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ASSIGNABILITY AND DIVISIBILITY OF EASEMENTS IN GROSS

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NO QUESTION concerning rights in land has produced as many varied and inconsistent opinions, both by courts and by accepted authorities, than the problem of the assignability and divisibility of easements in gross. Those differences might be glossed over as relatively unimportant were it not for the fact that the recent merger of the country's two large telegraph companies has again brought the matter into sharp focus. But the problem is not restricted to telegraph companies for many billions of dollars worth of plant has been constructed or installed by electric light and power concerns, telephone corporations, pipe line companies, and the like, by virtue of rights given to them through grants of easement obtained from a myriad of property owners by the expenditure of large sums of money. They, too, desire to know where they stand on the question of whether such grants of easement are assets which can be sold, in part or in toto, should occasion arise, and a definite answer should be given to them. As the great bulk of money expended in this country today for easements in gross is being spent for rights of way by companies of the types above mentioned, the problem will be examined primarily from the viewpoint of their position.[1] While railroads have undoubtedly been the greater purchasers of such easements in the past but little consideration need be given to their rights inasmuch as courts

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1 Throughout the balance of this article such organizations will be referred to as "public service companies" in contrast to railroads.

have seen fit, from the beginning, to protect their interests for reasons hereafter set forth.

Although public service companies have been favored by several decisions holding their rights of way to be assignable,[2] and even by one case in which it was intimated that, because the easement was for commercial purposes, it should be alienable,[3] yet the main question involving easements in gross remains to be definitely decided and it is cause for concern if the attitude of American courts toward the general problem is not changed. The existence of doubt can be appreciated when it is pointed out that the courts of twenty-four states have not directly passed upon this question,[4] while, in the remaining twenty-four, five have consistently ruled against the assignability of easements in gross,[5] six have just as consistently favored assignability,[6] while any semblance of consistency is lacking in the remaining thirteen.[7]

For a proper understanding of the problem it may be desirable to recapitulate the rights involved. An easement has been defined as a right which one person has to use the land of another for a specific purpose,[8] but for classification purposes all easements are generally divided into two broad classes, namely easements appurtenant and easements in gross. Where the enjoyment of the easement is limited for the benefit of the owner of a particular tract of land, called a dominant tenement, the easement is said to be appurtenant and the property charged with the burden thereof is designated as the servient tenement. In the case of an easement in gross, however, there is only

2 American T. & T. Co. v. McDonald, 273 Mass. 324, 173 N. E. 502 (1930); Standard Oil Co. v. Buchi, 72 N. J. Eq. 492, 66 A. 427 (1907); Dalton Street Ry. Co. v. City of Scranton, 326 Pa. 6, 191 A. 133 (1937).

3 Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 200 A. 646, 130 A. L. R. 1245 (1938).

4 No clear-cut decisions appear to exist in Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Kansas, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Washington, West Virginia, and Wyoming.

5 Connecticut, Illinois, Kentucky, Minnesota, and Texas.

6 Iowa, at least by dictum, Massachusetts, New Hampshire, Oregon, Virginia, and Wisconsin.

7 The cases from Arkansas, California, Indiana, Maine, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, and Vermont are considered elsewhere in this article.

8 17 Am. Jur., Easements, p. 923, §2.

a servient tenement for the enjoyment of the right is not limited to any tract of land but is vested in the grantee independently of his ownership or non-ownership of land.[9]

I. Common Law Views

At the time when the law relating to easements was being developed in England, the processes of living were far from complex. Agriculture was the mainstay of life and corporations were virtually unknown. In that simple period the need for an easement privilege most often arose when the owner of a plot of land remote from the highway desired a right of way over the intervening land. An easement appurtenant was the result. Because the amount of travel across the servient property would be in proportion to the size of the dominant estate, courts readily permitted such right to be transferred along with the dominant property. The theory to support such attitude was that the easement was admeasurable, i.e., the amount of travel across the servient property would always be limited, hence there was no likelihood that the burden on the servient estate would or could be increased beyond the burden which was anticipated at the time of making the grant.

No such attitude was taken with reference to easements in gross, however, for the idea that an easement could exist without a dominant tenement was expressly denied. Thus in the case of *Rangeley* v. *Midland Railway Company*,[10] Lord Cairns stated: "There can be no easement properly so called unless there be both a servient and a dominant tenement. . .There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross."[11] That fact was more emphatically declared in *Keppell* v. *Bailey*[12] where Lord Chancellor Brougham stated:

9 Willoughby v. Lawrence, 166 Ill. 11, 4 N.E. 356 (1886).

10 [1868] L. R. Ch. App. 306.

11 [1868] L. R. Ch. App. 306 at 310.

12 2 My. & K. 517, 39 Eng. Rep. 1042 (1834). The case was cited as authority for the holding in Hill v. Tupper, 2 H. & C. 122, 159 Eng. Rep. 51 (1863), where it was held that the claimant had a contract right enforcible against his covenantor. In Rymer v. McIlroy, [1897] 1 Ch. 528, an easement was granted to a tenant from year to year over adjoining land. When the grantee purchased the leased premises, the court held the way continued. See also note in 7 Col. L. Rev. 536. A rationale for the original view is given by Simes, The Assignability of

but it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. . . The covenant must be of such a nature as to "inhere in the land," to use the language of some of the cases; or "it must concern the demised premises and the mode of occupying them," as it is set down in others; "it must be *quodammodo* annexed and appurtenant to them," as one authority has it, or as another says, "it must both concern the thing demised, and tend to support it and support the reversioner's estate."[13]

Other English cases have gone even further, holding such rights to be in the nature of mere licenses personal to the grantee and for that reason unassignable. In the oft-quoted case of *Ackroyd* v. *Smith,*[14] for example, appears the statement that:

If a way be granted in gross, it is personal only, and cannot be assigned. So, common in gross *sans nombre* may be granted, but cannot be granted over. . .It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it; nor can the owner of land render it subject to a new species of burthen, so as to bind it in the hands of an assignee.[15]

Holdings against assignability such as these appear to be in accord with theories expressed by early writers. Blackstone explained the doctrine to his own satisfaction by saying:

This may be grounded on a special permission; as when the owner of the land grants to another a liberty of passing over his grounds to go to church, to market, or the like: in which case the gift or grant is par-

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Easements in Gross in American Law, 22 Mich. L. Rev. 521 at 532 (1924), to the effect that "Professor Holdsworth . . . suggests that a possible explanation for the English law may be found in the history of the assizes. He oberves that the assize of nuisance, a remedy for interference with easements, lay only for a freeholder against a freeholder; and that this procedural peculiarity may have 'hardened into the fixed rule of the substantive law that all easements must be appurtenant.' He also calls attention to the fact that Bracton does not recognize easements in gross and profits in gross as servitudes. This, he thinks, may have influenced the situation in the same direction." See Holdsworth, Hist. Eng. Law, III, 156. Simes also suggests that the use of the term "personal" was intended merely to mean that the easement was not appurtenant rather than to signify an intention to limit the same to the individual. Burby, Handbook of the Law of Real Property (West Pub. Co., St. Paul, Minn., 1943), p. 75, states than an exception to the rule is found with respect to an easement which requires practically exclusive possession of the servient tenement for its enjoyment. Restatement, Property, Tent. Draft No. 10, §41 and §43, takes the view that easements in gross of a commercial character are alienable as a matter of law, whereas noncommercial ones are alienable only if such was the intention of the parties.

13 2 My. & K. 517 at 535, 39 Eng. Rep. 1042 at 1049.

14 10 C. B. 164, 138 Eng. Rep. 68 (1850). Similarly, in Weekly v. Wildman, 1 Ld. Raym. 405 at 407, 91 Eng. Rep. 1169 at 1171 (1704), the court stated: "Although a common *sans nombre* may be granted at this day, yet such grantee cannot grant it over."

15 10 C. B. 164 at 188, 138 Eng. Rep. 68 at 77.

ticular, and confined to the grantee alone; it dies with the person; and, if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company.[16] His views have influenced American writers such as Kent[17] and Washburn[18] and may be found expressed in the works of others.[19] Fortunately, decisions to the effect that there is no such right as an easement in gross have, with but few exceptions, been disaffirmed in this country where it has been generally held that such an interest is a right in rem.[20]

It is over decisions which hold to the view that an easement in gross is necessarily personal and assignable that the greatest difficulty arises. That view might have been regarded as obviously correct at the time when it was first pronounced for, as Blackstone suggests, the right was then generally granted by the property owner to another, possibly a close friend, to permit him to travel to church or to market. The instrument containing the terms of such a grant would, doubtless, be lacking words of assignment or inheritance. But the pity of it is that now,

16 2 Bl. Com. 35.

17 In Kent, Com. III, 420, appears the statement: "If it be a right of way in gross, or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent. It dies with the person, and it is so exclusively personal, that the owner of the right cannot take another person in company with him."

18 Washburn, Easements and Servitudes, 2d Ed., p. 10, states: "A man may have a way, *in gross*, over another's land, but it must, from its nature, be a personal right, not assignable nor inheritable; nor can it be made so by any terms in the grant any more than a collateral and independent covenant can be made to run with the land."

19 See, for example, Sheppard's Touchstone, p. 239, to the effect that "if license be granted me to walk in another man's garden, or to go through another man's ground, I may not give or grant this to another."

20 Lewis, Assignability of Easements in Gross in Pennsylvania, 40 Dickinson L. Rev. 46 (1935), particularly p. 53. See also Washburn, Easements and Servitudes, 2d Ed., p. 45; Jones, A Treatise on the Law of Easements (Baker, Voorhis & Co., New York, 1898), §33 et seq. There is some authority, however, for denying to a way in gross the name of easement: Boatman v. Lasley, 23 Ohio St. 614 (1873); Houston v. Zahm, 44 Or. 610, 76 P. 641 (1904). In Bradley v. American T. & T. Co. of Pennsylvania, 54 Pa. Super. 388 (1913), the court, when denying that a telephone right of way was an easement, stated: "The right asserted lacks the essential quality of an easement that there must be two tenements owned by distinct proprietors, one to which the right is attached and another on which it is imposed." Such holding is similar to the decision in Adamson v. Bell Telephone Co. of Canada, 48 Ont. L. R. 24 at 31, 55 Dom. L. R. 157 (1920), where the court said: "It is doubtless the law that there is no such thing as an easement in gross in the proper sense of the word, and that the grantee of an easement must at the time of the creation of it have an estate in the tenement to which the easement is appurtenant."

when rights of way are taken with the intention that they are to be perpetual and assignable, many of our courts should still be willing to defeat such clear intention through reliance upon decisions which, perhaps logical when made, certainly cannot now be justified in the light of changed conditions. A review of those decisions declaring against assignability reveals some interesting facts as to the ultimate source of the authority relied upon. In cases arising in fourteen of the American states,[21] the principal authority cited to support the decision was either Blackstone, Kent, Washburn, some decision from another state which did so rely, or else was the case of *Ackroyd* v. *Smith*.[22] At least two other state courts[23] and one Federal court[24] have also taken the view that easements in gross are personal, hence non-assignable under a line of reasoning which merely amounts to giving a nod in the direction of such authorities.

There is good reason to believe that these early writers, so often cited as the voice of authority, never intended

21 *Arkansas*: Field v. Morris, 88 Ark. 148, 114 S. W. 206 (1908), but an intent to make the grant inalienable was, however, shown to be present. *California:* Eastman v. Piper, 68 Cal. App. 554, 229 P. 1002 (1924). *Connecticut:* Hall v. Armstrong, 53 Conn. 554, 4 A. 113 (1886); *Illinois:* Garrison v. Rudd, 19 Ill. 558 (1858); Koelle v. Knecht, 99 Ill. 396 (1881); L. & N. R. R. Co. v. Koelle, 104 Ill. 455 (1882), dictum; Kuecken v. Voltz, 110 Ill. 264 (1884); Waller v. Hildebrecht, 295 Ill. 116, 128 N.E. 807 (1920); Messenger v. Ritz, 345 Ill. 433, 178 N.E. 38 (1931); Traylor v. Parkinson, 355 Ill. 476, 189 N.E. 307 (1934). *Indiana:* Moore v. Crose, 43 Ind. 30 (1873), dictum; Hoosier Stone Co. v. Malott, 130 Ind. 21, 29 N.E. 412 (1891); Lucas v. Rhodes, 48 Ind. App. 211, 94 N. E. 914 (1911). *Kentucky:* Thomas v. Brooks, 188 Ky. 253, 221 S. W. 542 (1920). *Maine:* Davis v. Briggs, 117 Me. 536, 105 A. 128 (1918). *Michigan:* Stockdale v. Yerden, 220 Mich. 444, 190 N.W. 225 (1922). *New Jersey:* Joachim v. Belfus, 108 N. J. Eq. 622, 156 A. 121 (1931), overruling Shreve v. Mathis, 63 N. J. Eq. 170, 52 A. 234 (1902). *New York:* Moore v. Day, 191 N. Y. S. 731, 199 App. Div. 76 (1921). *Ohio:* Boatman v. Lasley, 23 Ohio St. 614 (1873); Junction Railroad Co. v. Ruggles, 7 Ohio St. 1 (1857). *Pennsylvania:* Tinicum Fishing Co. v. Carter, 61 Pa. St. 21 (1869), dictum; Lindenmuth v. Safe Harbor Water Power Co., 309 Pa. 58, 163 A. 159 (1932). *Rhode Island:* Cadwalader v. Bailey, 17 R. I. 495, 23 A. 20 (1891); Chase v. Cram, 39 R. I. 83, 97 A. 481 (1916). *South Carolina:* Fisher v. Fair, 34 S. C. 203, 13 S.E. 470 (1891); Kershaw v. Burns, 91 S. C. 129, 74 S. E. 378 (1912), dictum. *Utah:* Ernst v. Allen, 55 Utah 272, 184 P. 827 (1919). Some of these cases also rely on 9 R. C. L., Easements, p. 739, §6.

22 10 C. B. 164, 138 Eng. Rep. 68 (1850).

23 Elliott v. McCombs, (Cal. App.) 100 P. (2d) 499 (1940); Winston v. Johnson, 42 Minn. 398, 45 N. W. 958 (1890), dictum; Saratoga State Waters Corp. v. Pratt, 227 N. Y. 429, 125 N.E. 834 (1920), cited in Atlantic Mills v. New York Cent. R. Co., 223 N. Y. S. 206, 221 App. Div. 386 (1927); Whaley v. Stevens, 21 S. C. 221 (1883), dictum; Alley v. Carleton, 29 Tex. 74 (1867), dictum.

24 Salem Capital Flour Mills Co. v Stayton Water-Ditch & C. Co., 33 F. 146 (1887).

their views to have so far-reaching an effect, for they spoke only for the moment and at a time when easements in gross, so far as then known, were inconsequential. To find that these casual declarations of law should be so implicitly followed is serious enough. When, however, courts even extend the harshness of the rule by holding, as did a Pennsylvania court, that easements in gross are "not assignable nor can they be made so by the terms of the grant,"[25] or that an easement in gross is of such a personal nature that it dies with the grantee even though the instrument creating it conveys it to the grantee and his heirs and assigns forever,[26] the time would seem to have arrived when something ought to be done.

II. Theories Supporting Assignment

Those states which have permitted the assignability of easements in gross have not dealt with the problem with any degree of unanimity for different types of rights in that category have been accorded different treatment. The right least favored would seem to be the easement of way, for in only three cases has such an easement definitely been considered alienable. In the early case of *White* v. *Crawford*,[27] a Massachusetts court stated "that they may be granted, or may accrue, in various forms to one and his heirs and assigns, there can be no doubt." So, too, a Wisconsin court, in *Poull* v. *Mockley*,[28] indicated that it could see no good reason why such a right should not be transferred, particularly when suitable language was used to evidence such an intention. In New Jersey, however, the courts have wavered over the question. The case of *Shreve* v. *Mathis*,[29] arising in that state, first considered an easement of way to be alienable. Later, in the case of *Standard Oil Company* v. *Buchi*,[30] an easement in gross was again held to be assignable although the court intimated, as its reason, that the right there being considered

25 Tinicum Fishing Co. v. Carter, 61 Pa. St. 21 at 38 (1869).
26 Graham v. Walker, 78 Conn. 130, 61 A. 98, 2 L. R. A. (N. S.) 983 (1905); Fisher v. Fair, 34 S. C. 203, 13 S. E. 470 (1891).
27 10 Mass. (10 Tyng) 183 at 188 (1813).
28 33 Wis. 482 (1873).
29 63 N. J. Eq. 170, 52 A. 234 (1902).
30 72 N. J. Eq. 492, 66 A. 427 (1907).

was something more than a mere easement of way. Still more recently, however, in the case of *Joachim* v. *Belfus*,[31] the court declared that a reservation in a deed of the right to erect electric light and telephone poles was an easement in gross, was not appurtenant to the franchise of a corporation, was personal to the grantee, and consequently unassignable. Such decision led one writer to conjecture as to whether or not the New Jersey court would invoke, for a test of assignability, the fact that a public utility was, or was not, the grantee of the original easement.[32] One thing is certain, that case overruled the decision in the Shreve case so only two unchallenged cases exist on the right to assign an easement in gross given merely for the purpose of right of way.

Most of the decisions supporting assignability cover rights to take water or involve situations where the grantee is authorized to take partial possession of the grantor's land by placing something thereon. In some instances the right to take or use running water has been designated a profit, and on that basis has been held assignable although in fact the right was but an easement.[33] But other courts have held such a right assignable without reference to whether it was a profit or not,[34] as is evidenced by decisions sustaining assignment of a right to maintain a boom,[35] install a pipe line,[36] maintain a sewer,[37] erect telephone and telegraph lines,[38] and use pew[39] or burial rights.[40] Even Illinois, a state that has consistently refused

31 108 N. J. Eq. 622, 156 A. 121 (1931).

32 See note in 17 Iowa L. Rev. 235 at 237-8.

33 See, for example, Ring v. Walker, 87 Me. 550, 33 A. 174 (1895), for right to use a sluice; Columbia W. P. Co. v. Columbia Electric St. Ry., L. & P. Co., 43 S. C. 154, 20 S. E. 1002 (1895), for right to take water.

34 Goodrich v. Burbank, 94 Mass. (12 Allen) 459 (1866); Hall v. Ionia, 38 Mich. 493 (1878), dictum; Talbot v. Joseph, 79 Or. 308, 155 P. 184 (1916); Lawrie v. Silsby, 76 Vt. 240, 56 A. 1106 (1904).

35 Engel v. Ayer, 85 Me. 448, 27 A. 352 (1893). The court did, however, call the right in question a "profit."

36 Standard Oil Co. v. Buchi, 72 N. J. Eq. 492, 66 A. 427 (1907); Tide-Water Pipe Co. v. Bell, 280 Pa. 104, 124 A. 351, 40 A. L. R. 1516 (1924).

37 City of Richmond v. Richmond Sand & Gravel Co., 123 Va. 1, 96 S.E. 204 (1918).

38 American T. & T. Co. v. McDonald, 273 Mass. 324, 173 N. E. 502 (1930).

39 Bales v. Sparrell, 10 Mass. (10 Tyng) 323 (1813); Kimball v. Second Cong. Parish in Rowley, 41 Mass. (24 Pick.) 347 (1834).

40 McWhirter v. Newell, 200 Ill. 583, 66 N.E. 345 (1903); Wright v. Hollywood Cemetery Corp., 112 Ga. 884, 38 S.E. 94 (1901).

to recognize the assignability of easements in gross, has permitted the transfer of a right to maintain a billboard.[41]

One type of easement that has been favored above all others, however, is the one given to a railroad for right of way. It has been stated that such is nothing more than an easement in gross,[42] yet the courts have not for that reason refused to recognize the right of assignment.[43] In *Junction Railroad Company* v. *Ruggles*,[44] an Ohio court propounded, as a novel reason to support assignment, the idea that railroad rights of way were made up of a union of many rights taken from many owners so that each was appurtenant to the remainder. The general reason given though, is that an easement for railroad purposes forms a unique type distinct from other easements because the dominance of the railroad over the strip so granted is exclusive. This view has undoubtedly arisen because of the exigencies of the railroad business, for it is in the interest of public safety and convenience that the railroad should be permitted to exclude all persons from the right of way including even the owner of the underlying fee. Even though a right of way acquired by a railroad company is ordinarily designated as an easement, it is well settled that, as one writer has stated, it is an "interest in land of a special and exclusive nature and of a high character, and so far as the right of possession for railroad purposes is concerned, it has most of the qualities of an estate in fee, including perpetuity and exclusive use and possession."[45]

By comparison, there would seem to be no valid rea-

41 Willoughby v. Lawrence, 116 Ill. 11, 4 N.E. 356 (1886). A more complete list of references may be found in Simes, The Assignability of Easements in Gross in American Law, 22 Mich. L. Rev. 521 (1924), and Vance, Assignability of Easements in Gross, 32 Yale L. J. 813 (1923), to both of whom the author is indebted for many of the references herein cited.

42 Radetsky v. Jorgensen, 70 Colo. 423, 202 P. 175 (1921); In re Anthony Ave., 95 N. Y. S. 77, 46 Misc. 525 (1905); Query v. Postal Telegraph-Cable Co., 178 N. C. 639, 101 S.E. 390 (1919).

43 Columbus, H. & G. Ry. Co. v. Braden, 110 Ind. 558, 11 N.E. 357 (1887); Smith v. Hall, 103 Iowa 95, 72 N.W. 427 (1897); Garlick v. Pittsburgh & W. Ry. Co., 67 Ohio St. 223, 65 N.E. 896 (1902).

44 7 Ohio St. 1 (1857).

45 44 Am. Jur., Railroads, p. 312, §97. In Smith v. Hall, 103 Iowa 95, 72 N. W. 427 (1897), the court noted that damages "are assessed on the theory that the easement will be perpetual, so that, ordinarily, the fee is of little or no value, unless the land is underlaid by quarry or mine."

son why public service company easements should not be similarly treated. While the grant to such companies may not specify an exclusive use of a given area of land yet, in actual practice, such companies do have the exclusive use of that part of the servient estate as is actually occupied with their plant. The fact that the owner of the servient tenement may be permitted to work his land right up to the plant of the grantee, perhaps even over it if the plant is buried, should make no difference for railroads have been held powerless to prevent the owner of the underlying fee from granting to third parties the right to construct apparatus across the railroad right of way, whether in the ground under the tracks,[46] or through the superincumbent air,[47] so long as the same would not interfere with efficient operation. By assimilating public service company easements with those owned by railroads, a simple solution to the problem could be readily attained but no court has, as yet, taken that step.

The question of assignability has not, however, gone without attention from a number of well-known writers in this country. All of them appear to realize the need for supporting the assignability of easements of this character but they are not consistent in their reasons. Professor Vance, on the one hand, has advocated that the same test should be applied to easements in gross as is applied to profits *a prendre*.[48] For a fuller understanding of this theory it is necessary to touch briefly upon the nature of a profit and the state of the law as to its assignability. A profit is similar to an easement but with the exception that it enables the grantee to sever a part of the realty. Upon such severance the title in the thing severed goes to the grantee as, for example, in the case of a right to go on land and remove timber or drill for oil. If such right of profit is appurtenant, it is assignable in the same fash-

[46] Cumberland Valley & W. R. Co. v. Chambersburg & G. Electric R. Co., 15 Pa. Dist. R. 965 (1903).

[47] Cleveland, C., C. & St. L. Ry. Co. v. Central Ill. Pub. S. Co., 380 Ill. 130, 43 N.E. (2d) 993 (1942); Farmers Grain & Supply Co. v. Toledo, P. & W. R. R., 316 Ill. App. 116, 44 N.E. (2d) 77 (1942); Citizens' Telephone Co. v. Cincinnati, N. O. & T. P. R. Co., 192 Ky. 399, 233 S.W. 901, 18 A. L. R. 615 (1921); St. Louis, I. M. & S. R. Co. v. Cape Girardeau Bell Tel. Co., 134 Mo. App. 406, 114 S.W. 586 (1908). See also note in 22 CHICAGO-KENT LAW REVIEW 92.

[48] Vance, Assignability of Easements in Gross, 32 Yale L. J. 813 (1923).

ion as is an easement appurtenant.[49] Even if the profit is in gross and exclusive, it is also assignable.[50] The real problem over the assignability of profits occurs when such are in gross and not exclusive, as where the grantor retains the right to take also from the land the commodity described in the grant of the profit. Now if the grantee were permitted to assign his right to A, B and C, those three combined could take three times as much as the original grantee could have taken alone. The result would obviously be to increase the burden on the servient tenement. To prevent that possibility, it was declared quite early in Mountjoy's case,[51] that the grantee might assign his whole interest to "one, two or more; but then, if there be two or more, they could make no division of it but work together as one stock."[52] Pursuing that suggestion, Vance propounded the theory that in all cases where the easement in gross was admeasurable, so no surcharge of the servient tenement was possible, the same should be freely assignable.

That theory was answered by Professor Simes who held to the view that Mountjoy's case did not prevent assignability but only restricted that possibility, whereas the rule which Vance had deduced, i.e., that easements in gross not admeasurable were not to be assignable under any circumstances, did not hold true as to profits in gross, which, even if not admeasurable were still, in certain cases, assignable.[53] Simes argued that such easements should be considered assignable for three reasons: first, because that attitude would carry out the intention of the grantor; second, because easements are to be regarded as property rights; and third, because the principal objection to assignability, to wit: that to permit such would clog the title to real property, was not of sufficient import to justify any such conclusion.

49 Huntington v. Asher, 96 N. Y. 604, 48 Am. Rep. 652 (1884).

50 Tinicum Fishing Co. v. Carter, 61 Pa. St. 21 at 39 (1869).

51 Co. Lit. 164b (1584). See also reports of the same case in 1 Anderson 307, 123 Eng. Rep. 488; Godbolt 17, 78 Eng. Rep. 11; and 4 Leonard 147, 74 Eng. Rep. 786.

52 Co. Lit. 164b.

53 Simes, The Assignability of Easements in Gross in American Law, 22 Mich. L. Rev. 521 (1924).

He was, in turn, followed by Professor Clark, a colleague of Vance, who admitted the merit of both of these views but concluded by saying:

He [Simes] sets forth a cogent and powerful argument in favor of assignability, based in general upon the assignability of similar interests. But in answering the arguments against "surcharging" the servient estate, he does not give full weight to the practical difficulties of the easement in gross as a clog on title. These practical difficulties afford much basis for the traditional view of non-assignability.

I am disposed therefore to conclude that the traditional attitude of the courts toward easements in gross is on the whole a more desirable one than that advocated by either learned authority.[54]

Tiffany, however, seems to have adopted the progressive viewpoint taken by Simes, for he states: "Nevertheless it is somewhat difficult to see why, if, as appears to be the case, a profit in gross is capable of passing by voluntary transfer and by descent, an easement in gross should not be so capable."[55]

Recapitulation of the decisions and opinions against assignability, therefore, discloses that the reasons given can generally be classified as being (1) the broad statement made in early English decisions and writers to the effect that there is no such thing as an easement in gross and an attempt to create such right will result in, at most, a mere license; (2) the equally general statement that such an easement is personal to the grantee, hence unassignable; and (3) to permit assignment will result in a clogging of land titles. The first of these reasons is easily controverted by the fact that, in this country, easements in gross have invariably been recognized as rights in rem. The second was undoubtedly correct in ancient times when it appeared to be the clear intention to make easements of this type personal to the grantee as disclosed by the absence of words of inheritance necessary to make them descendable. Since neither of these conditions now prevail, for words of inheritance are generally used in such grants and the terminology thereof would negative any implication that the rights given were intended to be personal, there is left but one reason to support the traditional view.

[54] Clark, The Assignability of Easements, Profits and Equitable Restrictions, 38 Yale L. J. 139 at 147 (1928).

[55] Tiffany, The Law of Real Property (Callaghan & Co., Chicago, 1939), 3d Ed., Vol. III, p. 212, §761.

In support of the view that to permit the transfer of an easement in gross would involve a clogging of titles, the only decision which clearly bases its holding on that ground is the Ohio case of *Boatman* v. *Lasley*[56] wherein the court queried: "If such right be an inheritable estate, how will the heirs take? In severalty, in joint tenancy, coparcenary, or as tenants in common? If not in severalty, how can their interests be severed?"[57] The obvious answer to that question was given by Tiffany who wrote that "the heirs might well be regarded as holding in that form of cotenancy which exists in the case of descent of the land itself."[58] Despite this, analysis will show that the objection is not a real one. If the easement is taken in such form as would seem to make it inheritable, the probabilities are that it represents a property right of substantial value. The holder thereof would be a person more apt to take precaution to see that such a right would devolve on some certain party so as to avoid any doubt. As between the owner of the servient estate and such person, litigation to remove any alleged cloud would be simple to conduct.

Even admitting that such easement might be of little value, would it not likely be true that heirs of the grantee, through failure to exercise the right, would eventually lose the same through adverse user of the land by the owner of the servient estate. If action be necessary to remove a cloud, such heirs would be more apt to permit such right to go by default in case the owner of the servient estate should see fit to sue. The only argument to support the claim that the existence of the easement might be said to hamper the title would then be the difficulty of securing service on all the necessary parties to such litigation. Assuming that the owner of the servient estate might despair over the task of securing such service, the fact that the owners of the easement are not readily apparent would tend to indicate that the burden against the land is so small as not materially to affect the saleability of the property. Moreover, courts do not object to the clogging of titles where the result to

56 23 Ohio St. 614 (1873).
57 23 Ohio St. 614 at 618.
58 Tiffany, op. cit., Vol. III, p. 212, §761.

be achieved is worthwhile, as is evidenced by the upholding of various building restrictions in the case of urban property, or the even more serious case of the possibility of reverter which is permitted to remain in the grantor on conveyance of a qualified or determinable fee. Although that possibility may be neither alienable or devisable, courts have repeatedly held that it descends to the heirs of the original grantor.[59]

On the other hand, the doctrine that easements in gross are assignable is consistent with two rules of construction that have long been followed by courts, to wit: (1) that in the construction of deeds the intention of the parties should govern;[60] and (2) that where a deed is possible of two constructions "that method of construction which will be more favorable to the grantee will be selected and the deed will be construed against the grantor."[61] For lack of adequate reasons to the contrary, then, one logical conclusion would seem to be open and that is to make all easements in gross assignable unless it clearly appears from the language of the grant that an opposite result is intended.

III. Problems Arising From Assignability

The mere fact that twenty-four states have not yet ruled on this question does not prove that the same is unimportant. Undoubtedly, there have been many cases in this country where easements in gross have been transferred but the owners of the servient tenements have not raised any objection because they have been guided by the literal meaning of the recorded grant and the declaration of a right to assign included therein. Another reason for the absence of litigation, and one which tends to disprove the whole "personal element" theory of easements in gross, is the manner in which the modern service companies exercise the privilege conferred by the grant. It is not the grantee but the employees of such company who go upon the servient property to construct and maintain the plant. Such employees are generally organized into groups or gangs who travel from place to place. As a consequence, the employee stepping

59 North v. Graham, 235 Ill. 178, 85 N.E. 267 (1908).
60 Senhouse v. Christian, 1 T. R. 560, 99 Eng. Rep. 1251 (1787).
61 16 Am. Jur., Deeds, p. 530, §165.

upon the property to do the work is generally one whom the owner of the servient tenement has never seen before. Even though all the employees appear to be strangers, he does not object so long as they do not attempt to exercise rights beyond the scope of the grant. If, unknown to him, the easement has been assigned along with the plant to another company, the owner of the servient tenement notes that it is merely still another stranger who has stepped on to his land to do some work. He never had in his the mind the nature of a personal grantee, for his main concern was the price he was to receive for granting the rights which were to be perpetually exercised on his property. For these reasons, he makes no protest and would think of none unless archaic rules were drawn to his attention. Even then, he probably would remain silent from a feeling that an application of common sense is sometimes worth more than a dozen legal decisions. Protest is apt to come, if at all, when the assignment of the grant threatens to impose additional obligations on the servient estate.

Only one really practical problem, therefore, is presented by the assignment and that is how to prevent a surcharging of the servient tenement. That problem does not alone arise because of an assignment, for it has always existed in the case of the exercise of any easement in gross and the courts have been called upon innumerable times to determine whether the grantee has exceeded the rights given him. Naturally this problem will also be present in case of an assignment, but the test, either before or after assignment, should be the same, i.e., what was the maximum intended burden. Certain decisions hold that where an unlimited way or easement has been granted, then once that easement has been exercised the burden has become establishd and cannot, at a later date, be increased.[62] The more popu-

[62] Allen v. San Jose L. & W. Co., 92 Cal. 138, 28 P. 215 (1891); Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191 (1906); Rolens v. City of Hutchinson, 83 Kan. 618, 112 P. 129 (1910); Chesapeake & Potomac Tel. Co. v. Tyson, 160 Md. 298, 153 A. 271 (1931); Foster v. Conn. River T. Co., 223 Mass. 528, 112 N.E. 226 (1916); Lidgerwood Estates, Inc. v. Public S. E. & G. Co., 113 N. J. Eq. 403, 167 A. 197 (1933); Stephens v. N. Y. O. & W. Railway Co., 175 N. Y. 72, 67 N.E. 119 (1903); Postal Telegraph-Cable Co. v. Forster, 73 Or. 122, 144 P. 491 (1914); Minto v. Salem Water, Light & Power Co., 120 Or. 202, 250 P. 722 (1926); Pennsylvania Water & Power Co. v. Reigart, 127 Pa. Super. 600, 193 A. 311 (1937); Tennessee Public Service Co. v. Price, (Tenn. App.) 65 S.W. (2d) 879 (1932); City of Lynchburg v. Smith, 166 Va. 364, 186 S.E. 51 (1936). See also 17 Am. Jur., Easements, p. 996, §97, note 10; 5 L. R. A. (N.S.) 851.

lar and more logical rule would appear to be that the grantee may exercise, from time to time, any or all of the rights conferred by the terms of the grant.[63] The sense of this rule can be readily demonstrated, for at the time a new business purchases a right of way across property it may be uncertain as to what the future may bring forth by way of success, governmental regulation, or competition. The amount of plant built at first might be just sufficient to meet the needs of the moment. But that fact should not prevent it from acquiring, at the outset, rights of way necessary to meet future needs. To require the purchase of new rights every time an addition to existing plant is contemplated would mean additional expenditure with a consequent increase in cost to the ultimate consumer.

One solution to the problem might be worked out, at least from a practical viewpoint, if the grantee could obtain the privilege to build as many new lines, from time to time, as it might desire upon or over a strip of land of a given width. So long as the grantee, or its assigns, did not extend its plant beyond the boundaries of the designated strip, the servient tenement could not be surcharged. If the entire strip ultimately became utilized by the grantee, a situation would be presented identical to that of a railroad which exclusively uses its entire right of way. Until that time, the grantor would have the advantage of being able to use some part of the strip for his own purposes so long as he did not interfere with the maintenance of the grantee's plant. Another way might be to express the intended burden by including a stipulation as to the greatest number of lines that could be installed under the grant, such as five pipe lines, no one of which may exceed a diameter of eighteen inches. A deter-

63 Western Union Tel. Co. v. Polhemus, 178 F. 904 (1910); C. F. Lott Land Co. v. Hegan, 177 Cal. 169, 169 P. 1035 (1917); Brookshire Oil Co. v. Casmalia Ranch Co., 156 Cal. 211, 103 P. 927 (1909); Hamaker v. Pacific Gas & Electric Co., 59 Cal. App. 642, 211 P. 265 (1922); Diamond State Tel. Co. v. Maclary, 18 Del. Ch. 142, 156 A. 223 (1931); Tong v. Feldman, 152 Md. 398, 136 A. 822 (1927); West Arlington Land Co. v. Flannery, 115 Md. 274, 80 A. 965 (1911); Standard Oil Co. v. Buchi, 72 N. J. Eq. 492, 66 A. 427 (1907); Nichols v. New York and P. T. & T. Co., 110 N. Y. S. 325, 126 App. Div. 184 (1908); Bowerman v. Inter-Ocean Tel. & Tel. Co., 105 N. Y. S. 565, 121 App. Div. 22 (1907); Barber v. Hudson River Tel. Co., 93 N. Y. S. 993, 105 App. Div. 154 (1905); Patterson v. Chambers' Power Co., 81 Or. 328, 159 P. 568 (1916); Hammond v. Hammond, 258 Pa. 51, 101 A. 855 (1917); Haldiman v. Overton, 95 Vt. 478, 115 A. 699 (1922); Buckles-Irvine Coal Co. v. Kennedy Coal Corp., 134 Va. 1, 114 S.E. 233 (1922).

mination of the question of surcharge then becomes a simple matter.

IV. Divisibility of Easements In Gross

Assuming that easements in gross are assignable, there is the further question as to whether or not they should also be considered as divisible. That divisibility is a problem has been recognized, for in *Miller* v. *Lutheran Conference & Camp Association*[64] the court determined that the question before it was not so much one of assignability as it was one concerning divisibility. Again, in *Boatman* v. *Lasley*,[65] the court asked the pertinent question, "If it be assignable, what limit can be placed on the power of alienation? To whom and to how many may it be transferred? Why not to the public at large, and thus convert into a public way that which was intended to be a private and exclusive way only."[66] So long as the courts apply no uniform tests to assignability they will also be obliged to deal with problems of divisibility. If, however, the test above suggested, i.e. the maximum intended burden be applied, no problem should arise. Where the grant does not prohibit assignment it should be possible to assign to as many assignees as desired so long as the total rights exercised by both the assignees and the original grantee do not exceed that burden. Any surcharging of the servient estate produced by such assignments, would entitle the owner of the fee to the same remedy at law that he has in case of an excessive use by the original grantee.

The Miller case favored divisibility, but limited the right by the rule pronounced in Mountjoy's case, namely, that "the assignees make no division of it, but work together as one stock." For that reason the court concluded that the easement was capable of joint ownership but it was not divisible in the sense of allocating a separate part thereof to each assignee. The result of the Miller case is apparently incorrect, for no valid reason exists as to why it should be impossible for the assignees to make a division of the easement so long as the maximum burden is not exceeded. If the original grantee took an easement over a fifteen-foot strip of land, or obtained the right to construct three pole lines over

64 331 Pa. 241, 200 A. 646, 130 A. L. R. 1245 (1938).
65 23 Ohio St. 614 (1873).
66 23 Ohio St. 614 at 618.

the grantor's property, no added burden arises from dividing the easement by transferring the exclusive use of a five-foot strip, or the right to construct and maintain two of the three pole lines, to the assignee. As a matter of practical operation, it would be impossible for the original grantee and his assignee to work together "as one stock" save in the sense that the total sum of the rights exercised by both should not exceed the maximum intended burden.

The Supreme Court of Massachusetts was faced with just such a problem in the case of *American Telephone and Telegraph Company of Massachusetts* v. *McDonald*[68] where the grant in question gave to the grantee, its successors and assigns, "the right to erect, operate and maintain lines of telephone and telegraph" over certain lands. The original grantee later gave to the plaintiff telephone company the right to string a cable upon its fixtures, and the owner of the fee challenged the construction thereof. In deciding that such an easement could be divided the court stated:

> The defendants contend that the original grantee had no power to make over the grant to the plaintiff; that its right was limited to an exclusive use by itself, and that no right to assign a similar use to another was conveyed.
>
> We do not so construe the instrument. . .The words of a deed are ordinarily to be taken most strongly against the grantor. . .We find no facts which require us to interpret the words "exclusive" to mean that the right granted is confined to use by the grantee alone. The right is "exclusive" of the grantor, not "exclusive" in the grantee.[69]

If assignment in toto is to be permitted, questions concerning divisibility will thereby be rendered relatively insignificant, except as to the point of imposing a surcharge on the servient estate.

V. Avoiding the Rule Against Assignment

The apparently unsettled status of the easement in gross generates interest in the question as to how best the interests of public service companies may be protected. The simplest solution, from the legal standpoint, would be for the various states to enact necessary legislation making such interests transferable in whole or in part. This has already been done in five states where statutes exist that

[68] 273 Mass. 324, 173 N.E. 502 (1930).
[69] 273 Mass. 324 at 326, 173 N.E. 502 at 502-3.

apparently cover the right to transfer easements in gross.[70] But it can hardly be expected that the law-making bodies will generally exert themselves to pass laws, no matter how wise, when the chief beneficiaries thereof would be the large public service corporations. In fact, the agitation therefor might arouse antagonism as was the case of laws which took away, from certain types of public service companies, the right to claim an easement by prescription.[71]

Acting independently of the several state legislatures, it might be feasible for such companies to take easements in the form of easements appurtenant rather than as easements in gross. Such is the practice of one large Canadian company that does so by naming, as the dominant tenement, a tract of land many miles away.[72] The validity of this possibility is borne out, in this country, by the case of *Tide-Water Pipe Company* v. *Bell*[73] where the court intimated that the dominant tenement in the case of a pipe-line easement could be a pumping station located in another county. One serious objection thereto, however, would be the fact that in case of total or partial assignment of the easement it would be necessary to transfer the dominant tenement.

Another alternative might be to change the terminology of the form of grant most frequently used, which presently gives to the grantee the right to construct such plant as it may from time to time require over the described strip. If the form were changed to recite the grant to the company

70 *California:* Deering Civ. Code 1941, §1044. The statute was relied on in Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 P. 1024 (1895), but was seemingly ignored in Elliott v. McCombs, (Cal. App.) 100 P. (2d) 499 (1940). *Montana:* Rev. Code 1935, §6837. *North Dakota:* Comp. Laws 1913, §5490. *South Dakota:* Code 1939, §51.1301. *Virginia:* Code 1942, §5147, followed in City of Richmond v. Richmond Sand & Gravel Co., 123 Va. 1, 96 S.E. 204 (1918).

71 Ill. Rev. Stat. 1943, Ch. 134, §15.

72 Another possible reason for taking the right of way in the form of an easement appurtenant is to get away from the English rule, which is apparently closely followed in Canada, that the easement in gross is merely a license and not binding on a subsequent purchaser of the otherwise servient tenement: Ackroyd v. Smith, 10 C. B. 164, 138 Eng. Rep. 68 (1850). By taking an easement appurtenant, the grantee will be acquiring an interest in the land over which the lines are constructed of such a nature that the subsequent purchaser takes with notice and subordinate to the rights of the public service company.

73 280 Pa. 104, 124 A. 351, 40 A. L. R. 1516 (1924). That the dominant and servient tenements do not have to be adjacent, see Graham v. Walker, 78 Conn. 130, 61 A. 98 (1905); D. M. Goodwillie Co. v. Commonwealth Electric Co., 241 Ill. 42, 89 N.E. 272 (1909); Witt v. Jefferson, 13 Ky. L. 770, 18 S.W. 229 (1892).

of the exclusive use of a strip of land for "communication purposes" in the case of telephone and telegraph companies, or for "electric transmission purposes" in the case of electric light and power companies, the product would be the creation of a right of way similar to that taken by a railroad,[74] the assignability of which has long been established. Such grant would have the added advantage of overcoming the rule above mentioned, applied in a minority group of states, that where the easement right has once been exercised the scope of the grant has thereby been defined and the burden cannot later be increased. A taking of exclusive possession of the entire strip from the start would permit the grantee in possession to add new plant from time to time, as it may desire, without having its authority questioned. If the policy wisely adopted by the courts, in the case of railroads that acquire easements of right of way only, were carried to a logical conclusion, it would seem that similar results ought to be achieved in the case of identically-worded easements granted to public service companies.

VI. Conclusions

It is only by holding public service company easements assignable that the real intent of both parties can be realized. The property owner, invariably represented by counsel at the time of execution, is made to realize the significance and the extent of the right he is parting with; that the grantee is a company of no small means; and that the grant is intended to be perpetual in character. He accordingly demands all that the traffic will bear, and the grantee pays accordingly, taking a grant carrying words of assignability. To follow outmoded reasoning by declaring such easements in gross to be personal and unassignable, or at most to amount only to mere licenses, is unquestionably reverting to archaic principles inconsistent with the progress that has been achieved in other fields of law and fraught with serious economic consequences. Assume, for example, a public service company that has built a cross-country line over prop-

[74] A typical railroad easement reads: ". . . does grant, sell, bargain and convey unto said grantee, its successors and assigns, a right of way in and over certain tracts of land [here follows description] . . . It is understood and agreed between the grantor and the grantee herein that the grantee, its successors and assigns, shall use said right of way for railroad purposes. . . ."

erty obtained through easements of this character. Later, for economic reasons or because government regulation demands it to prevent monoply, it becomes necessary to sell its entire plant to another company. The seller may be confronted with the problem of trying to dispose of a line worth millions without being able to secure a single offer merely because its line crosses one state which denies the right of eminent domain and refuses to recognize the assignability of easements in gross. Property owners of such a state, cognizant of the facts, might ask such exorbitant prices for granting new rights of way to the prospective purchaser as to make it unwise to consider the purchase. A nation, relying upon such means of communication, power, or oil transportation, could well be rendered helpless because of a few words carelessly spoken centuries ago!

Realization of that danger may have prompted a Federal court, in a comparatively recent case, to settle the question whether perpetual easements acquired by condemnation ceased because of the conveyance thereof and the subsequent dissolution of the condemnor. Reviewing the argument that the condemnor obtained only a personal right of use during its life or ownership of the property so taken, the court said:

> If any part of the right of way of a railroad company, telephone company, or electric power and light or a water company be acquired by condemnation the enterprise would become disrupted by the mere transfer of the property at public or private sale, or by the failure of the company or by the expiration of the charter. . .The service to the public which justified the condemnation would thus be made limited and precarious. The life expectancy of the person, and the term of charter of a corporation would become factors in valuing what is taken. No such thing has ever been supposed to be the law. . .When a corporation fails, its easements by condemnation are assets for creditors, the court may sell them with the other property and the business may go on serving the public.[75]

Further criticism may be directed to courts that, while reasonably protecting public service corporations through holding their rights of way to be assignable, have given reasons lacking in logic. While a profit *a prendre* may also include an easement, yet a right of way, in the ordinary sense of the term, cannot, by the wildest stretch of imagina-

[75] Florida Blue Ridge Corp. v. Tennessee Electric P. Co., 106 F. (2d) 913 at 916 (1939).

tion, be construed to be a profit. So, too, while the correct result may have been obtained through holding easements assignable in cases where the grantee has taken partial possession of the premises, that line of reasoning has its shortcomings for it supposes that if no possession is taken the easement is, therefore, necessarily non-assignable. Yet, in order to reach the point where its plant is located, the public service company may frequently take a secondary easement of way only either from the same property owner or from an abutting owner. That right of ingress and egress may be as important to the company as its primary easement, but under such reasoning even though the company is able to assign its primary easement, it could not transfer the equally important secondary one. Also left open to doubt is the question whether the company, which took a grant giving the right to construct lines, could assign such right before a line was installed and possession taken.

These are baffling questions generated by existing decisions. They may be quickly answered if easements in gross granted to public service companies be considered to be fully and freely assignable.