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Real Property - Easements - Right to Take Water From a Pond as Absolute, Exclusive Profit in Gross

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REAL PROPERTY—EASEMENTS—RIGHT TO TAKE WATER FROM A POND AS ABSOLUTE, EXCLUSIVE PROFIT IN GROSS—One Divine owned a small natural lake and a mill nearby. He dammed the lake, and ran a pipe from it to his mill. At times he sold water after it left the mill to defendant's assignor, who owned a hotel near the mill. In 1919 Divine sold the lake to plaintiff's assignor, reserving to himself the right to dam the lake and draw off water from it, so long as the level stayed between high and low water marks. Then Divine sold the mill lot to defendant's assignor, who closed it down, but continued to take water through the pipe for his hotel. Plaintiff brought suit for a declaratory judgment, an injunction, and damages, claiming that defendant had no right to draw water, except for use at his mill. The trial court granted plaintiff an injunction, but the appellate division reversed, holding that defendant could use the water for any purpose for which it was being used in 1919. On plaintiff's appeal, *held*, affirmed. The right which passed to defendant is a profit *a prendre*, an absolute and exclusive right in defendant to draw water at any place and for any purpose within the limits stated in the deed. *Loch Sheldrake Associates v. Evans*, (N.Y. 1954) 118 N.E. (2d) 444.

The case presents four distinct questions for analysis: (1) whether the right to take water from an enclosed lake is an easement or a profit; (2) whether the right is assignable; (3) whether on the facts here, the right is appurtenant to the mill lot or in gross; and (4) whether the right is exclusive in the grantor and his assigns, or in common with the owner of the lake. On the first point,

there is strong minority support for the court's position that the right which passed to defendant was a profit.¹ The opposite view,² supported by dicta in some New York cases,³ is based on the conclusion that there can be no possession,⁴ and therefore no ownership, of water in streams and lakes. The right to take water is thus no more than an easement of way to get to the water. It can be argued that, at least in an enclosed lake, water can be brought into possession.⁵ Further, the analogy between the right to take water and such recognized species of profits *a prendre* as the right to cut ice,⁶ or to hunt or fish,⁷ is very strong. The fact that a profit, though held in gross,⁸ is more readily

¹ *Clement v. Rutland Country Club*, 94 Vt. 63, 108 A. 843 (1920); *Columbia Water-Power Co. v. Columbia Electric Street R., Light & Power Co.*, 43 S.C. 154, 20 S.E. 1002 (1894); CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND,"* 2d ed., 86, 87 (1947). Some of the decisions can be traced to a belief that easements could not be held in gross; therefore the interest at issue must be a profit. *Columbia Water-Power Co. v. Columbia Electric Street R., Light & Power Co.*, this note *supra*. See *Pierce v. Keator*, 70 N.Y. 419 at 422 (1877). At one time there was little distinction between an easement and a profit. See *Post v. Pearsall*, 22 Wend. (N.Y.) 425 at 432 (1839); *Nellis v. Munson*, 108 N.Y. 453 at 459, 15 N.E. 739 (1888); WASHBURN, *EASEMENTS AND SERVITUDES*, 4th ed., 8 (1885). Cf. 5 *PROPERTY RESTATEMENT* §450, special note (1944).

² *Race v. Ward*, 4 El. & Bl. 702, 119 Eng. Rep. 259 (1855); *Manning v. Wasdale*, 5 Ad. & El. 758, 111 Eng. Rep. 1353 (1836); *Goodrich v. Burbank*, 12 Allen (94 Mass.) 459 (1866); 3 TIFFANY, *REAL PROPERTY*, 3d ed., §841, and see §765 (spring water) (1939); 28 C.J.S., *Easements* §3, p. 632 (1941).

³ *Post v. Pearsall*, note 1 *supra*, at 433; *Huntington v. Asher*, 96 N. Y. 604 at 609, 48 Am. Rep. 652 (1884). The case of *Saratoga State Waters Corp. v. Pratt*, 227 N.Y. 429, 125 N.E. 834 (1920), has been cited as contra [CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND,"* 2d ed., 86, note 64 (1947); 29 YALE L.J. 696 (1920)]. However, since the court expressly declined to rule on the question, it is believed not to be authority for either view.

⁴ That "rights" in water in an enclosed lake are based on possession, see Bennett, "Concurrent Legal Interests in Water Supplies," 22 So. CAL. L. REV. 349 (1949). The article seeks to apply to the area of water rights the ideas formulated in HOHFELD, *SOME FUNDAMENTAL LEGAL CONCEPTIONS* (1923). See also Hohfeld, "Faulty Analysis in Easement and License Cases," 27 YALE L.J. 66 (1917).

⁵ Bennett, "Concurrent Legal Interests in Water Supplies," 22 So. CAL. L. REV. 349 at 355, 356 (1949). The common law rule, note 2 *supra*, contained a well-recognized exception where water was trapped in a cistern or reservoir. *Embrey v. Owen*, 6 Exch. 353 at 369, 155 Eng. Rep. 579 at 585 (1851); 2 BLACKST., *COMM.*, Jones ed., 14 (1915). See Wiel, "Running Water," 22 HARV. L. REV. 190 at 202 (1909). It could then become the subject of property, and would be regarded as personal property. *Wallace v. Winfield*, 98 Kan. 651, 159 P. 11 (1916); *Syracuse v. Stacey*, 169 N.Y. 231 at 245, 62 N.E. 354 (1901). See 3 TIFFANY, *REAL PROPERTY*, 3d ed., §§721, 841 (1939). In *Saratoga State Waters Corp. v. Pratt*, note 3 *supra*, at 444, the right to take water from cisterns or wells was assumed to be a profit.

⁶ *Huntington v. Asher*, note 3 *supra*; *Mitchell v. D'Olier*, 68 N.J.L. 375, 53 A. 467 (1902).

⁷ *Allright v. Cortright*, 64 N.J.L. 330, 45 A. 634 (1900); *Minnesota Valley Gun Club v. Northline Corp.*, 207 Minn. 126, 290 N.W. 222 (1940); *Winslow v. Fleischner*, 110 Ore. 554, 223 P. 922 (1924). See Hahner, "An Analysis of Profits *a Prendre*," 25 ORG. L. REV. 217 at 220 (1946).

⁸ Profits in gross are, of course, assignable, 28 C.J.S., *Easements* §3, p. 632 (1941), and profits appurtenant pass with the land, 28 C.J.S., *Easements* §3, p. 633 (1941); CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND,"* 2d ed., 65 (1947).

assignable than an easement has been suggested as another reason for considering the right to take water as a profit.⁹ By its holding, the court in the principal case managed to avoid very neatly the troublesome question whether easements in gross are assignable in New York. There are no square holdings on this point, and dicta is conflicting.¹⁰ The writers on the subject seem generally to favor assignability.¹¹

The New York court declined to consider evidence that the water right at issue was appurtenant to a mill lot, because it felt that the granting deed, silent about a dominant tenement, was free from ambiguity, and must be interpreted in a vacuum. While such a conclusion is always somewhat subjective, and can be criticized as a poor way to arrive at grantor's intent¹²—the goal of the process of interpretation of any deed¹³—this version of the "plain meaning" rule seems firmly entrenched in New York.¹⁴ On the other hand, it is well established in New York that an easement in gross will not be presumed where it can fairly be construed to be appurtenant to land.¹⁵ Silence as to a dominant estate is not much of an indication of intent one way or the other. A better indicator would seem to be an analysis of the physical use and enjoyment of the profit as granted.¹⁶ Be that as it may, however, the more important point is that nothing in the nature of a profit in gross requires (as the court would seem

⁹ CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND,"* 2d ed., 87 (1947).

¹⁰ That they are assignable, see *City of New York v. Law*, 125 N.Y. 380, 26 N.E. 471 (1891); *Antonopulos v. Postal Telegraph Cable Co.*, 261 App. Div. 564, 26 N.Y.S. (2d) 403 (1941). That they are not assignable, see *Saratoga State Waters Corp. v. Pratt*, note 3 *supra*; *Atlantic Mills of Rhode Island v. New York Central R. Co.*, 221 App. Div. 386, 223 N.Y.S. 206 (1927), *affd.* 248 N.Y. 535, 162 N.E. 514 (1928); *Mathews Slate Co. of New York v. Advance Industrial Supply Co.*, 185 App. Div. 74, 172 N.Y.S. 830 (1918); *Weigold v. Bates*, 144 Misc. 395, 258 N.Y.S. 695 (1932); *Post v. Pearsall*, note 3 *supra*.

¹¹ 29 YALE L.J. 218 (1919); 32 YALE L.J. 813 (1923); Simes, "The Assignability of Easements in Gross in American Law," 22 MICH. L. REV. 521 (1924); 17 IOWA L. REV. 235 (1932); Kloek, "Assignability and Divisibility of Easements in Gross," 22 CHI-KENT L. REV. 239 (1944); Welsh, "The Assignability of Easements in Gross," 12 UNIV. CHI. L. REV. 276 (1945); CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND,"* 2d ed., c. 3 (1947). See cases collected in 130 A.L.R. 1253 (1941).

¹² See Powell, "Construction of Written Instruments," 14 IND. L.J. 199, 309, 397 (1939), 25 A.B.A.J. 185 (1939); 3 PROPERTY RESTATEMENT §242 (1940). But *cf.*, *id.*, §241, comment *a*; Sither, "Statutory Interpretation and the Plain Meaning Rule," 37 KY. L.J. 66 (1948).

¹³ 3 PROPERTY RESTATEMENT §241, comment *c* (1940).

¹⁴ *Wilson v. Ford*, 209 N.Y. 186, 102 N.E. 614 (1913); *Uihlein v. Matthews*, 172 N.Y. 154, 64 N.E. 792 (1902); *French v. Carhart*, 1 N.Y. 96 (1847); 2 New York Real Property Law (McKinney, 1945) §240, subdiv. 3.

¹⁵ *Wilson v. Ford*, note 14 *supra*, at 196; *Atlantic Mills of Rhode Island v. New York Central R. Co.*, note 10 *supra*, at 389; *Antonopulos v. Postal Telegraph Cable Co.*, note 10 *supra*, at 569; *Waters of White Lake, Inc. v. Fricke*, 282 App. Div. 333 at 369, 26 N.Y.S. (2d) 400 (1953). See 89 A.L.R. 1187 at 1189 (1934). See also 3 TIFFANY, *REAL PROPERTY*, 3d ed., §759, p. 207 (1939).

¹⁶ See Hahner, "An Analysis of Profits a Prendre," 25 ORE. L. REV. 217 at 225, 226 (1946). *Cf.* Bigelow, "The Content of Covenants in Leases," 12 MICH. L. REV. 639 (1914).

to believe)¹⁷ that the rights acquired be unlimited, absolute, or exclusive.¹⁸ Quite to the contrary, the law appears to be settled that a profit is in common, unless expressly made exclusive.¹⁹ It is to be hoped that courts in the future will not construe easements or profits as unlimited and exclusive unless they were so intended.

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¹⁷ Principal case at 447, 448.

¹⁸ This impression might be received as a negative implication of English cases which hold that a profit appurtenant cannot be unlimited, or "without stint." *Bailey v. Stephens*, 12 C.B. (n.s.) 91 at 110, 142 Eng. Rep. 1077 (1862); *Chesterfield v. Harris*, [1908] 2 Ch. 397 at 421, 423.

¹⁹ 5 PROPERTY RESTATEMENT §486 (1944); 3 TIFFANY, REAL PROPERTY, 3d ed., §811 (1939); Hahner, "An Analysis of Profits a Prendre," 25 ORE. L. REV. 217 at 227-229 (1946); 29 CALIF. L. REV. 632 (1941); 133 A.L.R. 1200 (1941).