Volume 40
Issue 1 *Dickinson Law Review - Volume 40, 1935-1936*

10-1-1935

Assignability of Easements in Gross in Pennsylvania

Kennard Lewis

of the husband does not abrogate separation agreements unless there is an express provision to that effect.

6. Finally and most important, the termination of such agreements is a question *not* of automatic revocation but of the *intention* of the parties as gathered from the deed of separation as a whole and other circumstances.

John D. Glase

ASSIGNABILITY OF EASEMENTS IN GROSS IN PENNSYLVANIA

I

INTRODUCTION

The common theory in regard to easements in gross is that they are mere personal interests in the land of another; that they are personal to the grantee because not appurtenant to other premises; and that because of their personal character are not assignable or inheritable, *nor can they be made so by any terms of the grant.*[1] The last clause, "nor can they be made so by any terms of the grant" is alleged by Professor Simes[2] to have been a personal contribution of Professor Washburne to the law of easements in gross. The latter assumes, however, to rely on a statement of Sir William Blackstone as his authority.[3] In discussing ways as incorporeal hereditaments, the commentator said: "This may be grounded on a special privilege; as where the owner of 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 particular, and confined to the grantee alone; it dies with the person; and if the grantee

---

[1]Boatman v. Lasley (leading case) 23 Ohio State 614, (1873); 9 Ruling Case Law 739; 19 Corpus Juris 867; Louisville & N.R.R. Co. v. Koelle, 104 Ill. 455, (1882); Washburne on Easements, 4th ed., 11, 45; Tinicum Fishing Co. v. Carter, 61 Pa. 38, (1869); Lindenmuth v. Safe Harbor W.P. Corp., 309 Pa. 58, (1932); Weekly v. Wildman, 1 Ld. Raym. 405 at p. 407, (1698); 14 L.R.A. 333, (excellent note on assignability of easements in gross); Stockdale v. Yerden, 220 Mich. 444, 448, 190 N.W. 225, 226, (1922) quoting 9 R.C.L. 739. Cf. also Thomas v. Brooks, 188 Ky. 253, 221 S.W. 542, (1920); 30 Yale Law Journal 94; Atlantic Mills v. N.Y.C. Railroad, 221 App. Div. 386, 223 N.Y. Supp. 206 (3rd Dept.), (1927); Waller v. Kildebrecht, 295 Ill. 116, 122, 128 N. E. 807, 809 (1920); Tide Water Pipe Co. v. Bell, 280 Pa. 104, 124 Atl. 351, 40 A.L.R. 1516 (1924); Cadwalader v. Bailey, 17 R. I. 495, 23 Atl. 20, (1891).

[2]Simes, "The Assignability of Easements in Gross in American Law," 22 Mich. L.R. at 536, (1924).

[3]Blackstone's Com., Bk. II, 35.

leaves the country, he can not assign over his right to any other, nor can he justify taking another person in his company."

Sir William Blackstone, however, was not discussing a grant to "Grantee, *his heirs and assigns,*" but rather a grant to "Grantee, *alone.*" Such a grant unquestionably should be, and is, personal to the grantee, and is not assignable or inheritable. It is, therefore, an injustice to Blackstone, and a distortion of the true facts for Professor Washburne to have considered Blackstone's statement as authority for the broader rule. The Ohio court, nevertheless, in a leading case,[4] citing Blackstone and Washburne, decided that an easement in gross could *not* be made assignable by *express terms of the grant.*

An easement consists of two parts, one called the benefit, the other the burden. The burden is attached to the servient tenement, and is well named, since that tenement must suffer the burden of allowing the owner of the benefit to do certain things on the land. The benefit, on the other hand, is that interest enjoyed by the owner of the dominant tenement in the case of easements appurtenant, and by the owner of the benefit without a dominant tenement in case of easements in gross. The decisions are in accord that the burden usually passes with the servient land. It is in regard to assignability of the benefit that disagreement arises. The assignability of the benefit is all that is considered in this note.

If the arbitrary rule of nonassignability of the benefit did not, at times, bring about such unjust results, amounting to confiscation of whatever assets a decedent may have invested in easements in gross during his lifetime, and which, when made, were intended to be assignable and inheritable, one could accept it without protest. Since, however, it frequently results in injustice when heirs and assigns are excluded by the court, though included in the terms of the grant, then the rule arouses warranted disapproval. Such disapproval is strengthened when it appears that the rule probably originated in misinterpretation and misunderstanding.

So firmly has the rule against assignability become entrenched in the common law through dicta and decisions[5] that it would be difficult to persuade many a court to the contrary. The doctrine of nonassignability, however, has been repudiated in some jurisdictions[6] and criticised adversely by

---

[4]Boatman v. Lasley, 23 Ohio St. 614, (1873).

[5]See footnote 1.

[6]Poul v. Mockley, 33 Wis. 482, (1873) where the court said: "We cannot see any substantial reason for holding that an easement in gross cannot be assigned or transferred, especially when the language of the grant shows unmistakably that the intention was that it should be enjoyed by the grantee, 'his heirs and assigns.' "

Cross v. Berlin Mills Co., 79 N.H. 116, 105 Atl. 411, (1918) where the court said: "The plaintiff's position, that the deed to Coe and Pingree conveyed to them

writers.[7] There are, nevertheless, writers who support and justify the rule of nonassignability.[8] Numerically, more jurisdictions hold to nonassignability while more writers argue for assignability. The present writer suggests that like every *status quo,* the rule has found men to justify it. The reasons given in justification, such as the clog on title and surcharge arguments, perhaps evolved after the rule was promulgated in order to preserve it, and probably were not, as is often alleged, the cause for the development of the rule *ab initio.*

II

ARGUMENTS FOR AND AGAINST ASSIGNABILITY OF EASEMENTS IN GROSS

A. CLOG ON TITLE

The most cogent argument against assignability of easements in gross is that such an easement is a clog on title, that it prevents the free sale of the land, that it creates an encumbrance on the fee far out of proportion in value to the worth of the interest, and is, therefore, a restraint on alienation that should be limited, at most, to the life of the grantee of the benefit. Professor Clark[9] calls such easements "most unfortunate encumbrances on title". He fears such gross rights will be forgotten by their owners after a period of years has elapsed, and then be remembered at some future date, just in time to block an advantageous sale of the servient estate. He suggests that heirs and assigns will become numerous and scattered, so that formal releases will be difficult to secure. He considers a bill in

---

merely an easement in gross to maintain a boom or booms in the river opposite his land for the purpose of floating logs, and consequently that it was not assignable cannot be sustained. As the right was expressly granted to them, 'their heirs and assigns forever' and as it was not otherwise limited or modified by other language in the deed, no argument is required in support of the proposition that the parties to the deed understood it conveyed an inheritable and assignable right. The grantor's intention thus clearly shown must be given effect . . . . unless there is some rule of law or some principle of public policy that renders it unenforcible . . . . The absence of a dominant estate in the grantee would seem to afford little reason why the grantor's capacity to convey an easement should be limited to an unassignable right."

Goodrich v. Burbank, 12 Allen (Mass.) 459, (1866) where the right to take water from a spring through an aqueduct was held assignable, though not appurtenant.

Tide Water Pipe Co. v. Bell, 280 Pa. 104, (1924) where the right to lay a pipe line was held to be assignable though apparently not appurtenant.

Shreve v. Mathis, 63 N.J. Eq. 170, 52 Atl. 234, (1902); Standard Oil Co. v. Buchi, 72 N.J. Eq. 492, 66 Atl. 427, (1907); and see Comment (1923) 32 Yale L.J. 813, 816, n. 28.

equity to quiet title too great a burden to place on the owner of the servient land. Professor Clark and others sharing his view are right in maintaining that an easement in gross may become a clog on title. The dispute arises over whether or not such easements are not worth running this *occasional* risk.

In the first place Professor Clark is assuming the unusual situation to illustrate his point. In most instances heirs or assigns could be found and releases obtained if necessary. The heirs or assigns, moreover, would be anxious to sell or use their interest rather than to forget and abandon it.

Easements appurtenant,[10] indeed, and profits a prendre both appurtenant and in gross[11] are assignable and inheritable. Since these similar rights are alienable, it would seem reasonable that easements in gross should be alienable also. In the assignable types of easements and profits just mentioned, clogs on title have not proved unduly burdensome, and non-assignability has not been resorted to as a remedy.

Another type of clog on title which is increasingly common today is building restrictions in deeds and zoning ordinances. These encumbrances, more limiting on the owners of the restricted land than most easements, are not considered too great clogs on title to be allowed.

The recording systems, moreover, in use today for the recording of deeds and encumbrances on title give notice to prospective purchasers, and assist owners of easement rights in keeping exact records of them and their terms.

The modern tendency of the law, moreover, in regard to interests in land is to make more interests therein freely alienable. This is a commercial age, whereas in the time of Blackstone and earlier, the English law existed for the protection and benefit of a landed feudal aristocracy. At that time it was necessary to keep large tracts of land intact and unencumbered to facilitate rendering feudal services. The rule of primogeni-

---

[7]Simes, "The Assignability of Easements in Gross in American Law," 22 Mich. L.R. 521; Vance, "The Assignability of Easements in Gross," 32 Yale L.J. 813; Note writer, 17 Iowa L.R. 235; 2 Tiffany on Real Property, 2d ed. 1227, where Mr. Tiffany says: "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. The courts could effectively protect the owner of the servient tenement against an assignment to such a number of persons as unduly to increase the burden thereon, and the heirs might well be regarded as holding in that form of cotenancy which exists in the case of the descent of land itself.

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

[9]Clark, p. 144.

[10]19 C. J. 935.

[11]2 Tiffany on Real Property 1224; Washburne on Easements, 4th ed., 45; Jones on Easements, sec. 33; 14 Cyc. 1144; 19 C.J. 870.

ture in inheritance law was designed to accomplish this purpose. Now, indeed, as the rule of primogeniture no longer exists in Pennsylvania, so, likewise, the fee has been allowed to become more encumbered. The present tendency is to make many more interests in land alienable than the mere right of possession of the soil. To illustrate, consider the sale of a nonpossessory interest in land, an easement, apart from either dominant or servient estate. The Pennsylvania Supreme Court recently decided a case allowing the sale, apart from the dominant estate, of the right to withdraw subjacent support from surface land.[12] The gross right sold in this case has been called colloquially the "third estate". Thus the law is allowing to a greater extent than ever before the sale of interests in land, gross rights which are of comparatively limited value unless assignable and inheritable. The clog on title argument, therefore, pictures a difficulty which may arise only occasionally in unusual cases, and an argument which was born in, and should have died with, the feudal Middle Ages, and an objection which is overbalanced by the utility of alienability of easements in gross.

B. SURCHARGING THE SERVIENT ESTATE

The other major argument against assignability of easements in gross is that of surcharging the servient tenement. By surcharge, in this instance, is meant excessive user by the owners of the gross right. The danger threatened under this argument is that where an easement in gross has been granted to "X, his heirs and assigns," in time the heirs and assigns will become so numerous that, whereas formerly only X used the easement, now hundreds of heirs or assigns will enjoy it. The Ohio court in the leading case of *Boatman v. Lasley*[13] has stated strongly the practical difficulty which gives rise to this fear of surcharge. The court said there: "If such a right be an inheritable estate, how will the heirs take? In severalty, in joint tenancy, coparcenary, or as tenants in common? 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?"

The author of a leading article an assignability of easements in gross[14] has answered clearly this argument of surcharge. He replies to the Ohio

---

[12]Penman v. Jones, 256 Pa. 416, 100 Atl. 1043, (1917).

[13]23 Ohio St. 614, (1873).

[14]Simes, "The Assignability of Easements in Gross in American Law," 22 Mich. L. R. 527.

court by saying that the court is not distinguishing clearly between a grantee's power to take title to an easement in gross and his ability to enjoy it under the terms of the easement; that ten thousand people may acquire jointly title to a one room house, yet could not enjoy their property at the same time; that there are other means, viz., an action for damages or an injunction in a proper case, of preventing surcharge than denying title to the grantee.

The opponents of assignability have pictured the spectre of surcharge in its most terrorizing form. It can not be too strongly emphasized that surcharge, like clog on title, will arise but seldom, and will not be the usual occurrence. For the reason that difficulty may occasionally arise in the use of the easement, alienation should not be forbidden entirely. Profits a prendre in gross are not for that reason inalienable. Surcharge is prevented in regard to profits a prendre in gross by the rule that new owners must exercise such profit only together as "one stock".[15] It would seem, therefore, that rather than deny title to heirs and assigns, the law should require them to enjoy their gross right as "one stock", in common, and not in severalty, or otherwise limit the use which assigns may make of the easement.

Another point which exponents of nonassignability invariably overlook is that the owner of the servient land can *always* protect himself when he creates the easement in the first instance by granting it to "Grantee, *alone*". It is entirely optional with a grantor whether he shall include heirs and assigns or not. When the grantor can by his own contract carry out his own wish, why should the law protect him further? For it to do so is carrying the paternalism of the law too far. "Surely," as Professor Simes has said, [16] "the prevention of surcharge is for the protection of the owner of the servient estate and no one else. If he is willing to have the easement pass to heirs and assigns and so declares. why should the law prevent him?"

The problem of surcharge is, moreover, more theoretical than real. "It does not seem to me, however," says one of the supporters of nonassignability,[17] "that this issue (surcharge) is emphasized in the decisions. The only reference looking in this direction I have discovered is one in *Boatman v. Lasley,* 23 *Ohio State at* 618, which I read as being more directed to the difficulties as to the title than any question of excessive user." Professor Clark bases his objection to the assignability of easements in gross on the possible clog on title difficulty, and disparages the notion that

---

[15]Mountjoy's Case (leading case) Co. Lit. 164 b., (1589).
[16]Simes, p. 526.
[17]Clark, p. 145.

surcharge is important. He very aptly remarks[18] that rarely will it matter whether a way is used three times a day or six if it must be kept open, or whether water is drawn through a pipe continuously or only on alternate days, if the pipe must be allowed to remain where it is. It is the feeling of that writer, though he does not favor assignability, that surcharge of the servient estate is not a momentous objection to assignability. Mr. Simes, on the other hand, who favors assignability,[19] considers the problem of surcharge his only great obstacle to surmount. That Mr. Simes has surmounted it is admitted by his opponent Mr. Clark,[20] where he says: "The objection (of surcharge) he (Mr. Simes) successfully answers." It would seem, therefore, that with surcharge successfully answered by as competent a teacher of property law as Professor Simes, and with Professor Clark not considering it a controlling argument anyway, that it would be safe to say that fear of surcharge should not stand in the way of allowing persons to make easements in gross assignable when they desire to do so.

C. VALUELESS AND UNIMPORTANT

Another objection to assignability is that easements in gross are usually of small value.[21] The argument implies that such easements are of so little value and importance that it is immaterial whether the heirs and assigns ever get them or not. Fortunately, however, not all persons concur with this view. One writer says:[22] "The infrequency of totally valueless easements in gross also detracts from the argument against their assignability. A right which yields no substantial gain is not likely to be the frequent subject of a bargain. At best, such a right would make a poor gift and need rarely be feared as an outstanding encumbrance on the land." To illustrate that easements in gross may be of great value a recent case is apropos.[23] In this case certain summer resort boating, fishing and bathing rights in gross, worth many thousands of dollars were considered sufficiently valuable and important to be the subject of protracted litigation. At best, the argument that the easement is of little value is weak, and indicates a tendency to disparage, rather than to evaluate properly, such rights. The law, moreover, on principle should not deny protection to a legal right merely because it is of less value than some

---

[18]Clark, p. 146.
[19]Simes, p. 525.
[20]Clark, p. 145.
[21]Clark, p. 144.
[22]Note, 17 Iowa L.R. 238.
[23]Miller v. Miller, 118 Pa. Superior, (1935).

other right. If that were the practice only expensive rights would be protected by the courts.

EXPRESSED INTENTION OF BOTH GRANTOR AND GRANTEE IN THE DEED

The strongest argument in favor of assignability of easements in gross is that both grantor and grantee intended that the easement should be assignable and inheritable. By the use of appropriate words, "heirs and assigns," the parties to the original grant creating the easement in gross have shown that they desired the easement to extend beyond the first grantee. One purpose of the law is to hold men to their agreements, and in the absence of a strong public policy or some rule of law forbidding it, contracts should be enforced as written. The arguments setting forth clog on title and surcharge as reasons of policy against assignability have been discussed. No other objections have been made in the name of policy. It is hard to think of a stronger argument in favor of assignability than that the terms of the contract, grant or deed command that the right be assignable and inheritable.

E. EASEMENTS IN GROSS ARE PROPERTY RIGHTS

In England no easements in gross are recognized by that name. Lord Cairns has said:[24] "There can be no such thing according to our law ... as what I may term an easement in gross. An easement must be connected with a dominant tenement." It is contended, however, that the English do recognize some easements in gross, but refuse to call them by that name.[25]

In the United States, however, courts generally do recognize easements in gross as property rights.[26] The Pennsylvania Supreme Court recognizes that easements in gross may be acquired by prescription.[27] Justice Sharswood in the *Tinicum* case [28] comments that there is a difference in the amount of evidence required to establish by prescription an easement in gross and one appurtenant. It seems as though he considered the gross right a property right, for personal licenses are not acquired by prescription. In another Pennsylvania case[29] the court said: "There

---

[24]Rangeley v. Midland Rail Co. L.R. 3 Ch. 311, (1808).

[25]2 Tiffany on Real Property, 2d. ed., 1224.

[26]2 Tiffany on Real Property, 2d ed., 1224; Washburne on Easements, 4th ed., 45; Jones on Easements, sec. 23.

[27]Tinicum Fishing Co. v. Carter, 61 Pa. at 40, (1869).

[28]61 Pa. at 40.

[29]Riefler & Sones v. Wayne S. W. P. Co., 232 Pa. 282, 81 Atl. 300, (1911).

is a class of rights which one may have in the land of another, without their being exercised in connection with other land, and which are known as easements in gross." No American case holds that easements in gross are *not* rights *in rem*.[30] If easements in gross may be acquired by prescription, and are generally considered as property rights, it follows that they should be alienable, since the modern trend in the law is to regard interests in property as alienable in the absence of strong reasons to the contrary. [31] As has been observed,[32] a number of cases, basing their decision on the assumption that such easements are property rights, have considered easements in gross as assignable.

F. SIMILAR INTERESTS ARE ASSIGNABLE

As has been stated, the similar interests of profit a prendre in gross,[33] and the somewhat similar interests of both profits[34] and easements[35] appurtenant are both assignable and inheritable. There does not seem to be much difference, except in degree, between an easement and a profit in gross. Of the two, the profit is more of a burden on the servient land, and as an encumbrance on the fee, should be considered the less desirable on grounds of public policy. Strangely, however, the profit a prendre in gross is not considered a very undesirable encumbrance, whereas the easement in most jurisdictions is held to be too great an encumbrance on the servient land to be pemitted for more than the lifetime of the grantee. Such is the inconsistency of the law!

III

THE PENNSYLVANIA CASES FROM *TINICUM FISHING COMPANY v. CARTER* to *LINDENMUTH v. SAFE HARBOR WATER POWER CORPORATION*

The earliest Pennsylvania authority usually cited for nonassignability of easements in gross is the case of *Tinicum Fishing Company v. Carter*.[36] In that case[37] Justice Sharswood *obiter dictum* declares that a fishing right

---

[30]Simes, p. 530.
[31]Gray, Restraints on Alienation, 2d ed., p. 2; 3 Tiffany on Real Property, 2d ed., sec. 586.
[32]Footnote 6.
[33]Footnote 11.
[34]Footnote 11.
[35]Footnote 10.
[36]61 Pa. 21, (1869).
[37]At page 38.

in gross may be created. He then considers what the nature of such a right would be. In his speculations, which appear in the opinion, he entertains quotations from Chancellor Kent[38] and Professor Washburne[39] to the effect that easements in gross are unassignable and can not be made either assignable or inheritable by any terms of the grant. The learned justice, however, was not obliged to decide the question of assignability of easements in gross in that case, and wisely refrained from committing himself thereon. He merely cites several authorities and offers their opinions for whatever they may be worth.

The *Tinicum* case, moreover, is treated as involving a profit a prendre and not an easement in gross.[40] It is also peculiar in that it involves the acquisition of the prescriptive right in the navigable Delaware River, the bed of which belongs to the United States, and to which different rules apply in regard to acquiring rights by prescription than in the Commonwealth of Pennsylvania on privately owned soil.[41] It is evident, therefore, that the *Tinicum* case is not decisive on the problem of the assignability of easements in gross.

There have been two Pennsylvania cases which quote the nonassignability dicta of the *Tinicum* case with approval, *Commonwealth v. Zimmerman*,[42] and *Lindenmuth v. Safe Harbor Water Power Corporation*.[43] The *Zimmerman* case, however, involves a grant to a grantee alone, and not to heirs and assigns also. It is, therefore, of little aid in solving the problem of grants including heirs and assigns. There is, however, in that case a very noteworthy statement in this regard. The court says:[44] "The clause in the said deed contains no words creating an estate of inheritance, the words 'heirs and assigns,' or their equivalent not appearing in the clause." It is apparent that when composing that sentence, Judge Koch of the Superior Court felt that *if* the words "heirs and assigns" had been used, an inheritable estate would have been created.

In the recent *Lindenmuth* case Justice Maxey quotes at length from Justice Sharswood's opinion in the *Tinicum* case to the effect that easements in gross are unassignable. The dictum is extensive and rather positive. The Justice, however, recognizes that the view favoring assignability exists,[45] and leaves the question open. He says:[46] "While

---

[38] 3 Kent Com. 420.
[39] Washburne on Easements, p. 8.
[40] 61 Pa. at 39.
[41] 61 Pa. at 36.
[42] 56 Pa. Superior Court 513, (1913).
[43] 309 Pa. 58, 163 Atl. 159, 89 A.L.R. 1180, (1932).
[44] 56 Pa. Superior at 315.
[45] 309 Pa. at 63.
[46] 309 Pa. at 64.

the precise question of the assignability of such easements (in gross) has never been definitely raised in the pleadings of any case reaching the appellate courts of Pennsylvania, there is very weighty Pennsylvania judicial dictum against the assignability of easements in gross." Later in the opinion Justice Maxey declares: "However, in the Tinicum Fishing Co. case the subject of controversy was not an easement in gross, but a profit a prendre." In the next paragraph he continues, "The decision of the case now before us does not turn on the question of the assignability of easements in gross, for the easement. . .was. . .appurtenant." The *Lindenmuth* case, therefore, of necessity leaves the question of assignability of easements in gross uncertain, but unfortunately ignores the earlier case of *Tide Water Pipe Company v. Bell,*[47] in which an easement, apparently in gross but not called such, was held to be assignable by Justice Simpson.

In the *Tide Water* case the grantors conveyed to one Warren, *"his heirs and assigns,"* a right of way upon and through their land for the purpose of constructing from time to time one or more pipe lines. Warren apparently had no dominant estate to which this right could be appurtenant, nor does it appear that the grantors intended that it should be appurtenant. Later Warren assigned his interest to the Tide Water Pipe Company, which constructed several pipe lines. Subsequently one Bell, defendant, disputed the right of Warren to make the assignment to the Tide Water Company. Justice Simpson says:[48] "Defendant contends that the right of way is an easement in gross, which is not assignable, and hence Warren's attempt to transfer it to plaintiff was of no validity. With this both the majority and minority below disagree, 'because the words of its creation made it both assignable and inheritable, and thus extended its life beyond the grantee' . . . It may be said that, in this State, *WHERE A CONFLICT EXISTS BETWEEN A NAME ATTEMPTED TO BE APPLIED TO A PARTICULAR CONTRACT, AND THE LANGUAGE OF THE CONTRACT ITSELF, WE REJECT THE NAME AS INAPPLICABLE AND DO NOT ELIMINATE WORDS FROM THE CONTRACT.*[49] In the present instance the grant was to 'B. F. Warren, his heirs and assigns,' and must be interpreted to mean just what it says."

While the Supreme Court does not definitely say that the right involved is an easement in gross, the language *in re* assignability is broad enough to include easements in gross as well as those appurtenant. As a matter of fact the court purposely avoids calling the right by any very definite name.[50] The word "servitude",[51] however, is used in several places to mean "ease-

[47]280 Pa. 104, 124 Atl. 351, 40 A.L.R. 1516, (1924).
[48]280 Pa. at 112.
[49]Italics and capitals added.
[50]280 Pa. at 112, 113, 114.

ment in gross". The court apparently prefers to reserve the name "easement in gross" to apply, as a legal conclusion, to an unassignable right. The result of such a play on words is that when the parties desire an unassignable right the court will call it an easement in gross, but when the parties have shown by the use of appropriate words that they want an assignable and inheritable right, the court will call it a "servitude" or perhaps not name the right at all, but, nevertheless, allow assignability and protect the right. It is apparent in the *Tide Water* case, moreover, that it is immaterial in the mind of Justice Simpson whether the right be in gross or appurtenant, that he would have allowed assignability regardless, and that he distinctly refrained from calling the right an easement in gross. The inevitable conclusion which must be drawn is that there are, in this Commonwealth, rights which are easements in gross in all but name, and which are both assignable and inheritable.

Even in the *Lindenmuth* case, in which Justice Maxey quotes copiously from the *Tinicum* dicta, Justice Simpson, in a concurring opinion in which Justices Schaffer and Linn concur, bases his decision on a much broader ground than does Justice Maxey. Justice Simpson says:[52] "Alleging, as its only answer on this point, that the... agreement provides for an easement in gross does not aid plaintiff, since the agreement, no matter by what technical name it is called, in unmistakable language excludes all idea of this hoped for recovery of damages: Tide Water Pipe Co. v. Bell, 280 Pa. 104, 112." It seems clear that what the learned Justice meant here was that since the words "heirs and assigns" appear in the deed, the easement, though plaintiff should prove it to be in gross, still would be assignable.

It is unfortunate that in the *Tide Water* case Justice Simpson did not have the courage or the desire to say what he apparently assumed, that the easement was in gross, and thus make his decision incontrovertible. His meaning, nevertheless, is unmistakable, that the words in the contract govern rather than the name applied to such a contract, that the terms of the grant or deed determine assignability, and not the questionable and disputed attributes of what is known commonly as an easement in gross. When the precise issue of assignability of these gross rights comes to the attention of the Supreme Court again, it is hoped that that court will follow the profoundly sensible and liberal lead of Justice Simpson in the *Tide Water* decision, rather than the parenthetical dicta of the more recent *Lindenmuth* case.

Kennard Lewis

---

[51] 280 Pa. at 113, 114 esp.
[52] 309 Pa. at 71.