O'Donovan v. McIntosh: Changing the Contours of Maine's Easement Law

Michael J. Polak

University of Maine School of Law

Follow this and additional works at: https://digitalcommons.mainelaw.maine.edu/mlr

Part of the Land Use Law Commons, and the Property Law and Real Estate Commons

Recommended Citation


Available at: https://digitalcommons.mainelaw.maine.edu/mlr/vol52/iss2/8
O’DONOVAN V. MCINTOSH: CHANGING THE CONTOURS OF MAINE’S EASEMENT LAW

I. INTRODUCTION ........................................................................................................ 448
II. THE NATURE OF EASEMENTS ........................................................................ 449
III. HISTORY OF THE ASSIGNABILITY OF EASEMENTS IN GROSS ............... 450
   A. Legal Background Concerning Noncommercial Easements in Gross .......... 450
   B. Legal Background Concerning Commercial Easements in Gross .... 455
IV. THE O’DONOVAN DECISION ................................................................................. 457
V. DISCUSSION ........................................................................................................... 462
VI. CONCLUSION .......................................................................................................... 465
I. INTRODUCTION

In O'Donovan v. McIntosh, a real estate developer, Timothy O'Donovan, brought an action seeking, in part, a declaratory judgment concerning the transferability of an easement that he purchased from the defendant, John A. McIntosh, Jr. O'Donovan and McIntosh subsequently filed a joint motion for partial summary judgment to obtain a ruling that would affirm the assignability of the easement in question. Susan Huggins, the owner of the servient estate upon which the easement in question imposed, objected to this motion as a third party defendant. She filed a cross-motion for summary judgment maintaining that the easement in question was not transferable. The trial court agreed with Huggins and granted her motion. O'Donovan and McIntosh appealed to the Supreme Judicial Court of Maine, sitting as the Law Court.

After first determining that the disputed easement was an easement in gross, the issue before the Law Court became whether such easements were capable of assignment. In a 4-2 decision, the Law Court elected to reverse the trial court and held that the assignability of easements in gross depended upon a determination of the intent of the parties.

In so holding, the Law Court changed the contours of Maine's easement law. Before O'Donovan, Maine courts adhered to the school of thought that easements in gross were personal rights and, therefore, not assignable. In an attempt to discern whether the court was correct in overturning its past decisions regarding easements in gross, this Note examines the legal background of these property interests, examining in particular the assignability of the different types of easements in gross. This Note also explores contemporary views on the subject and delves into the present state of the law as it exists in a number of jurisdictions.

1. 1999 ME 71, 728 A.2d 681.
2. The plaintiff/appellant, Timothy P. O'Donovan, is the president of Black Bear Development, Inc. See id. ¶ 4, 728 A.2d at 683.
4. See O'Donovan v. McIntosh, 1999 ME 71, ¶ 6, 728 A.2d at 683.
5. See id.
6. See id.
7. See id.
8. See id.
9. See id. ¶ 7, 728 A.2d at 683. "An easement is in gross when it is not created to benefit or when it does not benefit the possessor of any tract of land in his use of it as such possessor." Restatement of Property § 454 (1944).
10. See O'Donovan v. McIntosh, 1999 ME 71, ¶ 7, 728 A.2d at 683.
11. See id. Justice Dana wrote the opinion of the court, and he was joined by Rudman, Alexander, and Calkins. Justice Saufley took no part in the consideration of the case.
12. See O'Neill v. Williams, 527 A.2d 322, 323 (Me. 1987) ("An easement in gross is a purely personal right, is not assignable, and terminates upon the death of the individual for whom it was created."); Davis v. Briggs, 117 Me. 536, 540, 105 A. 128, 129 (1918) (noting that "an easement in gross which, because of its personal nature . . . is not assignable or inheritable").
Finally, this Note concludes that the Law Court correctly held that the McIntosh easement was assignable. However, its general ruling, that all easements in gross are capable of assignment depending upon the intent of the parties, was overly broad.

II. THE NATURE OF EASEMENTS

An easement can be broadly defined as "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose . . ."\textsuperscript{13} It may also be thought of as an "incorporeal right or hereditament to which property is rendered subject."\textsuperscript{14} The holder of an easement does not receive title to the land affected by the easement but instead receives the right to use that land in the specified manner.

Easements are sometimes confused with licenses. Like an easement, a license in real property also allows one to come onto the property of another for a specific purpose.\textsuperscript{15} However, the fundamental difference between easements and licenses is that "[w]hile an easement implies an interest in land, a license is merely a personal privilege to do some particular act or series of acts on land without possessing any estate or interest therein."\textsuperscript{16} Although these rights may seem similar in effect, they differ in nature. Because licenses are simply privileges, they are usually held to be "personal, revocable, and unassignable."\textsuperscript{17} On the other hand, easements, as interests in land, are not revocable,\textsuperscript{18} and depending upon the type of easement, are capable of assignment.

Although the law of each state may differ, easements can generally be created through an express or implied grant,\textsuperscript{19} prescription,\textsuperscript{20} reservation,\textsuperscript{21} necessity,\textsuperscript{22}

\begin{itemize}
  \item \textsuperscript{13} \textit{Black's Law Dictionary} 527 (7th ed. 1999). An easement is defined by the \textit{Restatement of Property} § 450 (1944) as:
    \begin{itemize}
      \item \textsuperscript{a}n interest in land in the possession of another which
      \item \textsuperscript{a}n interest in land in the possession of another which
      \item (a) entitles the owner of such interest to a limited use or enjoyment of the land
      \item (a) entitles the owner of such interest to a limited use or enjoyment of the land
      \item in which the interest exists;
      \item in which the interest exists;
      \item (b) entitles him to protection as against third persons from interference in such
      \item (b) entitles him to protection as against third persons from interference in such
      \item use or enjoyment;
      \item use or enjoyment;
      \item (c) is not subject to the will of the possessor of the land;
      \item (c) is not subject to the will of the possessor of the land;
      \item (d) is not a normal incident of the possession of any land possessed by the owner
      \item (d) is not a normal incident of the possession of any land possessed by the owner
      \item of the interest, and
      \item of the interest, and
      \item (e) is capable of creation by conveyance.
      \item (e) is capable of creation by conveyance.
  \end{itemize}

\textit{Id.}

\begin{itemize}
  \item \textsuperscript{14} \textit{25 Am. Jur. 2d Easements and Licenses} § 2 (1996).
  \item \textsuperscript{15} \textit{See} \textsuperscript{id.} § 3.
  \item \textsuperscript{16} Condry v. Laurie, 41 A.2d 66, 68 (Md. 1945).
  \item \textsuperscript{18} \textit{See}, \textit{e.g.}, Russell v. Martin, 88 So.2d 315, 317 (Fla. 1956).
  \item \textsuperscript{19} \textit{See}, \textit{e.g.}, Wilson v. Johnston, 990 S.W.2d 554, 556 (Ark. App. 1999) (finding an easement created by a grant).
  \item \textsuperscript{20} \textit{See}, \textit{e.g.}, Collins Trust v. Allamakee County Bd., 599 N.W.2d 460, 463 (Iowa 1999) (recognizing easements created by prescription).
  \item \textsuperscript{21} \textit{See}, \textit{e.g.}, Knox County Stone Co. v. Bellefontaine Quarry, Inc., 985 S.W.2d 356, 360 (Mo. App. 1998) (recognizing easements created by reservation).
  \item \textsuperscript{22} \textit{See}, \textit{e.g.}, Cleek v. Povia, 515 So.2d 1244, 1247 (Ala. 1987) (acknowledging the legality of easements created by necessity).
\end{itemize}
pre-existing use,\textsuperscript{23} devise,\textsuperscript{24} and through the equitable doctrine of estoppel.\textsuperscript{25} Once created, there are two different classifications of easements: the easement appurtenant and the easement in gross. The easement appurtenant is one that is connected to a dominant estate and exists to benefit the owner of that estate in his use of it.\textsuperscript{26} This easement is generally held to run with the dominant estate, meaning that a transfer in the ownership of the dominant estate also transfers the right to benefit from the easement.\textsuperscript{27} The easement in gross, however, is not connected or attached to a dominant estate but exists to benefit the possessor irrespective of the possessor’s ownership in any particular land.\textsuperscript{28} Therefore, an important distinction between the two types of easements is that a dominant estate exists with an easement appurtenant and no dominant estate exists with an easement in gross.\textsuperscript{29} Depending upon the jurisdiction, whether an easement in gross is capable of assignment may very well depend upon its commercial or noncommercial nature.

III. HISTORY OF THE ASSIGNABILITY OF EASEMENTS IN GROSS

A. Legal Background Concerning Noncommercial Easements in Gross

The assignability of noncommercial easements in gross is a much disputed area of the law. Some early court decisions held that easements in gross could be assigned or inherited.\textsuperscript{30} Traditionally, however, the law has deemed easements in

\textsuperscript{23} See, \textit{e.g.}, Wright v. Horse Creek Ranches, 697 P.2d 384, 387 (Colo. 1985) (acknowledging the legality of easements created by a pre-existing use).

\textsuperscript{24} See, \textit{e.g.}, Schatz v. Schatz, 419 N.W.2d 903, 907 (N.D. 1988) (finding that a particular will granted an easement rather than a fee simple absolute title).

\textsuperscript{25} See, \textit{e.g.}, Louis W. Epstein Family Partnership v. Kmart Corp., 13 F.3d 762, 774 (3d Cir. 1994) (finding an easement created by estoppel); \textit{see also} \textit{Am. Jur. 2d Easements and Licenses} § 16 (1996).

\textsuperscript{26} \textit{See Restatement of Property} § 453 (1944); \textit{2 American Law of Property} § 8.6 (A. James Casner ed., 1952).


\textsuperscript{28} \textit{See Restatement of Property} § 454 (1944); \textit{2 American Law of Property} § 8.9 (A. James Casner ed., 1952).

\textsuperscript{29} \textit{See Restatement of Property} §§ 489, 491 (1944).

\textsuperscript{30} \textit{See} Senhouse v. Christian, 99 Eng. Rep. 1251 (K.B. 1877). In \textit{Senhouse}, the plaintiff brought a trespass action against the defendant for unlawfully using a path located on the plaintiff’s property. \textit{See id.} The defendant claimed that he was entitled to use the pathway on account of an easement that he had inherited from his grandfather. \textit{See id.} at 1252. The court first found that the plaintiff held good title to the disputed path. \textit{See id.} However, the court further found that the plaintiff had granted “a free and convenient way . . . together with full and free license to and for the said John Christian deceased [defendant’s grandfather], his heirs and assigns . . .” \textit{Id.} In deciding the case, the court acknowledged that the purported easement had been granted to the defendant’s grandfather in gross. \textit{See id.} at 1256. Nevertheless, the court unanimously found that the defendant was entitled to use the right of way. \textit{See id.} The court did, however, find for the plaintiff on the grounds that the defendant had used the right of way in a manner inconsistent with the original grant of the easement. \textit{See id.} at 1257. In White v. Crawford, 10 Mass. 183 (1813), the plaintiff claimed a right of way across the defendant’s property and brought
gross to be personal in nature and, therefore, has categorically refused to allow their transfer. This notion has been derived from the decision handed down by the old English Court of Common Pleas in the case of Ackroyd v. Smith. In Ackroyd, the plaintiff granted to Smith a certain plot of land and a right of way over a particular road. When the successors of Smith used the right of way, the plaintiff brought a trespass action against them. The court granted the plaintiff relief, finding that the original conveyance of the right of way to Smith was "unconnected with the enjoyment or occupation of the land . . . ." The court went on to hold that "[i]f a way be granted in gross, it is personal only, and cannot be assigned." An Illinois court held in a similar manner in the case of Garrison v. Rudd, where the court found that a disputed easement was one in gross. The court first determined that the deed that sought to grant the easement merely conveyed "a personal right, wholly independent of [the grantor's] domicil . . . ." The court then stated that "since a way appendant cannot be turned into gross, because it is inseparably united to the land to which it is incident, so a way in gross cannot be granted over, because of its being attached to the person." Twenty years after the Garrison decision, the case of Boatman v. Lasley came before the Supreme Court of Ohio. In Boatman, the court was called upon to resolve the same issue of whether an easement in gross was capable of being transferred. The court held:

an action in trespass against him when he attempted to block it. See id. at 186. The plaintiff claimed to have inherited the easement from her deceased husband. See id. at 187. The defendant argued that the easement in question was one in gross, and should be construed as a personal grant to the plaintiff's husband only. See id. The court stated: "As to ways in gross, that they may be granted, or may accrue, in various forms, to one and his heirs and assigns, there can be no doubt." Id. at 188. The court held in favor of the plaintiff. See id. at 189.

32. See id. at 76.
33. Defendants Samuel and Thomas Smith.
35. Id.
36. Id.
37. 19 Ill. 558 (App. Ct. 1858).
38. Taylor owned two plots of land that were divided by a public roadway. See id. at 560. One of the plots of land was located on the banks of a river. See id. He sold the riverside plot to Rudd, reserving in the deed an easement over the land to get to the river. See id. This deed made no mention of Taylor's second plot of land. See id. A number of years after this sale, Taylor sold the second plot of land to Garrison. See id. This deed not only conveyed the second plot of land but also purported to convey the reserved easement over Rudd's land. See id. When Garrison used this easement, Rudd brought an action in trespass. See id. at 558. The trial court found for Rudd and Garrison excepted. See id. at 559. The Illinois Appellate Court affirmed, holding that Taylor's reserved easement was in gross and was not appurtenant to the second plot of land. See id. at 564.
39. Id.
40. Id. at 564-65.
41. 23 Ohio St. 614 (1878).
42. See id. at 617. The original action was brought by Lasley to foreclose on a mortgage that Boatman had taken out to finance the purchase of the lands mortgaged. See id. Boatman brought a counterclaim arguing that Lasley had breached a covenant that the land was to be free from encumbrances. See id. at 614-15. Apparently, Lasley had previously granted a right of way over
A mere naked right to pass and repass over the land of another, a use which excludes all participation in the profits of the land, is not, in any proper sense, an interest or estate in the land itself. Such a right is in its nature personal; it attaches itself to the person of him to whom it is granted, and must die with the person.  

The court’s most serious reservations about sanctioning the assignability of easements in gross pertained to the uncertainty that would surround the divisibility of such interests, and also to the risk of surcharge upon the servient estate. The court inquired:

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?

If [the easement in gross] 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?

Even today, close to one hundred and fifty years after the Ackroyd v. Smith decision, a number of jurisdictions still adhere to its holding and do not allow noncommercial easements in gross to be assigned. Although the Ackroyd doctrine still persists, there is a growing sentiment that easements in gross should be capable of assignment. The Restatement of Property states: “The alienability of noncommercial easements in gross is determined by the manner or the terms of their creation.”; 2 AMERICAN LAW OF PROPERTY § 8.82 (A. James Casner ed., 1952) (“There seems to be no reason to deny to parties who create easements in gross the privilege of making them alienable if they wish to do so.”); 4 Richard R. Powell, Powell on Real Property § 34.16, at 34-218 (1998) (stating that the only barriers to the alienability of easements in gross are the manifest intent of the parties to disallow alienation and a misplaced fear of a “resultant surcharge” on the land); 3 Herbert Thornbird Tiffany, Tiffany on Real Property § 761 (Supp. 1998) (“[T]here is a growing recognition of the assignability of all easements in gross except those demonstrably intended to benefit only the individual who is its first recipient.”); Alan David Hegi, Note, The Easement in Gross Revisited: Transferability and Divisability Since 1945, 39 Vand. L. Rev. 109, 113-14
mercial easements in gross is determined by the manner or the terms of their creation." 49 This view acknowledges that a number of these interests are personal in nature; nonetheless, it seeks to effectuate the intent of the parties. Some states have subscribed to this view either through the enactment of statutes 50 or by court decision. 51

One of the earliest court decisions that denounced the Ackroyd doctrine and espoused this view was the New Jersey case of Weber v. Dockray. 52 In Weber, the Chancery Division of the New Jersey Superior Court was called upon to determine the question of whether the grant of a particular easement conveyed an alienable interest. 53 William O. Robinson, along with two other individuals, owned Lot 29 on New Jersey's Raccoon Island. 54 Nordyke Metzger owned the neighboring Lots 30 and 31. 55 On December 7, 1939, Robinson and Metzger entered into a written agreement that purported to convey to "Robinson, his heirs and assigns forever 'the right to store one automobile in the northwesterly half of the garage now situate on Lot 31 ... together with the right of access and egress to said garage from the highway ..." 56 In 1944, Robinson, along with his co-owners, conveyed Lot 29 to the defendant, Lancelot Dockray. 57 At the same time, Robinson also conveyed to Dockray the easement he had received from Metzger. 58 Subse-

---

49. RESTATEMENT OF PROPERTY § 491 (1944). The Restatement of Property also provides a list of factors to be considered when attempting to discern the transferability of an easement in gross from its terms of creation:

(a) the personal relations existing at the time of creation between the owner of the easement and the owner of the servient tenement;
(b) the extent of the probable increase in the burden on the servient tenement resulting from the alienability of the easement either by increasing the physical use of the land or by decreasing its value;
(c) the consideration paid for the easement.

Id. § 492.


51. See, e.g., Collier v. Oelke, 21 Cal. Rptr. 140, 142 (Ct. App. 1962) (noting that "the settled rule in California [is] that an easement in gross is property and can be transferred"); Lindley v. Maggert, 645 P.2d 430, 431 (Mont. 1982) (noting that an easement is freely alienable unless an express provision in the deed prohibits alienation); Weber v. Dockray, 64 A.2d 631, 633 (N.J. Super. Ct. Ch. Div. 1949) ("[T]he right to transfer an easement in gross, depends upon the intention of the parties as shown by the language of the grant; the definite and fixed nature of the burden upon the servient tenement and the circumstances existing at the time the grant was made[sic]."); Farmer's Marine Copper Works, Inc. v. City of Galveston, 757 S.W.2d 148, 151 (Tex. App. 1988) (holding that "the parties may create an assignable easement in gross through an express assignment provision").


53. See id. at 632.

54. See id.

55. See id.

56. Id.

57. See id.

58. See id.
quentely, Robinson passed away. The following year, Metzger conveyed his lots to Wright, who shortly thereafter conveyed the property to the plaintiff, Weber. At all times throughout these conveyances, the deeds to Lots 30 and 31 recited that the property was made subject to the original Robinson/Metzger grant.

The court decided that the easement granted to Robinson was capable of being transferred and, therefore, upheld its conveyance to Dockray. In coming to this determination, the court followed the widely accepted principle that in order to favor the alienation of such interests, one should construe, whenever possible, an easement to be appurtenant rather than in gross. After examining the nature of the properties and the language of the grant, the court found that the easement could reasonably be interpreted as appurtenant. Although the court based its decision on this determination, it went on to state that even assuming that the grant resulted “in the creation of an easement in gross, it does not necessarily follow that the easement expired with the death of Robinson.” The court acknowledged the Ackroyd doctrine and the considerable jurisprudence that had adopted it. However, it noted that there was “a growing tendency to recognize the right to transfer easements in gross and to protect them as assignable interests in real estate.” Moreover, the court stated: “There would appear to be no logical reason why, if he chose to do so, a man could not grant to another an interest in his land entirely irrespective of the grantee’s possession of another estate.” The court concluded that an easement in gross should be capable of assignment if the parties so intended.

More recently, in 1982, the case of *Lindley v. Maggert* was decided in Montana. In *Lindley*, Sam Shimamoto purchased land from Stephen Pinnow. Within the deed that conveyed the land, Pinnow expressly reserved a roadway easement over the property. Subsequently, Pinnow conveyed this easement to a number of landowners, including the plaintiff Lindley, who owned property in a tract of land originally owned by Pinnow’s father. Shimamoto eventually sold his property to the defendant, Kurtis Maggert. When Maggert obstructed the right of way provided by the easement, Lindley brought suit. The trial court, faced with the question of whether the easement rights could be transferred, held that the easement was valid and capable of being assigned.

---

59. See id.
60. See id.
61. See id. at 633.
62. See infra notes 192-93 and accompanying text.
63. Weber v. Dockray, 64 A.2d at 633.
64. See id.
65. Id.
66. Id.
67. Id.
68. See id.
69. 645 P.2d 430 (Mont. 1982).
70. See id. at 431.
71. See id.
72. See id.
73. See id.
74. See id.
75. See id. at 431-32.
On appeal, the Montana Supreme Court determined from the language of the original reservation that the resulting easement was one in gross. Furthermore, the court stated that "[w]hether or not such an easement may be alienated and apportioned depends upon the manner and the terms of the creation of the easement." Finding no language in the deed that sought to limit the grantor's right to alienate the easement, the court upheld the trial court's decision.

Although such decisions evidence a trend toward abandoning the Ackroyd rule, the question regarding the alienability of noncommercial easements in gross remains a hotly debated issue.

**B. Legal Background Concerning Commercial Easements in Gross**

The commercial easement in gross evolved from the profit à prendre. A profit à prendre is "[a] right or privilege to go on another's land and take away something of value from its soil or from the products of its soil . . . ." Although profits à prendre, like easements, are interests in land, they differ from easements in the nature of the rights that they embody. Whereas a profit à prendre grants "the power and the privilege to acquire through severance, ownership of some part of the physical substances included in the possession of land," an easement simply confers a right to enjoy land without transferring any rights in the soil of that land.

Like easements, profits à prendre may be appurtenant or in gross. Historically, however, profits à prendre held in gross have been capable of assignment. In 1583, the King's Bench decided in *Mountjoyes Case* that a reservation by deed to mine for ore and dig for turf was assignable. American courts have also long recognized the alienability of the profit à prendre.

The "commercial" easement in gross is said to have arisen out of problems concerning the assignability of railroad easements. In 1857, *Junction Railroad Co. v. Ruggles* was decided in Ohio. The Ohio Railroad Company was incorporated by an act of the Ohio General Assembly in 1836. It was vested with the right to construct a railroad to begin in the eastern part of the state and run westerly

---

76. See id. at 431.
77. Id.
78. See id. at 431-32.
79. BLACK'S LAW DICTIONARY 1227 (7th ed. 1999).
82. See, e.g., Louis Pizitz Dry Goods Co. v. Penney, 4 So.2d 167, 169 (Ala. 1941); see also AM. JUR. 2D Easements and Licenses § 4 (1996).
85. See id. at 786.
86. See, e.g., Engel v. Ayer, 85 Me. 448, 455, 457, 27 A. 352, 355 (1893) (holding that a right to tie booms to a pier was a profit à prendre and, therefore, assignable); Boatman v. Lasley, 23 Ohio St. 614, 618-19 (1873) ("[t]he profit à prendre is a part of the estate, as to be treated as an inheritable and assignable interest."); Cadawalder v. Bailey, 23 A. 20, 22 (R.I. 1891) (noting that the profit à prendre is an interest in the land).
88. 7 Ohio St. 1 (1857).
89. See id. at 2.
through several Ohio counties before terminating. Pursuant to this right, Ohio Railroad began to acquire rights of way along the proposed path of the tracks. One of these rights of way was secured from Almon Ruggles. In 1837, the Ohio Railroad Company received a loan from the state amounting to one hundred and fifty thousand dollars. However, in 1842, the railroad neglected to pay the interest on the loan and as a result, its property, including the rights of way, was seized by the governor. The seized property was then auctioned to the highest bidder and sold to Lane. Lane, in turn, sold the property to the Junction Railroad Company. When Junction sought to occupy the right of way originally acquired from Almon Ruggles, Richard Ruggles, the then owner of the servient estate, threatened to bring a trespass action against them. In response to these threats, Junction filed a bill requesting a decree that would permanently enjoin Ruggles from interfering with its rights.

In deciding this case in favor of the Junction Railroad Company, the Ohio Supreme Court upheld the transfer of the right of way and, in so doing, created an exception to its rule that easements in gross were not assignable. Though the court acknowledged the then well-established principles regarding the transferability of easements in gross and easements appurtenant, it sought to differentiate the railroad easement from either kind. The court determined that the railroad easement was "sui generis, and must be governed by reasons peculiar to itself . . . ." Moreover, the court mentioned that "a railroad, strictly speaking, is neither a person nor real estate . . . ." However, for purposes of assignability, the court equated the railroad right of way with an easement appurtenant, reasoning that "[l]ike real estate, a railroad is—or at least the Ohio Railroad was—expected to be of perpetual duration." Essentially, the court held that when Almon Ruggles originally granted the right of way to the Ohio Railroad Company, it was with the understanding that it would be for perpetuity. Therefore, the court decided that it would be wrong to allow Richard Ruggles to compel further compensation.

90. See id.
91. See id.
92. See id. at 3.
93. See id.
94. See id. at 4.
95. See id.
96. Almon Ruggles had died sometime after he granted the right of way to the Ohio Railroad Company. See id. Richard Ruggles was his son and the devisee to part of the land encumbered by the grant. See id.
97. See id. at 5.
98. See id.
99. See id. at 7-8.
100. See id. at 6.
101. See id. at 7.
102. Id.
103. Id.
104. Id.
105. See id.
106. See id. at 10.
Through the years, the assignable commercial easement in gross has been recognized in a number of jurisdictions and has grown to encompass a variety of rights of way. Courts have been much less adamant about restricting the alienability of commercial easements in gross than they have been with noncommercial easements in gross, partly because they feel that the latter are personal in nature, while the former have economic roots. However, the distinction between the two is not always obvious. The Restatement of Property provides that "[e]asements in gross, if of a commercial character, are alienable..." The Restatement notes that "[a]n easement in gross is of a commercial character when the use authorized by it results primarily in economic benefit rather than personal satisfaction." This determination may, at times, be difficult to make. Nevertheless, most courts and legal treatises endorse the alienability of commercial easements in gross.

IV. THE O'DONOVAN DECISION

A brief examination of the development of easement law in Maine is necessary to establish the context of the O'Donovan v. McIntosh decision. In 1918, the Maine Law Court, deciding Davis v. Briggs, stated its position on the issue of the alienability of easements in gross. The case involved easement rights in water flow from a spring. When faced with the question of whether the easement was in gross or appurtenant, the court spoke of an easement in gross as "not assignable or inheritable." The court reiterated this same position, that an easement in gross is a "purely personal right, is not assignable, and terminates upon the death of the individual for whom it was created," sixty-nine years later in the case of O'Neill v. Williams. This remained the law in Maine until the decision in O'Donovan v. McIntosh.

A summary of important background facts is helpful in understanding the O'Donovan case. John A. McIntosh Jr. was a licensed real estate broker and had been for some time. In 1987, he decided to purchase a plot of land in Falmouth, Maine. This plot was bordered on one side by a second plot of land known as...

---


108. RESTATEMENT OF PROPERTY § 489 (1944).
109. Id. § 489 cmt. c.
110. 1999 ME 71, 728 A.2d 681.
111. 117 Me. 536, 105 A. 128 (1918).
112. Id. at 540, 105 A. at 129.
113. 527 A.2d 322, 323 (Me. 1987).
114. See Brief of Appellants at 4, O'Donovan v. McIntosh, 1999 ME 71, 728 A.2d 681 (No. CUM-98-577).
115. See O'Donovan v. McIntosh, 1999 ME 71, ¶ 2, 728 A.2d at 682; see also Brief of Appellants at 4.
the Fish Parcel, and on the other side, by the public roadway, Foreside Road. McIntosh had also purchased an option on the “Fish Parcel.” Eventually, McIntosh’s option on the Fish Parcel lapsed. In 1989, he decided to sell his land to Susan Huggins and also to reserve, through the deed, an alienable right of way across the property connecting the Fish Parcel to Foreside Road. Timothy P. O’Donovan, president of Black Bear Development, Inc., subsequently purchased the Fish Parcel with the intent to subdivide and develop it. Because the Fish Parcel was landlocked, O’Donovan also purchased the right of way from McIntosh. Black Bear filed an application for subdivision approval with the Falmouth Town Planning Board. Huggins expressed concerns regarding the development and opposed the transferability of the easement in dispute. As a result of the questions surrounding the alienability of the easement, the Planning Board suspended its approval until the issue was resolved.

In O’Donovan v. McIntosh, O’Donovan brought suit against McIntosh seeking, in part, a declaration in favor of the alienability of the easement that he had purchased from him. McIntosh brought Huggins into the suit by filing a third party complaint against her seeking damages for breach of contract, reformation, and

116. See O’Donovan v. McIntosh, 1999 ME 71, ¶ 2, 728 A.2d at 682.
117. Id.
118. See id.
119. See id. The deed, in pertinent part, stated:
   Excepting and reserving for the benefit of the Grantor and his heirs and assigns, a right of way and easement for access (50) feet in width. . . . Said right of way and easement shall (1) be for the purpose of ingress and egress to and from the lot herein conveyed and other land adjacent to and behind the above described parcel, commonly known as the “Fish parcel” . . . . The assigns of the Grantor herein shall be limited to those building and/or occupying a subdivision located on the above-mentioned “Fish parcel.” Also reserving the right to install utilities . . . over and under said right of way for the use and benefit of said other land. . . .
   By acceptance of this deed the Grantor and Grantee agree to convey the right of way above mentioned to the Town of Falmouth in the event that it shall be accepted as a public way.
   Id. ¶ 3, 728 A.2d at 682.

The deed also incorporated by reference a side agreement. See id. at ¶ 3, 728 A.2d at 683. The third paragraph of the side agreement provided:

As further consideration for the conveyance of the property, I [Susan Huggins] agree not to actively oppose any application for development permits for the parcel served by the easement and will assent to the inclusion of my lot for purposes of the Site Location of Development Law, (or any subsequent law) if required for permitting purposes, in the event a development should be proposed for that property. I understand that this agreement shall be binding upon any future purchaser of this property.

Appendix to Brief of Appellants at 77.
120. See O’Donovan v. McIntosh, 1999 ME 71, ¶ 4, 728 A.2d at 683; Brief of Appellants at 9-10.
121. See O’Donovan v. McIntosh, 1999 ME 71, ¶ 4, 728 A.2d at 683; Brief of Appellants at 10.
122. See O’Donovan v. McIntosh, 1999 ME 71, ¶ 5, 728 A.2d at 683.
123. See Brief of Appellee at 4-5, O’Donovan v. McIntosh, 1999 ME 71, 728 A.2d 681 (No. CUM-98-577).
124. See O’Donovan v. McIntosh, 1999 ME 71, ¶ 5, 728 A.2d at 683.
125. See id. ¶ 6, 728 A.2d 683.
rescission, unjust enrichment, estoppel, and contribution.\textsuperscript{126} Subsequently, O'Donovan and McIntosh filed a joint motion on partial summary judgment to declare, as a matter of law, that the disputed easement was freely alienable.\textsuperscript{127} In response to this motion, Huggins filed a cross-motion for summary judgment.\textsuperscript{128} Huggins's motion primarily sought a declaration that would render the disputed easement void.\textsuperscript{129} The superior court, holding that the disputed easement was not assignable, granted Huggins's motion for summary judgment.\textsuperscript{130} O'Donovan and McIntosh appealed to the Maine Law Court.\textsuperscript{131}

The appellants, O'Donovan and McIntosh [hereinafter O'Donovan], advanced arguments before the Law Court to establish that the disputed easement was freely alienable. Pointing to past Law Court decisions that focused on the intent of the parties creating an easement, O'Donovan urged the Law Court to consider "the intent of the parties to a deed . . . in order to determine whether the easement in question is alienable."\textsuperscript{132} O'Donovan acknowledged the predominant doctrine that easements in gross generally could not be assigned; however, he stressed that the Law Court had refrained from consistently applying that rule.\textsuperscript{133} O'Donovan also stressed that what was at issue was not "classifying the McIntosh easement as being either 'appurtenant' or 'in gross.'"\textsuperscript{134} He implored the Law Court to overlook this "red herring" and focus instead on the parties' intent.\textsuperscript{135}

O'Donovan then contended that the intent of the parties to a deed should be determined by the deed itself.\textsuperscript{136} He posited that when a deed clearly and unambiguously expresses the will of the parties, "'[t]he intention of the parties, as expressed in the instrument, governs the interpretation of . . . [the] deed.'"\textsuperscript{137} Furthermore, O'Donovan argued that under the law established in Fine Line, Inc. v. Blake\textsuperscript{138} and Milligan v. Milligan,\textsuperscript{139} extrinsic evidence of the parties' intent is not to be considered unless the deed itself is unclear on the issue.\textsuperscript{140} O'Donovan then argued that the plain language of the deed\textsuperscript{141} shows that both "parties intended that the Commercial Easement be permanent and assignable."\textsuperscript{142} Moreover, he

\begin{itemize}
\item \textsuperscript{126} See id.; see also Brief of Appellee at 6, O'Donovan v. McIntosh, 1999 ME 71, 728 A.2d 681 (No. CUM-98-577).
\item \textsuperscript{127} See O'Donovan v. McIntosh, 1999 ME 71, ¶ 6, 728 A.2d at 683.
\item \textsuperscript{128} See id.
\item \textsuperscript{129} See id.
\item \textsuperscript{130} See id.
\item \textsuperscript{131} See id.
\item \textsuperscript{132} Brief of Appellants at 15.
\item \textsuperscript{133} See id. (quoting Davis v. Briggs, 117 Me. 536, 105 A. 128 (1918)).
\item \textsuperscript{134} Id. at 16 n.3.
\item \textsuperscript{135} Id.
\item \textsuperscript{136} See id. at 18.
\item \textsuperscript{137} Id. at 19 (alteration in original) (quoting First Hartford Corp. v. Kennebec Water Dist., 490 A.2d 1209, 1211 (Me. 1985)).
\item \textsuperscript{138} 677 A.2d 1061, 1063-64 (Me. 1996) (stating that extrinsic evidence is admissible only when the deed is ambiguous).
\item \textsuperscript{139} 624 A.2d 474, 477 (Me. 1993) (stating that there must be a latent ambiguity for extrinsic evidence to be considered).
\item \textsuperscript{140} See Brief of Appellants at 19.
\item \textsuperscript{141} See supra note 119 (quoting the language of the deed).
\item \textsuperscript{142} Brief of Appellants at 20.
\end{itemize}
argued that the “Side Agreement” that was incorporated into the deed constituted a contract in which Huggins further “expressed her understanding that the Commercial Easement would be used to access a potential subdivision on the Fish Parcel . . .” O’Donovan emphasized that the plain language of the deed and the Side Agreement strongly supported the contention that the parties intended to create an alienable easement of a commercial nature.

O’Donovan also urged the Law Court to continue following its jurisprudence favoring, in all cases, the promotion of the alienability of property interests. Elaborating upon this jurisprudence, he referred to Maine’s traditional rules of construction that, whenever possible, the court should construe a grant or easement as being appurtenant, and therefore undeniably alienable. He also referred to Law Court decisions that abolished the technical requirement that the word “heirs” be used in order to reserve a lasting interest. Furthermore, O’Donovan posited that Maine law classifies a number of “rights as profits and holds them to be alienable.”

Finally, O’Donovan asserted that the easement in question was a commercial easement in gross, which, according to the Restatement of Property, was freely alienable. He argued that the deed provided clear evidence that McIntosh reserved the easement not for personal satisfaction but for purely economic reasons. Therefore, he implored the Law Court to follow the nationally recognized rule that commercial easements in gross are alienable by holding that the easement in question was assignable.

The Appellee, Susan Huggins, primarily argued on appeal that the disputed easement was not capable of being assigned. She first contended that McIntosh failed to reserve a valid interest at all. Huggins argued categorically that easements appurtenant were transferable while easements in gross were not. She claimed that the intent of the parties was only relevant in making the determination of how to classify the easement. She noted that “McIntosh did not own the Fish Parcel . . . Therefore, he could not, as a matter of law, have created a right appurtenant to that land.” Furthermore, Huggins concluded that McIntosh desired to create, in effect, an easement appurtenant to land he did not own, and therefore, as a matter of law, the easement must necessarily fail.

143. See supra note 119 (quoting the language of the Side Agreement).
144. Brief of Appellants at 21.
145. See id. at 22.
146. See id. at 22-23.
147. See id. at 23.
148. See id.
149. Id. (citing Engel v. Ayer, 85 Me. 448, 455-57, 27 A. 352, 355 (1893) (classifying a right to place and maintain booms on a pier as an assignable profit à prendre)).
150. See id. at 25 (citing RESTATEMENT OF PROPERTY § 489 (1944)).
151. See id. at 28.
152. See id. at 25.
153. See Brief of Appellee at 12.
154. See id. at 13-14.
155. See id. at 12.
157. See id.
Huggins argued, in the alternative, that if the deed did create a valid interest, at most it created an easement in gross to pass and repass over her land. She further argued that under Maine law such easements have never been assignable and that the intent of the parties was irrelevant to a determination of an easement's alienability. She stated that the Law Court has “never allowed the parties to make up their own rules about what the legal incidents of such interests are once they are classified.” Huggins refuted the O'Donovan claim that the deed created a commercial easement in gross by stating that “[t]here is nothing inherently commercial about it. . . . [I]t exists merely to provide access to the back land.” Moreover, she asserted that even if the easement was commercial, the court, which had held that profits à prendre were alienable, had never before recognized the commercial/noncommercial distinction. Finally, Huggins urged the Law Court to adhere to the doctrine of stare decisis and to depart from its previous easement policies “only when the most compelling of reasons demand change.”

The O'Donovan court, in reversing the superior court, held that “the easement is assignable because the parties clearly expressed that intent in the language of the deed.” The court, although admitting that it had previously stated that easements in gross were not assignable, noted that it had never applied that rule “to frustrate the parties' clear intent, as set forth in the deed, that the holder may assign the easement.” The court also stated that its decision was “consistent with our general policy favoring the free alienability of property.” The court dismissed Huggins's exhortations to adhere to the doctrine of stare decisis by stating: “where the authorities supporting the prior rule have been drastically eroded, [and] . . . the holding of the [prior] case is counterproductive to its purposes, the situation is appropriate for legal change by the court's decision.” Finally, the court rejected the argument that the alienability of an easement in gross would unfairly burden the servient estate, stating: “The servient tenement holder, however, is protected because an easement holder may only use the easement in a manner consistent with the intent of the parties that created the easement.”

Chief Justice Wathen, in dissent joined by Justice Clifford, asserted that “[t]he intent of the parties is relevant in clarifying whether an easement is appurtenant or in gross.” The Chief Justice stressed that once this determination was made, “there is no proposition of Maine decisional law more firmly settled than the principle that an easement in gross is personal and not assignable.” He criticized

158. See id. at 16.
159. See id. at 18.
160. Id. at 19.
161. Id. at 25.
162. See id. at 24.
163. Id. at 23 (quoting Tripp v. Huff, 606 A.2d 792, 793 (Me. 1992) (quoting Brown v. Heirs of Maria Fuller, 347 A.2d 127, 130 (Me. 1975)) (emphasis omitted).
165. Id. ¶ 8, 728 A.2d at 683.
166. Id. ¶ 10, 728 A.2d at 684.
167. Id. ¶ 11, 728 A.2d at 684 (alteration in original) (internal quotations omitted) (quoting Myrick v. James, 444 A.2d 987, 998-99 (Me. 1982)).
168. Id.
169. Id. ¶ 13, 728 A.2d at 685 (Wathen, C.J., dissenting).
170. Id.
the court for abandoning the doctrine of stare decisis and stated that "[i]f there is a need for changing the law, it is better addressed by the Legislature." Finally, Chief Justice Wathen concluded his dissent by lamenting that the decision "necessarily acts on the past as well as the future and is capable of resurrecting long forgotten easements to dash the settled expectations of landowners and title examiners." 172

V. DISCUSSION

By holding that the question of the transferability of easements in gross should be determined by the intent of the parties to the transaction, the Maine Law Court followed a path of jurisprudence that has only been adopted by a handful of states. 173 Also, as Chief Justice Wathen noted in his dissenting opinion, the O'Donovan v. McIntosh 174 decision completely overturned part of Maine's well-established easement law. 175 The Chief Justice is correct: Maine courts have followed the rule that easements in gross should be regarded as personal, nontransferable interests in land for at least eighty-one years. 176 Notwithstanding that fact, a close examination of other aspects of the easement law in Maine reveals, in many instances, a trend toward the relaxation of the common law rules in order to favor the transferability of easement rights in general.

At common law, if one wished to secure a perpetual interest in land one was compelled to use the word "heirs" in the granting instrument. 177 If this rule was not complied with, no matter how clear the intent of the parties was to the contrary, a life estate was created. 178 This technical requirement could easily act to frustrate the will of the parties. In order to resolve this problem, the Maine Legislature passed the Short Form Deeds Act in 1967. 179 The Act expressly obviated the requirement of technical words for the transfer of perpetual interests in land. 180 Once passed, however, the courts did not apply the Act retroactively. 181 This resulted in two different standards governing whether land interests would be held to be perpetual, one for grants constructed prior to the passage of the Act, and the other for grants constructed after that date. 182 Nevertheless, in 1999, Maine's 119th Legislature rewrote the Act not only so that it would apply retroactively, but also to include a provision by which an individual may bring a civil action to recover property lost due to the omission of the technical language in a deed writ-

171. Id. ¶ 14, 728 A.2d at 685.
172. Id.
173. See statutes and cases cited supra notes 50-51 and accompanying text.
175. See id. ¶ 14, 728 A.2d at 685 (Wathen, C.J., dissenting).
176. See supra Part IV.
178. See Hall v. Hall, 106 Me. at 391, 76 A. at 706.
180. See id.
182. See id. at 881 (holding that because the deed in the case was drafted in 1953, it therefore "must be reviewed under common law principles governing the creation of easements before the 1967 adoption of the Short Form Deeds Act").
The development of this area of the property law clearly demonstrates an evolution of thinking towards allowing the intent of the parties to determine whether a particular interest in land is assignable. A second example of this evolution of thinking, which favors the assignability of such property interests, can be seen in the courts' treatment of profits à prendre. Maine has acknowledged the transferability of profits à prendre for over a century. In determining what rights should be considered as profits à prendre the courts have adopted an expansive view. They have not only held that a profit à prendre is a right to take something directly from the soil, but they have extended the scope of the interest to include rights to engage in certain activities on the soil for profit. For example, in the case of Engel v. Ayer, the Maine Law Court held that a right to maintain booms on a pier was a profit à prendre. In coming to this conclusion, the court analyzed the commercial character of the right, and found that the original grantor retained a right "either to use . . . himself, or to let or sell to other persons." The court held in a similar manner in the case of Ring v. Walker. In Ring, the court decided that a right to use and maintain a log sluice was a profit à prendre and not an easement in gross. There the court probed into the parties' intent to determine what kind of interest was created, noting "the language [of the grant] discloses a clear and unmistakable intention to


§ 772. Words of inheritance; habendum

1. Words of inheritance; habendum. In a conveyance or reservation of real estate, the terms "heirs," "successors," "assigns," "forever" or other technical words of inheritance, or an habendum clause, are not necessary to convey or reserve an estate in fee. A conveyance or reservation of real estate, whether made before or after the effective date of this section, must be construed to convey or reserve an estate in fee simple, unless a different intention clearly appears in the deed.

2. Preservation of rights. A person claiming an interest in real estate by reason of the omission of technical words of inheritance or the lack of an habendum clause in a deed that conveyed or reserved a property interest before October 7, 1967 may preserve that claim by commencing a civil action for the recovery of that property in the Superior Court or the District Court in the county or division in which the property is located on or before December 31, 2002.

3. Limitation. After December 31, 2002, a person may not commence a civil action for the recovery of property or enter that property under a claim of right based on the absence of an habendum clause or technical words of inheritance in any deed.

4. Construction of laws. This section may not be construed to extend the period for bringing of an action or for the doing of any other required act under any statute of limitations.

5. Liberal construction. This section must be liberally construed to effect the legislative purpose of clarifying title to land currently encumbered by ancient deeds that lacked technical words of inheritance or an habendum clause.

185. See Hill v. Lord, 48 Me. 83, 100 (1861) (finding a transferable profit à prendre in a right to take seaweed off the land of another).
186. 85 Me. 448, 27 A. 352 (1893).
187. See id. at 456-57, 27 A. at 355.
188. Id. at 454, 27 A. at 355.
189. 87 Me. 550, 33 A. 174 (1895).
190. See id. at 558, 33 A. at 176.
except a perpetual right, inheritable and transferable, and not an easement in gross, or one limited to a lifetime. 191 These cases portray the court’s early desire to find some way to uphold the assignability of easement type rights if at all possible.

Maine also acknowledged this policy through an adherence to the traditional rules of construction for grants of easements. These rules require that in order to promote the alienability of land interests, whenever possible an easement should be construed as being appurtenant to land rather than in gross. 192 These rules of construction have been adopted by several other states as well, regardless of their position on the transferability of easements in gross. 193 In favoring findings of easements appurtenant, states have sought to foster the transferability of easement rights, while at the same time claiming to adhere to the old common law doctrine.

A number of courts have also shown an inclination toward favoring the alienability of easements in gross by adopting the idea of the commercial easement. 194 Commercial easements are, at their core, nothing more than easements in gross that a court decides were not meant to be personal.

But why have courts clung to the idea that easements in gross are simply not transferable? Those who adhere to the Ackroyd195 doctrine have voiced concerns similar to those expressed in Boatman v. Lasley,196 regarding how heirs would take and the possible imposition of unconsidered surcharges upon the servient estate. However, these concerns are not as daunting as they might first appear. First, concurrent estates have been recognized in the law for a number of centuries. 197 The inheritors of such an interest in land would simply take in the manner provided in the granting instrument. A strict adherence to the intent of the grantor would provide the initial protection from any abuses of the right of way granted. Further protections may lie in the ability of the grantor to bring an action for damages in the event any abuses do occur. 198

In light of all this, Justice Dana’s reassurances in the O’Donovan opinion that “the reasons supporting the rule against alienability are no longer compelling” ring true. 199 These reasons also should assuage Chief Justice Wathen’s concerns about abusing the doctrine of stare decisis. 200

191. Id. at 559, 33 A. at 176.
192. See LeMay v. Anderson, 397 A.2d 984, 987 (Me. 1979) (citing Davis v. Briggs, 117 Me. 536, 540, 105 A. 128, 129 (1918)).
194. See supra note 107 and accompanying text.
196. 23 Ohio St. 614 (1878).
200. See id. ¶ 14, 728 A.2d at 685 (Wathen, C.J., dissenting).
VI. CONCLUSION

According to Article III of the United States Constitution, the power of the federal judicial branch extends to actual cases and controversies.\(^{201}\) Maine, in its constitution, has granted broader powers to its courts.\(^{202}\) Nevertheless, the Maine Supreme Judicial Court has stated that “the role of the judicial branch in the framework of government is to decide actual cases and controversies . . . .”\(^{203}\) Because courts determine the outcome of actual cases and controversies, it follows that their decisions in these cases should be based upon the respective issues before them. Therefore, courts generally only decide cases so far as necessary to effect a satisfactory outcome.\(^{204}\)

According to prevailing opinion, the outcome of the \textit{O'Donovan v. McIntosh}\(^{205}\) was correct.\(^{206}\) The easement that McIntosh created in the deed to Huggins was properly held to be alienable. However, the court’s holding, that an easement is alienable when the parties to its creation so intend, is overly broad. The court should have recognized the commercial/noncommercial classification of easements in gross by finding that the easement in question was commercial in nature. The appellants asked the court to hold that the “Commercial Easement” was alienable.\(^{207}\) In fact, the appellants refer to the disputed easement as the “Commercial Easement” throughout their brief.\(^{208}\) Further, the creating documents contained ample evidence from which the court could have based a finding that the easement was commercial in nature.\(^{209}\) The court would then have been able to restrict its holding to this particular type of easement.

As a result of the \textit{O'Donovan} decision, Maine courts must be wary of which easements they allow to be transferred. Easements in gross are usually personal in nature. Consequently, the courts must be ever vigilant to correctly interpret the true intent of the parties. The burden of proving that an easement in gross is alienable should be placed upon the party that seeks to transfer it. This measure would provide added insurance that those easements in gross that were intended to be personal remain inalienable. Also, it would serve to discourage false claims from being brought in the first place.

In deciding \textit{O'Donovan v. McIntosh}, the Law Court adhered to a highly regarded yet sparsely followed jurisprudence. Only time will tell the real impact this decision will have on property law in the state of Maine.

\textit{Michael J. Polak}

\begin{itemize}
  \item \textsuperscript{201} \textit{See U.S. Const. art. III, § 2.}
  \item \textsuperscript{202} \textit{See supra note 48 and accompanying text.}
  \item \textsuperscript{203} \textit{See supra note 119.}
\end{itemize}