pleas of Franklin County, Penna. dated January 26, 1915, finding that Emanuel Martin conveyed the said real estate to John M. Wenger on April 1, 1907, and the said John M. Wenger never recorded the said deed and it has been mislaid or lost; and the Decree of Court "shall be taken and allowed as good and sufficient evidence" of the conveyance from Emanuel Martin to John M. Wenger.

(c) John M. Wenger and Fannie Wenger, his wife, conveyed the land to Jacob W. Sollenberger; April 13, 1915.

(d) Harvey S. Sollenberger and Amos E. Sollenberger, executors of the Last Will and Testament of Jacob W. Sollenberger, conveyed to Clarence H. Clippinger and Frances M. Clippinger, his wife; March 18, 1938.

(e) Mary S. Rotz, executrix of the Last Will and Testament of Clarence H. Clippinger, deceased, conveyed to Norman F. Seilhamer and Helen C. Seilhamer, his wife; March 31, 1956.

(f) Norman F. Seilhamer and Helen C. Seilhamer, his wife, conveyed to Frank A. Railing, Sr. and Betty J. Railing, his wife, plaintiffs herein; January 29, 1959.

3. The chain of title from H. Gehr, assignee of Jacob Martin to the defendants is:

(a) H. Gehr, assignee of Jacob Martin conveyed to John Hoffer; February 15, 1890.

(b) John Hoffer and Mary Elizabeth Hoffer, his wife,

conveyed to Milton A. McCleary, a/k/a M. A. McCleary; March 31, 1899.

(c) C. H. McCleary and Jesse B. McCleary, Administrators of the Estate of M. A. McCleary, deceased, conveyed to Jacob V. McCleary and Milton A. McCleary; April 4, 1935.

(d) Jacob V. McCleary conveyed to Milton A. McCleary; December 31, 1942.

(e) Milton A. McCleary and Alice E. McCleary, his wife, conveyed to Irvin McCleary and Eugenia R. McCleary, his wife; March 11, 1946.

(f) Irvin McCleary and Eugenia R. McCleary, his wife, conveyed to Lynn S. Ramsey, Sr. and Dorothy I. Ramsey, his wife, defendants herein; April 29, 1954.

4. In the deed from Mary S. Rotz, Executrix of Clarence H. Clippinger to N. F. Seilhamer and Helen C. Seilhamer, his wife, the property is described inter alia:

"BEGINNING at an iron pin in the public road leading from Culbertson to Greenvillage, being Traffic Route No. 340 at lands of Irvin McCleary; thence *in driveway* of lands of Irvin McCleary South thirty-four (34) degrees fifty-nine (59) minutes West one hundred ninety-seven and seven-tenths (197.7) feet to an iron pin;" (italics ours).

There is attached to the deed a survey by John H. Atherton, C.S., (county surveyor) dated February 11, 1956, which shows the easterly property line as running from an iron pin in Route 340 in a "driveway" to an iron pin.

5. In the deed from Norman F. Seilhamer and Helen C. Seilhamer, his wife, to the plaintiffs herein, the description includes the following language:

"BEGINNING at an iron pin in the public road leading from Culbertson to Greenvillage, being Traffic Route No. 340 at lands formerly of Irvin McCleary, now Lynn Ramsey; thence in driveway by lands of Lynn Ramsey South 34 degrees 59 minutes West 197.7 feet to an iron pin."

The same survey of Atherton is attached to this deed as in the above finding of fact.

6. In the deed from Charles H. McCleary and Jesse B. McCleary, Administrators of the Estate of M. A. McCleary, the following language appears in the description:

"BEGINNING at a point in the public road leading from Culbertson to Greenvillage at corner of farm of Jacob V. McCleary and the eastern side of a fourteen (14) foot alley; thence in said public road North fifty-three (53) degrees ten (10) minutes West, two hundred twenty-nine (229) feet to a point on said public road at a private alley between the lands hereby conveyed and lands of Jacob W. Sollenberger; *thence through said private alley* by lands of Jacob W. Sollenberger South thirty-five and one-fourth (35-1/4) degrees West, two hundred two (202) feet to an iron pin at corner of lands of Jacob W. Sollenberger and farm of Jacob V. McCleary. . ." (italics ours).

7. In the deed from Jacob V. McCleary, single, to Milton A. McCleary, dated December 31, 1942 the same language appears in the description as is set forth above.

8. In the deed from Milton A. McCleary and Alice V. McCleary to Irvin McCleary and Eugenia R. McCleary, his wife, dated March 11, 1946 the same language appears in the description as above and in addition there appears the following:

"Together with all the rights of grantors for grantees, their heirs and assigns, in a strip of land 8 feet wide by 202 feet long which is now used as part of a private alley and is West of the land herein conveyed; and subject to such rights as may exist in a strip of land 15 feet wide by 202 feet long which is now used as part of a private alley and which strip of land is part of the land herein conveyed and is along the Western line of the land herein conveyed."

9. In the deed from Irvin McCleary and Eugenia R. McCleary, his wife, to Lynn Starrett Ramsey and Dorothy Irene Ramsey, his wife, (defendants herin), dated April 29, 1954 the following language appears:

". . . thence by the latter north fifty-four (54) degrees twenty seven (27) minutes west one hundred five (105) feet to an existing iron pin marker at fence post at the line adopted by Jacob W. Sollenberger and M. A. McCleary as per survey of John H. Atherton dated February 11, 1930; thence along a private driveway between the property within conveyed and lands of Clarence H. Clippinger and Frances M. Clippinger, his wife, north thirty four (34) degrees fifty four (54) minutes east two hundred two (202) feet to a point in the aforementioned public road; . . ."

"Together with all the right of the Grantors, their heirs and

assigns, in a strip of land eight feet wide by two hundred two feet long which is now used as a part of a private alley and is West of the land herein conveyed; and subject to such rights as may exist in a strip of land fifteen feet in width by two hundred two feet in length which is now used as part of a private alley and which strip of land is part of the land herein conveyed and is along the Western line of the land herein conveyed."

Attached to the deed is a draft which shows the boundaries of the real estate conveyed in the deed, together with a "private driveway" on the West side of the real estate conveyed which shows a private driveway encroaching fifteen (15) feet on the West side of the lands conveyed and the West boundary line marked as "fee line" and with eight (8) feet of the private driveway encroaching on the land of Clarence H. Clippinger and Frances M. Clippinger, his wife.

10. John H. Atherton was the county surveyor for the County of Franklin for a period of thirty-eight (38) years. He was succeeded in office by Waldo B. Marshall, III. Mr. Marshall resigned his office in 1961 and was succeeded by John Howard McClellan, who continued in office until 1971.

11. County Surveyor Atherton had purchased all maps and records in the office of the county surveyor from his predecessor in office. Mr. Marshall purchased from John H. Atherton all maps, records and matters pertaining to the office of County Surveyor and sold the same to John Howard McClellan. John Howard McClellan delivered all of the records and papers aforesaid to the County Commissioners of Franklin County in January of 1972, when the County Surveyor's office was abolished. All of the said records were delivered to Thomas R. Donahue, County Appraiser of Franklin County to be maintained under his custody and control on behalf of the county.

12. Among the records formerly of the County Surveyor's Office, now held by the County Appraiser under Greene Township and under the letter "S", was located a survey by John H. Atherton. This survey shows a line between the lands of Jacob W. Sollenberger on the West, and M. A. McCleary on the East extending from point A North 35-1/4 degrees East 188 feet 6 inches to an iron pin at point B, and thence North 35-1/4 degrees East 179 feet 9 inches from point B to an iron pin point C located on the southerly side of the public road from Greenvillage to Culbertson. The boundary line from point B to point C has a parallel broken line 8 feet to the West and 15 feet to the East extending to the southerly side of the public

road. Below the survey appears the following legend, "Consentable line between M. A. McCleary and Jacob W. Sollenberger, Greene Township, Franklin County, Pa. Scale 1" = 40 ft. Feb. 11, 1930 John H. Atherton, C.S. Line A-C to be the division line - Driveway from B to C to be kept open for use of both properties 15' from McCleary land, 8' from Sollenberger." The signature of John H. Atherton was identified by John Howard McClellan, who had seen Mr. Atherton sign his name. Mr. Atherton has been deceased for approximately six years.

13. In the 1920's, two small houses were erected on lands of M. A. McCleary, Sr. and were occupied by his tenants. These tenants, together with their visitors, and the Jacob W. Sollenberger family and their visitors, used the right of way which is located East of the Sollenberger home as a means of ingress and egress. Both of the small houses owned by M. A. McCleary, Sr. and rented to tenants have been razed and no sign of them can be observed.

14. A dirt driveway existed on the West side of the plaintiffs' property with stones being spread on it commencing in the 1930's. It was of an indefinite width ranging from 8' to 10' or more.

15. The home occupied by the defendants was built in 1946. A fifteen foot macadam driveway was laid from the public road to the garage at the time of the construction of the house, and the driveway extended South from that point of stone.

16. There was no dividing line fence or other clear deliniation of the boundary line between the adjoining driveways.

17. The owners of the two properties, their families and invitees used the common driveway as a means of ingress and egress to their respective properties with the plaintiffs and their predecessors primarily using the western portion of the driveway, and the defendants the eastern portion.

18. The parties and their predecessors, families, friends and invitees parked on their respective sides of the driveway from time to time without seriously inconveniencing each other.

19. Trees and shrubbery planted on plaintiffs' lands along the West side of the driveway were not cut back from the travelled portion of the drive; causing the plaintiffs, their

families and invitees to make a greater use of the eastern side of the driveway.

20. On February 23, 1973 the defendants caused a letter to be written to the plaintiffs demanding that the plaintiffs cease and desist from the use of that portion of the common driveway located upon defendants' land.

21. The plaintiffs ignored the letter of February 23, 1973 and continued to use such portions of the driveway as they saw fit as a means of ingress and egress.

22. On May 30, 1973 the defendants parked their automobile on the portion of the driveway located on their land to effectively block plaintiffs' usage of the eastermost fourteen feet of the common drive.

23. The defendants total interference with the plaintiffs' use of the easternmost fourteen feet of the common driveway continued for approximately eight days, and partial interference has continued irregularly thereafter.

24. The plaintiffs on June 9, 1973 demanded the defendants cease and desist from obstructing their right of way.

25. The defendants deny that the plaintiffs have any legal right to use the easternmost 15 feet of the driveway.

DISCUSSION

The plaintiffs contend they have an easement for ingress and egress over the 15 foot strip of defendants' land adjacent to the plaintiffs' East property line either by prescription, by implication or by grant, reservation or exception. We will consider the plaintiffs' contentions in that order.

Easement by Prescription

"An easement is created by such use of land, for the period of prescription, as would be privileged if an easement existed, provided the use is

(a) adverse, and

(b) for the period of prescription, continuous and uninterrupted."

Restatement of the Law of Property Section 457

In Pennsylvania, to acquire an easement by prescription

"the exercise of possession must be adverse, open, notorious and uninterrupted for a period of at least twenty-one years." *Lewkowicz vs Blumish*, 442 Pa. 369, 371 (1971). The Franklin County Court, Depuy, P. J., held in *Fritz vs Franklin Fire Co.*, 6 Adams 33, 42 (1964), that "it is not necessary where a prescription right is claimed for the user to have occurred every day or to have been constant. There must, however, be some continuity in the user."

The testimony in the case at bar by Mr. Albert Bretzel that he rented the property now owned by the plaintiffs for five or six months in 1956, and that he cannot ever recall making use of the right of way over defendants' property claimed by the plaintiffs shows such an interruption in the continuity of the adverse user of the claimed right of way, that considering the ordinary use of such a right of way a driveway which would generally be used almost daily, any claim by the plaintiffs to an easement by prescription arising since 1956 must fail.

Plaintiffs have not presented sufficient evidence to establish an "adverse, open, notorious and uninterrupted" twenty-one year use of the right of way claimed to establish an easement by prescription arising prior to 1956. "The evidence in proof of such exercise of possession must be clear and positive." *Lewkowicz vs Blumish*, 442 Pa. at 371. Witnesses at the trial testified, in the instant case, that at times prior to 1956 a common driveway was used by the occupants of the properties in question. It was not clearly established, however, that this driveway existed over any part of the property now belonging to the defendants for any continuous twenty-one year period.

Therefore, we must conclude that the plaintiffs have failed to prove by a preponderance of the evidence the existence of an easement by prescription.

Easement by Implication

"It is essential to the creation of easements by implication that there be a separation of title, uses showing the easement was meant to be permanent, and a showing that the easement was necessary to the beneficial enjoyment of the land granted or retained." 12 P.L.E. 455; *Becker vs Rittenhouse*, 297 Pa. 317, 325 (1929).

In the case at bar, no evidence has been introduced that the easement claimed by the plaintiffs was in existence and being used in 1890, when the real estate of the parties was titled to Jacob Martin, the last common owner. Similarly, no

evidence was introduced that the claimed easement was necessary to the beneficial enjoyment of the plaintiffs' property. Therefore, no easement by implication can be found.

Easement by Grant, Reservation or Exception

In the case at bar, in the 1954 deed from Irvin and Eugenia R. McCleary to the defendants is the statement that the land is ". . . subject to such rights as may exist in a strip of land fifteen feet in width by two hundred two feet in length which is now used as part of a private alley and which strip of land is part of the land herein conveyed and is along the western line of the land herein conveyed." This deed refers to the "line adopted by Jacob W. Sollenberger and M. A. McCleary as per survey of John H. Atherton dated February 11, 1930." "Where a grantor refers in his deed to a map or plan, it has the effect of making such map or plan a material part of the deed, so if copied therein, and such map or plan controls the general descriptions of the deed." 12 P.L.E. 10 "Deeds" Section 5; *Quicksale vs City of Philadelphia*, 177 Pa. 301 (1896); *Nissley vs Moeslein*, 23 Pa. Super. 119 (1903). The draft of this 1930 survey, admitted in evidence at trial under the Ancient Document Rule and established as the original by Thomas Donahue, Franklin County Appraiser, shows the boundary line between the property of Jacob W. Sollenberger, plaintiffs' predecessor in title, and M. A. McCleary, defendants' predecessor. On the draft at eight feet from the boundary line on the Sollenberger side and fifteen feet from the line on the McCleary side are lines extending back from a point "C" to point "B". The draft bears a legend which reads "Driveway from B to C to be kept open for use of both properties 15' from McCleary land, 8' from Sollenberger." The dimensions of the driveway shown on the draft are precisely those of the driveway-easement sought to be established here by the plaintiffs.

The draft attached to the 1954 McCleary-to-Ramsey deed shows this same area 15 feet wide on the McCleary side and 8 feet wide on the Sollenberger side clearly marked "Private Driveway." The draft and the wording of this deed clearly evidences the intent of Irvin and Eugenia McCleary that an easement over 15 feet on their side of the driveway continue to exist for the use of the adjoining property (now belonging to the plaintiffs) in conjunction with the easement for the use of the owners of the McCleary property (now belonging to the defendants) over the 8 foot space of land on the other side of the driveway.

In *Skottie Electronics, Inc. vs Mastanduono*, 57 Lack. Journal 209 (1956), the deed to the defendants' property specified that:

> "It is understood and agreed that both the grantee and the heirs of J. H. Olldorf, owners of the adjoining lot, shall have an easement on the right of way between the two properties as it now exists.
>
> 7. The heirs of J. H. Oller, deceased, were the owners in fee of the land now owned by plaintiff. . ."

The right of way, in a situation similar to that of the instant case, followed the common boundary line extending seven feet onto the defendants' land and two feet on the plaintiffs' land. Judge (now Justice) Eagen held that:

> "The decision in this case hinges completely upon the determination of a single legal question, namely, in Pennsylvania, may an easement be reserved in favor of a person who is a stranger to the deed or grant? In other words, was the easement reserved by Cravin in the deed to the defendant in favor of the land now owned by the plaintiff legally effective? We conclude in the affirmative and that the easement should be sustained. . . In Pennsylvania, a valid easement may be reserved and created in a deed in favor of a person not a party thereto."

(Note: In holding that an easement may be reserved in favor of a third party, Judge Eagen stating that "In Pennsylvania, the question has never been squarely and dogmatically decided", cited as supporting his decision: *Duross vs Singer*, 224 Pa. 573; *Strycker vs Richardson*, 77 Pa. Super. 252 (1921); Tiffany on Real Property, 3rd Ed. p. 51; and Dickinson Law Review, Vol. 53, p. 151.) The *Skottie Electronics* case appears to be on all fours with the case at bar and following the reasoning of that court a valid easement would be found to have been created by reservation in the present case in favor of the plaintiffs.

A similar issue was raised in this judicial district in *Dorand vs Reiber*, No. 258 October Term 1952, an action to quiet title. Logue conveyed property to McCormick, "Subject, however, to the following reservation, to wit: The right of Harvey Baker. . .to use. . .a strip of ground ten feet in width and extending back two hundred and ten feet as an alley. . ." Defendant demurred on the ground that Logue had attempted to create by reservation a new interest, viz. an easement, in favor of the third party, Baker. This court

recognized the defendant's position as expressed in *Pribek vs McGahan*, 314 Pa. 529 (1934), where the Supreme Court of Pennsylvania held that one not a party to a deed could not claim the benefits of a right of way reserved for his behalf in that deed.

In the Dorand case, however, the Honorable Edmund C. Wingerd, P. J. held that:

> "If we consider the clause as an intention to create an easement in a third party, not a party to the deed, on the theory that such a reservation can be properly considered a grant, there is considerable authority in support of such interpretation. In *Restatement of the Law of Property*, Vol. 5, Servitudes Section 472, we find 'By a single instrument of conveyance there may be granted an estate in land in one person and an easement in another.'"

The court held that the question as to whether a legal interest had been created in Baker turned upon the intent of the granter. If Logue intended to except for Baker a right of his already in existence, then Baker had an easement over the land conveyed to McCormick. The court went on to state that:

> "When we consider carefully the wording of the clause in question, we find that a reasonable interpretation of it is that the grantor was excepting for H. B. Baker a right, an easement which was then in existence over the land being conveyed to J. W. McCormick. . ."

The court held that, "We must judge from the words of the clause itself" and noted that the clause " 'Subject however to the following reservation'. . .seems to refer to something in existence. 'The right of Harvey Baker, his heirs and assigns.' "

In the instant case, the wording in the 1954 deed from Mr. and Mrs. Irvin McCleary to the defendants - "subject to such rights as may exist in a strip of land. . .now used as a private alley", and similar wording in the 1946 deed from Mr. and Mrs. M. A. McCleary to the Irvin McClearys, by the *Dorand* rationale would supply cause for a reasonable interpretation that the grantors of these deeds were excepting for the owners of the adjoining property now belonging to the plaintiffs an easement which was then in existence over the land being conveyed. The draft of the 1930 Atherton survey and testimony at trial that

there was some sort of driveway used in common by the owners and possessors of the two properties involved here prior to the granting of both the 1954 McCleary to Ramsey deed and the 1946 McCleary to McCleary deed, provide sufficient evidence for a finding that either deed granted in favor of the land owned by the plaintiffs, rights to an existing easement. It is immaterial that the rights existing at the time the 1946 deed was executed and delivered may have been created by a parol agreement (perhaps by agreement between Sollenberger and M. A. McCleary as referred to on the draft of the Atherton survey (although this agreement may well have been written and signed)). The rights then, although terminable at will under 33 P.S. Section 1, would still have existed at the time of the 1946 deed. The easement granted in that deed for the benefit of the plaintiffs' land, under the *Dorand* and *Ozehoski* rationale, would validate and render enforceable the pre-existing rights of the plaintiffs' land over the fifteen foot section of the private driveway on the defendants' land.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter.

2. The easement reserved in the 1946 deed from the M. A. McClearys ot the Irvin McClearys, and the 1954 deed from the Irvin McClearys to the defendants in favor of the land now owned by the plaintiffs, is valid and enforceable by reason of the fact that in Pennsylvania a valid easement may be reserved and created in a deed in favor of a person not a party thereto.

3. Even were this Court not to follow, as it herby does, the holding in *Skottie Electronics, Inc. vs Mastanduono*, supra, it would find that an easement had been granted in both the 1946 deed and the 1954 deed excepting for the owners of the property now owned by the plaintiffs, rights over the property now owned by the defendants, already in existence, *Dorand vs Reiber*, supra.

4. A twenty-three foot easement exists on the lands of the parties hereto for the benefit of the lands of the plaintiffs and the defendants. The eastern fifteen feet of said easement is imposed upon the lands of the defendants, and the western eight feet upon the lands of the defendants.

5. Neither the plaintiffs nor the defendants, nor their heirs and assigns may obstruct the said easement or prevent its proper usage as a means of ingress and agress.

6. The defendants will be enjoined from obstructing any portion of the twenty-three foot wide right of way.

7. The plaintiffs failed to prove any monetary damages and none will be awarded.

DECREE NISI

NOW, this 2nd day of January, 1976, the defendants, Lynn S. Ramsey and Dorothy I. Ramsey, his wife:

(a) Are enjoined from obstructing, causing or permitting the obstruction of the use of any portion of that certain twenty-three foot wide easement located on the western fifteen feet of their real estate and eastern eight feet of the plaintiffs' real eastate by the plaintiffs, their family and business invitees.

(b) Shall pay the costs of this proceeding.