DIS-UNITY OF TITLE IN CONNECTICUT: A TALE OF SUPREME CONFUSION OVER EASEMENT LAW

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In 1999, the Connecticut Supreme Court decided Bolan v. Avalon Farms Property Owners Assn., Inc., a case in which the Court purported to abolish an ancient rule of property law known as the “unity of title” doctrine. Unbeknownst to the Court, however, what Bolan abolished was not an established rule at all; rather, it was an ill-defined concept that the Court had created only eleven years earlier in the case of Ozyck v. D’Atri. The accidental “doctrine” – entirely unique to Connecticut – owed its relatively brief existence to Ozyck, a decision in which the Court’s misinterpretation of its own precedent spawned a misconceived amalgamation of two unrelated property concepts – one a black-letter easement principle (referred to herein as the “appurtenance principle”) and the other a formalistic remnant of ancient feudal law (referred to herein as the “reservations to strangers” doctrine).

Despite its ostensible demise in Bolan, the unity of title era has left quite a legacy in Connecticut. At the most basic level, the doctrine’s genesis, evolution, and “abolition” present a fascinating case study in how blind recitation of precedent, in the absence of true comprehension, can result in new and often obscure law. In the case of unity of title, even the decision “abolishing” the mistake has created its own problem: In a spin-off from the series of errors committed by the Supreme Court, the Connecticut Appellate Court has misinterpreted Bolan as abolishing a legitimate black-letter easement principle that was not even involved in the Supreme Court’s unity of title cases. Yet the most prominent legacy of the Court’s unity of title blunder is that it produced Carbone v. Vigliotti, a 1992 decision in which the Court propounded a revolutionary new

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1250 Conn. 135, 735 A.2d 798 (1999).
easement principle that is of independent national significance.

This article tells the story of the unity of title doctrine, from cradle to grave and beyond. For the purpose of providing background, Part I of this article discusses black-letter easement principles as they existed in Connecticut prior to 1988, with particular emphasis on the principles that later would be disrupted by the unity of title era. Part II discusses the 1988 case of Ozyck, in which the Supreme Court first confused these principles and attempted to preserve a fictional doctrine under the misnomer “unity of title.” Part III explores the 1992 case of Carbone, in which the Court’s perpetuation of the Ozyck confusion accidentally led to a revolutionary new principle of easement law that has most recently been shaped by the 2001 case of Abington Limited Partnership v. Heublein. Part IV analyzes the 1999 case of Bolan, in which the Court further perpetuated the Ozyck-Carbone confusion, ironically resulting in the “abolition” of the nonexistent unity of title doctrine. Part V discusses the legacy of the misconceived doctrine and the significant impact that Ozyck, Carbone, and Bolan have had — and may continue to have — on Connecticut easement law.

I. Pre-1988 Easement Law in Connecticut

Prior to 1988, Connecticut’s easement law was based on well-established common-law principles and was in general accord with the law of the majority of other jurisdictions. Part I of this article summarizes the established principles governing the creation and transferability of easements in Connecticut, with a focus on three central concepts that would later be transformed by the life and death of the unity of title doctrine. An explanation of these three concepts — referred to herein as the ownership principle, the appurtenance principle, and the inalienability principle — is a necessary prerequisite to the analysis contained in Parts II through V of this article.

A. General Principles

An easement is an interest in land that “creates a nonpos-
sessor right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.\textsuperscript{5} The property that is burdened by an easement – that is, the property interest in which an easement interest is granted – is referred to as the “servient” estate.\textsuperscript{6} The only person with the right to grant such an interest is the owner of the estate.\textsuperscript{7} Accordingly, \textit{in order for an easement interest to be valid, the original grantor of the easement must own the servient estate at the time of the original grant.}\textsuperscript{8} This rule – which is based on the fundamental principle that “a grantor cannot effectively convey a greater title than he possesses”\textsuperscript{9} – shall be referred to herein as the \textit{ownership principle.}\textsuperscript{10}

\textbf{B. Creation of Easements}

Connecticut law has traditionally recognized four ways in which easements are created: (1) express grant or reservation; (2) implication; (3) prescription; and (4) governmental condemnation.\textsuperscript{11}

1. Easements by Express Grant or Reservation (and the “Reservations to Strangers” Doctrine)

\textsuperscript{5}\textsc{Restatement (Third) of Prop.: Servitudes} § 1.2(1) (2000) (hereinafter \textsc{Servitudes}); \textit{Abington Ltd. Partnership v. Talcott Mountain Science Center}, 43 Conn. Sup. 424, 428 (1994) (quoting \textsc{Restatement (Second) of Prop.} § 450 (1944)).

\textsuperscript{6}\textsc{Saunders Point Assn. v. Cannon}, 177 Conn. 413, 415, 418 A.2d 70 (1979); \textsc{Servitudes, supra} note 5, § 1.1(1)(c).

\textsuperscript{7}\textsc{Waller v. Hildebrecht}, 128 N.E. 807, 809 (Ill. 1920) (“[N]o one but the owner of land can create an easement over it.”); \textsc{Servitudes, supra} note 5, § 2.3.

\textsuperscript{8}\textsc{See Stankiewicz v. Miami Beach Assn.}, 191 Conn. 165, 170, 464 A.2d 26 (1983). In most cases, the easement is created by the fee owner, and thus the servient estate is the fee interest in the land. However, the owner of a non-fee interest – such as a life tenant or a lessee – may also create an easement, in which case the non-fee interest becomes the servient estate. \textit{See Servitudes, supra} note 5, § 2.5.

\textsuperscript{9}\textsc{Stankiewicz}, 191 Conn. at 170.

\textsuperscript{10}In the recently completed Third Restatement of Servitudes (“Third Restatement”), the \textit{ownership principle} is formulated as follows: “If fewer than all of the owners of an estate attempt to create a servitude burdening that estate, the attempt does not create a servitude.” \textsc{Servitudes, supra} note 5, § 2.3.

\textsuperscript{11}These four methods of creation are consistent with those recognized in the \textit{Third Restatement}. \textit{See Servitudes, supra} note 5, §§ 2.1-2.2, 2.11-2.18. The Connecticut Supreme Court recently confirmed that there may be an additional method: estoppel. \textit{See Mellon v. Century Cable Mgmt. Corp.}, 247 Conn. 790, 794-95, 725 A.2d 943 (1999). This method, although recognized under the modern view, \textit{see Servitudes, supra} note 5, § 2.10, nonetheless cannot be considered a “traditional” Connecticut easement theory.
In most cases, easements are created expressly by written documents,12 in the form of either a grant or a reservation.13 An easement is created by express grant when a landowner expressly grants another the right to utilize the landowner’s property in a particular manner.14 An easement is created by express reservation when a landowner conveys a portion of his or her land and, in connection therewith, expressly reserves to himself or herself an easement for use of the conveyed portion.15 Although there is no functional analytical difference between a grant and a reservation,16 the distinction has traditionally been significant in Connecticut, due to an ancient rule that shall be referred to herein as the “reservations to strangers” doctrine.

The reservations to strangers doctrine is not a fundamental easement principle; rather, it is a formalistic rule of property law under which “a reservation in a deed to one not a party to it is void.”17 The doctrine applies to reservations of all types of property rights and can be explained as follows:

The broad rule grounded in the precedents and technicalities of the common law, and which still generally prevails, is that in a deed neither a reservation nor an exception in favor of a stranger to the instrument can, by force of ordinary words of exception or reservation, create in the stranger any title, right, or interest in or respecting the land conveyed. The strict reasoning which ordinarily gives support to the rule is that in point of fact the stranger has no interest in the land to be excepted from the grant, and likewise none from which a reservation can be carved out, an exception or reservation in his favor being therefore deemed quite impossible.18

The reservations to strangers doctrine is a technical
prohibition rather than a substantive one. Indeed, the doctrine does not prohibit a landowner from granting an easement interest in a parcel of land while contemporaneously conveying to a third party the fee subject to the easement. The doctrine merely states that as a matter of semantics, such an interest cannot be created by use of a "reservation" or "exception" in the deed to the fee. Due to the fact that this rule may often serve to frustrate the intent of a grantor, the doctrine has been expressly abolished in many jurisdictions.19

The Connecticut Supreme Court first expressly recognized the reservations to strangers doctrine in 1866, in the case of School District v. Lynch.20 As discussed in Parts III and V of this article, the doctrine would later become a central source of confusion during the unity of title era, leaving unclear the doctrine's continuing viability in Connecticut.

2. Easements by Implication

In the absence of an express grant or reservation, an implied easement may be inferred from certain "terms or circumstances surrounding the conveyance of another interest in land."21 Connecticut law recognizes implied easements where there is a transfer of land coupled with (1) prior use; (2) necessity; or (3) the creation of a subdivision map.22

In Connecticut, the law of implied easements based on prior use has been summarized as follows:

early common-law courts "mistrusted and wished to limit conveyance by deed as a substitute for livery by seisin." Willard v. First Church of Christ, Scientist, 498 P.2d 987, 989 (Cal. 1972) (citing Howard H. Harris, Reservations in Favor of Strangers to the Title, 6 OKLA. L. REV. 127, 132-33 (1953)). In abandoning the rule, the Third Restatement concludes that "the origin of the prohibitions is obscure" and that "[t]he only virtue of the rule is that it tends to ensure that a recorded easement will be properly indexed in the land-records system." SERVITUDES, supra note 5, § 2.6 cmt. a.


2033 Conn. at 335.
21SERVITUDES, supra note 5, § 2.2. BACKMAN & THOMAS, supra note 12, § 2.02[1].
22These three methods of creating implied easements are consistent with the general rule. BACKMAN & THOMAS, supra note 12, § 1.01[2][f]. The first of these three types of implied easements is often referred to as an "easement by implication," and the second as an "easement by necessity." See First Congress Ave. Corp. v. 495 Congress Ave. Ass'n, 2 Conn. Ops. 701 (Super. Ct. June 24, 1991) (Cellotto, J.).
Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case, the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made. 23

As to an implied easement based on necessity:

The basis of this right, if it exists, is the presumption of a grant or reservation arising from the circumstances of the case. Although called a way of necessity, the necessity does not create the way but merely furnishes evidence as to the real intention of the parties. Such a way is, therefore, not created by mere necessity; it always originates in some grant or change in ownership to which it is attached by construction as a necessary incident, presumed to have been intended by the parties. A way of necessity is dependent upon unity of ownership or title, followed by a severance thereof. 24

In the quotations above, the terms “unity of ownership” and “unity of title” both refer to common ownership of lands that are subsequently divided into two parcels, one becoming the servient estate and the other becoming the “dominant” estate. When such a division has occurred, the law presumes that the common owner, upon severance of his or her property, intended to provide both parcels with all access that was either: (1) already in use; or (2) reasonably necessary for future use. Where the common owner retains the servient


24 Leonard v. Bailwitz, 148 Conn. 8, 11, 166 A.2d 451 (1960) (citations omitted); see Hollywyle Assn. v. Hollister, 164 Conn. 389, 398-99, 324 A.2d 247 (1973); SERVITUDES, supra note 5, § 2.15. As discussed in the Third Restatement, easements by necessity have also been justified based on the “[p]ublic policy favoring use and acquisition of land.” SERVITUDES, supra note 5, at § 2.15, cmt. a.
portion, the implied easement is considered a grant. Conversely, where the common owner retains the dominant portion, the implied easement is considered a reservation.

Implied easements based on severance of the dominant and servient parcels are consistent with the *ownership principle*, which requires that the original creator of any easement must own the servient estate at the time of the easement’s creation. Since the deed of severance ends the servient owner’s fee interest in the dominant estate, the deed represents the last conveyance from which an easement can possibly be inferred in favor of a putative dominant parcel.25

In addition to implied easements based on prior use or necessity, there can be an implied easement by subdivision map. Specifically, when a landowner proposes to subdivide his or her property, an implied easement of access over roadways can be created as follows:

Where an owner of land causes a map to be made of it upon which are delineated separate lots and streets and highways by which access may be had to them, and then sells the lots, referring in his conveyances to the map, the lot owners acquire the right to have the streets and highways thereafter kept open for use in connection with their lands.26

By application of the *ownership principle*, an easement can be created in the foregoing manner only if the party recording the subdivision map owns the street or streets that become the servient estate.27

3. Prescriptive Easements

By statute, an easement interest may be acquired by “adverse use or enjoyment” that has “continued uninterrupted for fifteen years.”28 The use must be open, visible, and

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25Of course, a post-severance owner of the servient estate has the power to make an express grant of an easement to the then-dominant owner. Absent such an express grant, however, the only deed from which one could fairly presume an unspoken intent is the deed that severs the parcels.


27Stankiewicz, 191 Conn. at 170.

made under a claim of right. When these elements are satisfied, the servient landowner is precluded from preventing the use, having been put on notice of the nonpermissive use and failing to take any action during the statutory period.

4. Easement by Condemnation

As with any other interest in land, an easement may be acquired by a governmental entity through condemnation. Easements in Gross and Easements Appurtenant

Easements generally exist either "in gross" or "appurtenant," the latter of which may "run with the land," i.e., pass automatically to the successor of the dominant estate. In Connecticut, the distinction between the two forms of easements is described as follows:

An easement in gross belongs to the owner of it apart from his ownership or possession of any specific land and, in contrast to an easement appurtenant, its ownership is personal to its owners. If the easement is in its nature an appropriate and useful adjunct to [a specific parcel of] land..., with nothing to show that the parties intended it to be a mere personal right, then it is an easement appurtenant.... An easement appurtenant must have a dominant estate that enjoys the benefit of the right-of-way and a servient estate that bears the burden.

An easement is appurtenant to a dominant estate only to the extent that the easement and the dominant estate are owned by the same person or entity. This principle has traditionally been formulated as follows: "The easement can become legally attached to the dominant estate only if the

29Reynolds v. Soffer, 190 Conn. 184, 187, 469 A.2d 1027 (1983); see Servitudes, supra note 5, §§ 2.16-2.17.
31See Servitudes, supra note 5, § 2.18; Northeastern Gas Transmission Co. v. Collins, 138 Conn. 582, 592, 87 A.2d 139 (1952) ("authority [from the legislature] may be granted to take the fee or an easement").
32Servitudes, supra note 5, § 1.5 cmt. a.
same person has unity of title to both the easement and the dominant estate.”35 In this quotation, the term “unity of title” refers to the simultaneous ownership of a possessory interest (usually the fee to the dominant estate) and a nonpossessory interest (i.e., an easement interest in the servient estate). Stated another way, the principle holds that an appurtenant easement is appurtenant only to land owned by the grantee of the easement at the time the easement is created.36 Therefore, if an easement is conveyed to an individual who owns no land at the time of the conveyance, it is presumed that the easement is merely an easement in gross.37 Similarly, if the grantee does own land, the only land to which the easement can possibly be appurtenant is land that the grantee owns at the time he or she acquires the easement.38 This principle, referred to herein as the appurtenance principle, is based on the presumptive intent of the easement’s creator.39

Just as an appurtenant easement can only attach to land owned by the easement’s original grantee (the dominant estate), the easement generally cannot detach from the dominant estate, or otherwise be used by the grantee to benefit land other than the dominant estate.40 This includes land that is subsequently acquired by the dominant landowner.41 “An easement appurtenant is incapable of existence separate and apart from the particular land to which it is annexed... An appurtenant easement cannot be conveyed by the party entitled to it separate from the land to which it is appur-

3525 AM. JUR. 2d Easements and Licenses § 11 (1966); see also 28 C.J.S. Easements § 4 (1941); Curtin, 156 Conn. at 389.
36Stated yet another way: “Where an easement is claimed as appurtenant to certain land the burden is on the party claiming it to show that the original grantee of the easement was the owner of the land in question at the time of the grant.” 28 C.J.S. Easements § 49 (1941).
37Waller, 128 N.E. at 809-10.
38Curtin, 156 Conn. at 389.
39Because the rule is one of presumptive intent, the Third Restatement adopts the position that the presumption is rebuttable:
[A] servitude can be created to benefit any land, but if the intent to benefit land owned by another, or land to be acquired in the future, is not clearly apparent, the usual presumption ... is that the dominant estate is limited to land owned by the grantee at the time the easement or profit is created.
SERVITUDES, supra note 5, § 4.11 cmt. b; see id. at § 2.5 cmt. a.
40Lichteig, 9 Conn. App. at 411.
41Id.
tenant." This principle shall be referred to herein as the *inalienability principle.*

D. Summary of Basic Easement Principles

As outlined above, there are three axiomatic, black-letter easement principles that are particularly relevant to this article. These principles can be summarized as follows:

The *ownership principle* defines the limits of a landowner's power to *create* an easement. This principle can be succinctly stated as follows: In order for an easement interest to be valid, the original grantor of the easement must own the servient estate at the time of the original grant.

The *appurtenance principle* defines the limits of a landowner's power to *receive* an easement as appurtenant to his or her land. This principle can be stated as follows: An easement is appurtenant only to land that is owned by the grantee of the easement at the time of the easement's creation.

The *inalienability principle* defines the limits of a landowner's power to *transfer* an appurtenant easement. This principle can be stated as follows: An easement appurtenant is incapable of existence separate from the original dominant estate and therefore may not be transferred to benefit land other than the original dominant estate.

These principles are not independent, but follow from one another. Indeed, since under the *ownership principle,* only the

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42Harkins v. Girouard Estates, Inc., 31 Conn. App. 485, 495, 625 A.2d 1388, *cert. denied,* 227 Conn. 906, 632 A.2d 691 (1993) (quoting 2 *GEORGE W. THOMPSON, REAL PROPERTY* § 322 at 63-64 (1980)). Note that an easement appurtenant attaches to each part of the dominant estate, and therefore survives conveyances in which the dominant estate is divided:

It is a well established principle that where an easement is appurtenant to any part of a dominant estate, and the estate is subsequently divided into parcels, each parcel may use the easement as long as the easement is applicable to the new parcel, and provided the easement can be used by the parcels without additional burden to the servient estate. Stiefel v. Lindemann, 33 Conn. App. 799, 813, 638 A.2d 642, *cert. denied,* 229 Conn. 914, 642 A.2d 1211 (1994) (citing Phoenix Nat'l Bank v. United States Security Trust Co., 100 Conn. 622, 630, 124 A. 540 (1924)).

43As with the *appurtenance principle,* the Third Restatement treats this rule as a presumption that may be rebutted by evidence that the original grantor clearly intended future severance of the easement from the dominant estate. *SERVITUDES,* supra note 5, § 4.11 cmt. a, § 5.6.
servient owner may create an easement that burdens the servient estate; and since, by definition, an appurtenant easement is intended to attach to specific property, it therefore follows that the only lands a servient owner would reasonably intend as a dominant estate (absent a clearly expressed intent to the contrary) would be lands owned by the grantee of the easement at the time of the easement's creation. Further, since an easement can attach only to lands owned by the grantee at the time of the easement's creation, it therefore cannot be detached from the dominant estate, or used to benefit other non-dominant lands, else the ownership principle and the appurtenance principle would be rendered meaningless.44

These central principles, all well established in Connecticut, started to unravel in a series of Supreme Court decisions beginning in 1988.

II. THE BIRTH OF UNITY OF TITLE: OZYCK V. D’ATRI

In 1988, the Supreme Court took its first seriously wrong turn in analyzing Connecticut easement law. In the case of Ozyck v. D’Atri,45 the Court confused the elementary appurtenance principle with the ancient and formalistic “reservations to strangers” doctrine. In so doing, the Court inadvertently created a misconceived doctrine under the misnomer “unity of title.”

A. The Ozyck Facts46

In Ozyck, the plaintiffs claimed a right-of-way over the defendants’ land so as to reach a certain roadway, shown in Figure 1.1 on page 72 as Vineyard Avenue.

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44The interrelationship between the appurtenance principle and the inalienability principle is illuminated in the following quote from Shingleton: “An easement appurtenant is incapable of existence apart from the particular land to which it is annexed, it exists only if the same person has title to the easement and the dominant estate.” 133 S.E.2d at 185.

45206 Conn. 473, 538 A.2d 697 (1988).

46Unfortunately, in order to fully comprehend the nature of each judicial misstep discussed herein, one must understand many of the factual details regarding the geographical layout and chains of title involved in the relevant cases. While perhaps seeming overly tedious, the case facts have been considerably summarized from the appellate record such that this article contains only the level of detail necessary to prove the theses stated herein. As a further aid, a diagrammatic summary of the unity of title chronology is provided in the Appendix on pages 102-03.
As can be seen in Figure 1.1, the alleged servient estate comprised two separate parcels – one owned by the defendants, and one owned by Walter and Susan Spigelman, who were not made parties to the action. The parties traced their chains of title back to a time when one individual, Herbert Benton, owned all of the property shown in Figure 1.1. In 1906, Benton conveyed to Aaron Hull a small parcel of the property, as illustrated in Figure 1.2 below.

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**Figure 1.1**

*Ozyck v. D’Atri*

1988

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**Figure 1.2**

*Ozyck v. D’Atri*

1906-1910

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47Figure 1.1 is based on Brief for Appellants at Appendix C, Ozyck, 206 Conn. 473.
48See Ozyck, 206 Conn. at 473.
49Figure 1.2 is based on Brief for Appellants at Appendix D, Ozyck, 206 Conn. 473.
At the time of the Benton-to-Hull conveyance, Benton did not reserve to himself any right-of-way over Hull's land. In 1910, however, when Hull conveyed his property to John Hawley, the deed stated as follows: "There is a right of way across the south end of said described lot, known as the extension of Vineyard Avenue."51

B. The Ozyck Trial Court Decision

At trial, the plaintiffs argued that the above deed language was intended by Hull to grant an easement in favor of Benton's property. The trial court, however, never reached the issue of Hull's intent. Instead, the court expounded a bizarre proposition of law. The court reasoned that since Hull did not hold any interest in the putative dominant estate (the Benton property) at the time of the conveyance to Hawley, Hull therefore did not possess the power to create an easement appurtenant to Benton's property in 1910.52

The trial court's conclusion was directly contrary to the ownership principle, under which the owner of property possesses the exclusive power to grant an easement burdening his own property. In the case of Ozyck, it was undisputed that Hull owned the putative servient estate at the time the claimed easement was allegedly created.53 Thus, not only did Hull possess the power to create an easement appurtenant to Benton's property in 1910; he in fact possessed the exclusive power to do so.

The Ozyck trial court's confusion resulted from a misunderstanding of the following quoted passage from the 1983 Supreme Court decision in Stankiewicz v. Miami Beach Assn.:

It is fundamental that a grantor cannot effectively convey a greater title than he possesses. Short Beach Cottage Owners Improvement Assn. v. Stratford, 154 Conn. 194, 199, 224 A.2d 532 (1966); Martin v. Sterling, 1 Root 210, 211 (1790). As to easements, "[n]o right of way appurtenant can be created without a dominant as well as a servient estate... The dominant estate enjoys the benefit of the way, and the

50Ozyck, 206 Conn. at 475.
51Id. at 476.
53Ozyck, 206 Conn. at 474-75.
servient estate bears the burden. The way can become legally attached to the dominant estate only if the same person has unity of title to both the way and the dominant estate.53

(Citations omitted.) Curtin v. Franchetti, 156 Conn. 387, 389, 242 A.2d 725 (1968).54

In the above passage from Stankiewicz, the first three sentences, taken collectively, convey the concepts underlying the ownership principle, upon which Stankiewicz was decided.55 The first sentence is a fairly straightforward way of stating that one cannot grant an interest in land that one does not own, while the second and third sentences, both quoted from the 1968 case of Curtin v. Franchetti, are a somewhat cryptic explanation of how the concept expressed in the first sentence applies to appurtenant easements.

The fourth sentence of the Stankiewicz passage is an extension of the quotation from the cited case of Curtin v. Franchetti. This sentence is a statement of the appurtenance principle, upon which the case of Curtin was decided.57 It was quoted, quite unnecessarily, in Stankiewicz, which was a decision based solely on the ownership principle.58

Based on the quoted passage from Stankiewicz, the Ozyck trial court concluded as follows:

Since Hull had received no grant of appurtenances from his grantor Benton, Hull had none to convey to Hawley that related to the remaining [Benton property]... Whatever Hull might have been able to do in the way of appurtenances with respect to the... land he had acquired [from Benton], he had no power to create an appurtenance in the remainder of the thirty-one acres held by Herbert L. Benton such that Hull's... piece of land from which defendants acquired title, would become the servient estate of the remainder of the thirty-one acre piece of Herbert L. Benton as the dominant estate without some form of assent or acquiescence of Herbert L. Benton or of the owner of his remaining property...59

The court further explained that

54See supra note 27 and accompanying text.
55See supra note 27 and accompanying text.
56156 Conn. at 389.
57See supra text accompanying notes 34-39.
58See supra note 27 and accompanying text.
59Appellate Record, Mem. Dec. at 15, Ozyck, 206 Conn. 473.
when on June 10, 1910, Aaron E. Hull transferred to John G. Hawley... a piece of land and made mention of the existence of a right of way across the south end of that piece, ... [Hull] had no ownership in the remainder of the thirty-one acre piece of Herbert L. Benton such as to provide a unity of land or ownership to be able to create an appurtenance for the benefit of the remainder of the thirty-one acres of Benton...61

The nature of the trial court’s error is self evident: under the ownership principle, the fee owner of the servient estate always has the “power to create an appurtenance” in favor of other land. Thus, as owner of the servient estate in 1910, Hull had the absolute right to create any easement over land that he owned. He needed no “assent or acquiescence” from anyone. Further, although Hull could convey to Hawley only that which he owned, Hull nonetheless had the power and the right to make a contemporaneous conveyance of an easement interest to a third party, i.e., Benton.

The Ozyck trial court simply misinterpreted the Stankiewicz Court’s recitation of basic easement concepts. Specifically, the court misconstrued the fourth sentence from the Stankiewicz passage, which quotes Curtin for the proposition that “[t]he way can become legally attached to the dominant estate only if the same person has unity of title to both the way and the dominant estate.” In construing this statement of the appurtenance principle, the trial court interpreted the term “way” to mean “servient estate” (i.e., the fee interest in the traveled way), rather than an easement interest to use the way. Not only was the trial court’s interpretation directly belied by the authorities cited in Curtin,62 but the very idea simply makes no sense whatsoever: How can an easement interest “attach” to the dominant estate when one person owns both the dominant and servient estates? One certainly does

60In the original Memorandum of Decision, the name “Hawley” is actually used in this place. Based on other statements made in the decision, however, it must be assumed that the Court intended to refer to Hull rather than Hawley.
61Appellate Record at 16, Ozyck, 206 Conn. 473.
62Both authorities cited by the Curtin Court, see, e.g., 25 Am. Jur. 2d 426, Easements and Licenses § 11 and 28 C.J.S. 634 Easements § 4, use the term “easement” instead of “way” in their recitation of the appurtenance principle. Curtin,156 Conn. at 389.
not need an easement to cross one's own property; in fact, such an interest would be extinguished under the well-established doctrine of merger. The trial court clearly misinterpreted the phrase “attached to” to mean “created in favor of,” and interpreted the term “same person” to refer to the easement’s creator (as opposed to its recipient). The court therefore believed that the four sentences quoted from Stankiewicz collectively referred to a servient landowner’s power to create an easement (the ownership principle), as distinguished from a dominant landowner’s power to receive an easement as an appurtenance (the appurtenance principle).

Based on the trial court’s clear error in interpreting the law, the plaintiffs in Ozyck had an obvious case for appeal. However, as bizarre as the trial court’s decision was, the plaintiffs’ interpretation of that decision, and their analysis of the issues on appeal, was even more bizarre.

C. The Ozyck Appeal

On appeal to the Supreme Court, the plaintiffs accurately summarized the basis of the trial court’s holding as follows:

The Court’s decision in this case is based on one and only one premise: Since, at the time the express easement was created (the conveyance Hull to Hawley, June 30, 1910), there was no “unity of title” in the grantor, the express easement created was invalid. In other words, in view of the fact that the same owner did not own both the dominant and servient estate at the time the easement was created, the express grant was a nullity. Having found a failure of unity of title, nothing else was significant or important to the Court’s decision. “There was lacking therefore unity of ownership upon which to base a right of way as an appurtenance...”

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63See, e.g., Kratochvil v. Cox, 129 Conn. 246, 249-50, 27 A.2d 382 (1942) (when a single person or entity owns both the easement and the fee to the servient estate, the lesser interest (the easement) merges into the fee).
64Interestingly, a landowner’s power to create an implied easement does in fact require prior common ownership of the dominant and servient estates. See supra Part I.B.2. This was not, however, what the trial court was referring to, as evidenced by the lack of any discussion of implied easement principles. Rather, the trial court simply misinterpreted a different concept of “unity of title,” i.e., common ownership between the dominant estate and the easement appurtenant thereto.
65Brief for Appellants at 6 (quoting Appellate Record, Mem. Dec. at 14, Ozyck, 206 Conn. 473).
Having properly characterized the trial court’s holding, the plaintiffs made an unfortunate mistake of their own by assuming that the holding was supported by some established body of law, and that the language quoted from Curtin and Stankiewicz was somehow a part of that body. In searching for a connection between the trial court’s reasoning and some established doctrine, the plaintiffs apparently arrived at the one quirk in easement law that could frustrate a servient owner’s intent to create an easement while contemporaneously conveying the fee: the reservations to strangers doctrine.66

In their appellate brief to the Supreme Court, the plaintiffs maintained that the trial court’s holding was based on the ancient reservations to strangers doctrine, which the plaintiffs argued should be abolished. In providing the Court with a thorough exposition on the history of the doctrine,67 the plaintiffs referred to the rule as the “unity of title” doctrine68 and claimed that the doctrine had been applied in Connecticut in the case of Curtin.69 Of course, the plaintiffs were wrong on all counts. First, as explained above, the trial court’s decision in Ozyck was not based on the reservations to strangers doctrine; in fact, there were not even any words of “reservation” or “exception” in the deed language considered by the trial court. Second, the reservations to strangers doctrine had never been referred to as the “unity of title” doctrine, either in Connecticut or elsewhere. Third, the reservations to strangers doctrine was not applied in Curtin. Rather, the Curtin decision was based solely on the appurtenance principle, as mentioned above.

In Curtin, the deed at issue contained clear words of reservation in favor of the grantor, Charles Wood.70 The issue before the court was whether the easement’s dominant estate included lands that had passed to the plaintiff, Curtin. Although the plaintiff’s property had been owned by Wood at the time of the reservation, the plaintiff’s trial counsel neglected to put into evidence any documentation of such own-

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66See supra Part I.B.1.
67Brief for Appellants at 6-10, Ozyck, 206 Conn. 473.
68Id.
69Id. at 8.
70See Curtin, 156 Conn. at 388.
ership. Accordingly, upon the trial court’s finding in favor of the plaintiff, the defendant Franchetti (owner of the alleged servient estate) had an appellate issue based on insufficiency of evidence. In the defendant’s appellate brief, Franchetti correctly cited the appurtenance principle for the following proposition: “An easement can become attached to the dominant estate only if the same person has unity of title to both the easement and the dominant estate.” As pointed out in the defendant’s brief, the appurtenance principle mandates that in the context of litigation, “[w]here an easement is claimed as appurtenant to certain land the burden is on the party claiming it to show that the original grantee of the easement was the owner of the land in question at the time of the grant.” Since Curtin had failed to prove what the grantee, Wood, owned at the time of the easement’s creation, the Supreme Court held that there was no proper basis upon which the trial court could have concluded that the easement “attached,” i.e., became appurtenant, to the putative dominant estate that was later acquired by Curtin.

Simply put, Curtin involved a straightforward application of the appurtenance principle. The fact that the easement at issue was a reservation, as opposed to a grant, was irrelevant to the application of the rule. Further, the deed in question did not even involve a “stranger.” In short, the plaintiffs in Ozyck were simply wrong in their appellate reasoning; but their brief apparently was convincing enough that neither the defendants nor the Supreme Court discovered the plaintiffs’ misstatements of law.

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71 Id. at 389-90.
72 Brief for Appellant at 12, Curtin, 156 Conn. 387 (quoting 17A AM. Jur. 2d, Easements and Licenses § 9 (1966)).
73 Id. at 13 (quoting 28 C.J.S. Easements § 49 (1941)).
74 Curtin, 156 Conn. at 389-91.
75 The Ozycks’ confusion may have been a result of the following: By definition, a “reservation” (express or implied) can only occur upon severance of lands under common ownership. Consequently, the reservations to strangers doctrine would in fact work to void ostensible reservations where there is no common ownership of the servient estate and the putative dominant estate at the time of the reservation. As discussed above, case law on implied easements often refers to the period of common ownership as “unity of title” to the dominant and servient estates. This phenomenon, coupled with the use of the identical phrase “unity of title” in the Curtin appurtenance principle, may have led the Ozycks’ attorney to the conclusion that the term “way” within the Curtin decision referred to the servient estate.
D. The Supreme Court Decision in Ozyck

When confronted with the facts in Ozyck, the Supreme Court correctly recognized that the dispositive issue was not whether Hull possessed the power to create an easement in favor of Benton, but whether, in fact, Hull possessed the intent to create such an easement. On this point, the Court found as follows:

[T]he facts relevant to Hull's intention in inserting the language pertaining to the right of way in his deed to Hawley are undisputed. The only evidence of his intent was the deed itself and any circumstances surrounding the transfer that could be ascertained from the numerous deeds introduced and the location of the various parcels. We conclude that none of these circumstances, taken in conjunction with the language in the deed relied upon, is sufficient to sustain the plaintiffs' burden of proving that Hull intended to create an easement for the benefit of the Harris parcel or other land of Herbert Benton over the land conveyed to Hawley, including the parcel now owned by the defendants.76

Having found that there was no clear intent to create an easement, the Court therefore did not need to address the reservations to strangers doctrine (which had been mislabeled by the plaintiffs as the unity of title doctrine). Nonetheless, the Court addressed the issue directly, adopting the plaintiffs' flawed research in its entirety. "Though the unity of title doctrine is of ancient origin," wrote the Court, "Curtin appears to be the first case in which this court has followed it."77 In this quoted passage, it is clear that the term "unity of title doctrine" was actually intended to refer to the reservations to strangers doctrine, because the Court went on to cite three secondary sources in which the doctrine was criticized,78 and three out-of-state opinions in which the doctrine was expressly overruled.79 Nevertheless, the Court completely overlooked the 1866 case of School District v. Lynch,80 which was

76Ozyck. 206 Conn. 479-80.
77Id. at 478.
78Id. at 479 (citing Howard H. Harris, Reservations in Favor of Strangers to the Title, 6 Okla. L. Rev. 127 (1953), 2 American Law of Property § 9.29 (Casner Ed. 1952), and § Restatement (Second) of Prop. § 472, cmt. a (1944)).
79Ozyck. 206 Conn. at 479 (citing Willard, 7 Cal. 3d 473; Townsend, 378 S.W.2d at 808; Garza, 255 Or. 413).
8033 Conn. 330 (1866).
the real origin of the reservations to strangers doctrine in Connecticut. Further, the Ozyck Court accepted the plaintiffs' premise that the doctrine was applied in Curtin and expressed by the phrase, "The way can become legally attached to the dominant estate only if the same person has unity of title to both the way and the dominant estate."81 Of course, as discussed above, this quote from Curtin had nothing to do with reservations to strangers, but rather was a recitation of the elementary appurtenance principle.

After misidentifying Curtin as the origin of the reservations to strangers doctrine (and then mislabeling it "unity of title"), the Ozyck Court asserted that "[w]e also approved the rule, without any necessity for invoking it ... in Stankiewicz v. Miami Beach Assn., Inc."82 Here again, however, the Court was mistaken, for Stankiewicz, like Ozyck, did not involve a reservation to a stranger. In Stankiewicz, the issue was whether a developer of beachfront lots could create appurtenant easements by referring in a deed to a map delineating roadways. Although easements can be created in this fashion,83 the grantor must of course own the fee to the streets at the time of the conveyance.84 In Stankiewicz, the grantor did not own the streets (the servient estate) at the time of the conveyance of the alleged dominant parcels, thus invalidating any claims of an appurtenant easement.85 Consequently, the alleged easement was defeated by a simple application of the ownership principle. The Stankiewicz decision therefore had nothing to do with the reservations to strangers doctrine or the appurtenance principle.

In light of the Ozyck Court's extensive citations regarding the reservations to strangers doctrine, it is somewhat surprising that the Court confused the doctrine with the appurtenance principle because none of the sources cited by the Court refers in any way to the term "unity of title," or to the principle that an easement can legally attach to the dominant

81Ozyck, 206 Conn. at 478 (quoting Curtin, 156 Conn. at 389).
82Ozyck at 478-79 (citing Stankiewicz, 191 Conn. at 170).
83See supra notes 26-27 and accompanying text.
84Stankiewicz, 191 Conn. at 169-70.
85Id. at 170.
estate only if the same person owns both the easement and the dominant estate. When all was said and done, however, the Ozyck Court had inadvertently created a mythical “unity of title” doctrine, existing as a misconceived amalgam of the appurtenance principle and the reservations to strangers doctrine. Believing that this “unity of title” doctrine existed in Connecticut by virtue of Curtin, the Court stated as follows: “Under the circumstances, we have decided to defer any reconsideration of the rule adopted in Curtin until we are presented with an appropriate case where the intention of the grantor to create in his deed an interest in someone other than the grantee is reasonably clear.”

III. AN ACCIDENTAL INNOVATION: CARBONE V. VIGLIOTTI

The Court’s decision in Ozyck marked the beginning of the Supreme Court’s confusion regarding Connecticut easement law. In 1992, this confusion led to prominent changes in the law, as expounded in Carbone v. Vigliotti.

A. The Carbone Facts

In Carbone, the Supreme Court was confronted with an unusual set of facts. The defendant, Vigliotti, owned a tract of land comprising several contiguous parcels, upon which Vigliotti built a two-family house in 1988. (See Figure 2.1.) In order to travel to and from nearby Chestnut Street, the occupants of the house utilized a driveway owned by the neighboring plaintiff.

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86The Third Restatement confirms that Connecticut is the only jurisdiction in which the reservations to strangers doctrine is referred to as the "unity of title" doctrine. See Servitudes, supra note 5, § 2.6 at 112.
87Ozyck, 206 Conn. at 479.
89Id. at 218-19.
Sometime after Vigliotti began construction of the house, Carbone discovered that his neighbor’s choice of location had created a legal conundrum. The house straddled two parcels of Vigliotti’s land, depicted in Figure 2.1 as Parcels 2 and 4. The chain of title revealed that Parcel 4 included an appurtenant right thereto in the form of an express, recorded right-of-way over Carbone’s land to travel to and from Chestnut Street. The chain of title to Parcel 2, however, ostensibly revealed no similar right. Thus, Vigliotti’s right of access to the new house was unclear given that the house was located partially on Parcel 2 and partially on Parcel 4. Consequently, Carbone sued to enjoin Vigliotti from using the right-of-way to serve the entire house.91

Carbone and Vigliotti both traced their chain of title back to Gustave Hamre, who in 1936 owned Parcels 2, 3, and 4, as well as the fee to Carbone’s driveway. (See Figure 2.2.) On November 30, 1936, Hamre conveyed Parcel 4 to Harry Carsten “together with a right of way across [ Parcel 2] . . . also across a strip of land ten feet wide, located [ on Parcel 3]

90Figure 2.1 is based on an Appendix to the Court’s decision, id. at 232.
91Id. at 219.
and thence [across the driveway] ... to Chestnut St[reet].”92 Also on November 30, 1936, Hamre conveyed Parcel 2 to Frank Beach, who then owned adjacent property abutting East Main Street.93 As a result, Parcel 2 became an extension of Beach’s backyard. Hamre’s conveyance to Beach did not include a right-of-way over Hamre’s remaining land to reach Chestnut Street, because Beach did not need such a right-of-way to reach a public road.

Figure 2.294
Carbone v. Vigliotti
November 30, 1936

Sometime between 1939 and 1947,95 Beach conveyed Parcel 2 to Carsten, along with an appurtenant right-of-way to reach East Main Street. (See Figure 2.3.) On March 19, 1947, Carsten conveyed both Parcels 2 and 4 to George Edwards.96 Parcel 4 was conveyed with an appurtenant right-of-way over the 10-foot strip and the driveway to reach

92Id. at 221.
93Id.
94Id. at 232 (Appendix to Decision).
95The date of this conveyance was not in the appellate record. See Carbone, 222 Conn. at 221 n.5.
96Id. at 221.
Chestnut Street. Parcel 2, however, was not conveyed with any right-of-way to reach either Chestnut Street or East Main Street. It was at this point, therefore, that Parcel 2 effectively became landlocked.

On September 10, 1947, Edwards (then the owner of Parcels 2 and 4) acquired Parcel 3 from John Hamre, who at that time also owned the fee to the driveway.97 (See Figure 2.3.)

**Figure 2.3**
*Carbone v. Vigliotti*
September 10, 1947

![](image)

The deed from Hamre to Edwards stated that "[s]aid grantee has right of way over land of Grantor to Chestnut Street."98 Apparently based on this, the trial court concluded that John Hamre had intended in this deed to convey the right-of-way as an appurtenance not only to Parcel 3, but also to Parcel 2, which was already owned by Edwards.99 The trial court therefore held that Vigliotti had the right to use Carbone’s driveway to serve the entire building, including

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97 Id.
98 Id. at 221-22.
99 Id. at 222.
the portion that was situated on the former Parcel 2.

B. The Carbone Court's Decision: Unity of Title Solidified

On appeal, the Supreme Court rejected the trial court's conclusion. This rejection was based principally on the fact that, as in Ozyck, there was insufficient evidence of an intent to create an easement in favor of the alleged dominant estate (Parcel 2). The Court therefore found as follows:

In this case the language of the [Hamre-Edwards] deed as well as of the map legends does not unequivocally create an easement over the strip for the benefit of parcel 2, but may have been intended simply to acknowledge that the grantee, as the owner of parcel 4, had such an easement. Even if this language could reasonably be construed to have created a right-of-way over the strip, the absence of any reference to parcel 2, except as a boundary in the description of parcel 3, would indicate that its benefit was restricted to parcel 3.100

As in Ozyck, however, the Carbone Court chose not to limit its ruling to the issue of intent. Rather, the Court reasoned that Hamre's intent was irrelevant because the fictitious unity of title doctrine precluded Hamre from conveying to Edwards an appurtenant right-of-way for the benefit of Parcel 2.

"The way can become legally attached to the dominant estate only if the same person has unity of title to both the way and the dominant estate." Curtin v. Franchetti, 156 Conn. 387, 389, 242 A.2d 725 (1968). Under this rule the conveyance of parcel 3 by John Hamre to George Edwards could not have created a right-of-way over the 26.5 foot strip as an appurtenance to parcel 2, even if such an intention were plainly expressed in the deed, because John Hamre did not then own parcel 2, the "dominant estate," but only the "way," the servient estate. The defendant urges that we overrule Curtin and abandon the unity of title doctrine, as several other states have done. See, e.g., Willard v. First Church of Christ, Scientist, 7 Cal. 3d 473, 498, P.2d 987, 102 Cal. Rptr. 987 (1972); Townsend v. Cable, 378 S.W.2d 806, 808 (Ky. 1964); Garza v. Grayson, 255 Or. 413, 467 P.2d 960 (1970).

In Ozyck v. D'Atri, supra, 479, however, this court declined to reconsider our adherence to this doctrine because it was

100Id.
not clear in that case that the grantor had intended to create an easement for the benefit of a "stranger to the title." While we recognized that several commentators view the unity of title doctrine as an obsolete vestige of feudalism that frustrates the intention of the grantor; H. Harris, "Reservations in Favor of Strangers to the Title," 6 Okla. L. Rev. 127 (1953); 2 American Law of Property (Casner Ed. 1952) § 8.29; 5 Restatement, Property § 472, comment a; we decided to defer reconsideration of the subject until we are confronted with a case in which the grantor's intention to create an interest that would violate the rule is "reasonably clear." Ozyck v. D'Atri, supra. In view of our conclusion that there is insufficient evidence to support the inference that John Hamre, in conveying parcel 3, intended to create an easement for the benefit of parcel 2, which he had never owned, the present case affords no more appropriate an occasion than did Ozyck for reconsideration of the unity of title doctrine.\(^{101}\)

As is clear from the first two sentences of the above quotation, the Carbone Court perpetuated the Ozyck Court's error by interpreting the term "way" in the Curtin quotation to mean "servient estate," i.e., the fee interest in the traveled way rather than an easement interest in the way. Moreover, as is clear from the citations in the remainder of the passage, the Carbone Court once again mistook the Curtin quote to be an articulation of the misnamed unity of title doctrine, i.e., the reservations to strangers doctrine. Not only is it surprising that the two unrelated concepts were judicially intertwined, it is intriguing that the Court, obviously believing that it was applying some form of the reservations to strangers doctrine, applied the doctrine in a case in which there was neither a "reservation" nor a "stranger."\(^{102}\) Further, the Carbone Court, like the Ozyck Court, completely overlooked the real formulation of the doctrine in Connecticut, as articulated in the 1866 case of School District v. Lynch.\(^{103}\)

\(^{101}\)Id. at 223-24.

\(^{102}\)Indeed, there were absolutely no words of reservation in the deeds at issue; further, a right-of-way in favor of Parcel 2 would not have created an interest in a third party, i.e., a "stranger to the deed." Rather, since Edwards already owned Parcel 2 at the time, he would have been the grantee of both a fee interest and an easement interest, clearly not in violation of the reservations to strangers doctrine.

\(^{103}\)33 Conn. at 335.
In the end, the Carbone Court's confusion resulted in an arbitrary substantive rule of law prohibiting a landowner from granting an easement over his or her land in all instances except upon severance of lands under common ownership. However, that was just the beginning. In an incredible twist of irony, the Court, in its attempt to do justice while reluctantly preserving what it perceived to be the unity of title doctrine, created a revolutionary proposition of law that effectively diluted a legitimate unity of title concept: the appurtenance principle as articulated in Curtin.

C. "Easement by Carbone"

After inadvertently creating a new legal rule, and then finding it to be unjust, the Court did something intentional: it recognized an entirely new and revolutionary type of easement theory that may be referred to as "easement by Carbone." The formulation of this type of easement amounts to a broad exception to the inalienability principle and, by logical extension, to the appurtenance principle as well.104

Within the context of the Carbone facts, the Court observed that Vigliotti's proposed use of the driveway to provide access to his two-family home was "not materially different from that contemplated" when the easement appurtenant to Parcel 4 was created by the plaintiff's predecessor in title.105

In granting the right-of-way for access to Chestnut Street as an appurtenance to parcel 4, Gustave Hamre must have realized that it would someday probably be used for that purpose by the occupants of a dwelling similar to those in the surrounding area, several of which are two-family houses.106

Recognizing that ordinarily the inalienability principle requires that "[a]n easement cannot be made to attach to other land which the owner of a dominant estate may subsequently acquire,"107 the Court went on to state that the doctrine "was intended to protect the servient estate from the use

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104 See supra Part I.D.
105 222 Conn. at 224.
106 Id.
107 Id. at 225 (quoting 2 GEORGE W. THOMPSON, REAL PROPERTY § 322, at 77 (1961 Repl.)).
of an easement in a manner or to an extent not within the reasonable expectations of the parties at the time of its creation. The Court further acknowledged the continuing validity of the general rule as embodied by the Connecticut Appellate Court’s decision in Lichteig v. Churinetz. In Lichteig, as recognized by the Carbone Court, “the owner of the dominant estate was enjoined from using an easement appurtenant to that property, on which a residence was situated, for the purpose of providing access to a house on other land that he owned.”

In Lichteig, as noted by the Carbone Court, “there had been a material increase in vehicular traffic on the easement resulting from its use by occupants of the other house.” Conversely, the Carbone facts were more peculiar. There was a single building (the two-family house) that could have been located entirely on dominant land (Parcel 4) but instead encroached slightly on what the Court concluded was non-dominant land (Parcel 2). Further, the building at issue was the only structure on either of the two parcels, which together constituted a single building lot.

These peculiar facts presented the Court with an easy opportunity for carving out a narrow exception to the appurtenance principle and the inalienability principle. Instead, however, the Court went beyond any argument raised by the parties and propounded a seemingly broad proposition of law: “We conclude that, when no significant change has occurred in the use of the easement from that contemplated when it was created, as in this case, the mere addition of other land to the dominant estate does not constitute an overburden or misuse of the easement.” Obviously blind to the irony of confronting a legitimate “unity of title” concept head-on, the Court effectively rejected the appurtenance principle and the inalienability principle in favor of a standard based on the

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108 Id.
110 Carbone, 222 Conn. at 225.
111 Id. (citing Lichteig, 9 Conn. App. at 409).
112 222 Conn. at 218.
113 Id. at 225.
114 See supra notes 35-39 and accompanying text.
magnitude of total use rather than the authority of the user.

The reach of Carbone was given its first significant test in Abington Ltd. Partnership v. Heublein, a case that resulted in two Supreme Court decisions, one in 1998 ("Heublein I"), \(^{115}\) and a second in 2001 ("Heublein II"). \(^{116}\) In Heublein, the defendant Talcott Mountain Science Center owned and operated a school upon land that had a clear appurtenant right of access over the plaintiff's property. \(^{117}\) In an effort to expand its campus, however, the Science Center erected an entirely new structure on after-acquired land which, although adjacent to the dominant parcel, did not possess any clear easement right of its own. \(^{118}\) The trial court found that the new structure, although significantly expanding the Science Center's physical campus, did not result in a material increase in traffic over the plaintiff's property. \(^{119}\) Thus, applying Carbone, the trial court ruled that the use could continue. \(^{120}\) The plaintiff appealed and the Supreme Court ordered a new trial on unrelated grounds. \(^{121}\) In its decision, however, the Court took the unusual step of providing extensive "guidance" on the Carbone issue "[i]n light of the need for a retrial." \(^{122}\) In providing its guidance, the Court strongly suggested that Carbone could be extended to the Heublein facts. \(^{123}\)

On remand, the trial court again found in favor of the Science Center. \(^{124}\) On appeal in Heublein II, \(^{125}\) the Supreme Court explained its analysis in Heublein I as follows:

In explaining the holding of Carbone in Heublein I, we reiterated that, although an easement of access will not be presumed to attach automatically to after-acquired property,


\(^{116}\)257 Conn. 570, 778 A.2d 885 (2001).


\(^{118}\)Id. at 2.

\(^{119}\)Id. at 9.

\(^{120}\)Id.

\(^{121}\)Heublein I, 246 Conn. at 817 (remanding the case on ground that trial judge should have recused himself).

\(^{122}\)Id. at 827.

\(^{123}\)See id. at 827-32.


\(^{125}\)257 Conn. 570.
"in some circumstances, the parties at the time of the creation of an easement may be found to have contemplated, as a matter of law, that its benefits might accrue to adjacent property that was not formally within the terms of the easement." We further explained: "The nub of our holding [in Carbone] was to reject a bright-line rule that permitting adjacent after-acquired property to benefit from an easement of access automatically constitutes an overburden or misuse of the easement.... We adopted instead the principle that the construction of an easement requires inquiry into the intent of the parties when the easement was created.... To determine that intent, we held, a court reasonably may take into account the proposed use and the likely development of the dominant estate." We cautioned, however, that, "[u]nder no circumstances ... could an easement be construed to encompass after acquired property if the result would be a material increase in the use of the servient property." We thereafter stated that, upon retrial, "the governing principles stated in Carbone should be applied."126

In Heublein II, the Court concluded that the trial court had properly applied the Carbone/Heublein I principles to determine that the use of the easement could be extended to the after-acquired parcel.127 In so holding, the Court made clear that the “party seeking to extend an easement ... bears the burden of establishing that the easement should be construed to encompass after-acquired property.”128 This clarification regarding the burden of proof will likely make it more difficult to extend an easement in some circumstances. Nevertheless, Heublein II still represents a significant extension of Carbone. Indeed, although Carbone clearly had held that the addition of land to the dominant estate would not necessarily constitute an overburdening, there was still a question as to whether the same could be said for new structures built upon the additional land. In other words, would Vigliotti have passed the "easement by Carbone" test if, instead of building a two-family home straddling Parcels 2 and 4, he had built two single-family homes, one entirely on Parcel 2 and the other entirely on Parcel 4? Based on the Court's decision in Heublein II, the answer clearly is in the affirmative.

126 Id. at 580-81.
127 Id. at 583-85.
128 Id. at 586 n.29.
Under Carbone and Heublein II, non-dominant parcels have the right to make use of an easement consistent with all uses "contemplated when [the easement] was created."\(^{129}\) This is a rule with potentially enormous breadth, given that documents creating rights-of-way often do not contain any express restrictions as to the scope of permissible use. Where there are no express restrictions, "[s]uch a grant is to be construed as broad enough to permit any use which is reasonably connected with the reasonable use of the land to which it is appurtenant."\(^ {130}\) Further, "[t]he reasonable uses of the dominant tenement in connection with which the passway may be used are not limited to those to which the land was being put when the way was granted."\(^ {131}\) Therefore, based on Heublein II, one should be able to argue successfully that new uses of an unrestricted easement by non-dominant lands are permissible to the extent that the aggregate use of the easement would have been permissible in connection with the greatest reasonable use of the actual dominant estate. For instance, assume that Lots A through D are adjacent parcels located in a single-family residential zone. Lot B enjoys an unrestricted access easement across a driveway located on Lot A. Several years after the creation of the easement, the entire area becomes zoned for commercial uses. Thereupon, the owner of Lot B purchases Lots C and D as rental properties, directing the tenants to access their houses by crossing over the driveway on Lot A. The new uses effectively triple the traffic over the easement; yet the amount of traffic is still far less than if the owner of Lot B, instead of acquiring Lots C and D, had decided to erect a commercial structure – a hotel, for instance – on Lot B only. In this hypothetical situation, the aggregate uses by the three houses would be less burdensome than the maximum permissible use by Lot B; thus, Carbone and Heublein II would seem to permit the substantial expansion of the easement by the non-dominant lands.

\(^{129}\) Carbone, 222 Conn. at 225.  
\(^{130}\) Mackin v. Mackin, 186 Conn. 185, 189, 439 A.2d 1086 (1982); see also Birdsey v. Kosienski, 140 Conn. 403, 412-13, 101 A.2d 274 (1953); Peck v. Mackowsky, 85 Conn. 190, 194, 82 A.199 (1912).  
\(^{131}\) Birdsey, 140 Conn. at 413.
Despite reaffirming and expanding the application of Carbone in Heublein II, the Supreme Court has nonetheless made clear that the only non-dominant parcels that may be served by an "easement by Carbone" are those held by the owner of the dominant estate. In Il Giardino, LLC v. Belle Haven Land Co., the Court held that "the expanded use of an easement appurtenant by the dominant estate to benefit a nondominant estate, not owned by the dominant estate owner, constitutes, as a matter of law, an impermissible overburdening of the servient estate." Despite this apparent limitation of Carbone, however, it would seem that a non-dominant owner could circumvent Il Giardino by employing the following scheme: The non-dominant owner (a non-party to an easement) enters into an agreement with a friendly owner of a dominant estate. Under the agreement, the non-dominant owner conveys all of his or her land to the dominant owner, who therefore acquires the right, under Carbone, to serve both parcels with the easement burdening the servient estate. The dominant owner then conveys the non-dominant land back to the non-dominant owner, either in the form of a long-term lease or by quit-claim along with the appurtenant easement. The result is that the third party effectively obtains the right to service his or her property without the consent of the servient owner. The apparent availability of such a buy-lease or buy-sell arrangement presents an interesting question for future cases.

Another important question is whether an "easement by Carbone" is an appurtenant easement that legally attaches to non-dominant land and, therefore, passes automatically with succession. The answer is most likely in the affirmative. By framing the issue as one in which there is an "addition of other land to the dominant estate," the Court has seemed to foreclose the possibility that this newly recognized easement is held merely in gross. Indeed, Carbone and Heublein II expressly allow the expansion of the dominant estate; or, more specifically, they recognize new dominant estates by legally attaching an easement.

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133Id. at 516.
134This assumes that a Carbone-created easement is conveyable as an appurtenance. This question is discussed in the paragraph that follows.
thereto. It then should follow that the “new” dominant estate may be transferred, along with the appurtenance, apart from the “old” dominant estate. The question then is: When and how, exactly, does the easement become legally “attached” to the new “dominant” estate? One certainly could read the Carbone and Heublein II decisions as not quieting title to the easement, but instead merely permitting continuing uses. If this is correct, a right recognized pursuant to Carbone-Heublein II would not be self executing, but would only ripen into an appurtenant right by way of prescription. Obviously, the marketability of property such as Mr. Carbone’s and Mr. Vigliotti’s is significantly impacted by the time and manner in which Carbone-type rights vest.

A related issue is whether or not Carbone permits a court to “look back” and recognize the creation of rights in non-dominant lands held at one time (but not at the time of suit) by the then-owner of the dominant estate. It would seem that if indeed Carbone is meant to recognize appurtenant rights of new dominant parcels, a court naturally should be able to look back to common ownership, as it does to determine easements by implication. But if Carbone is meant merely to permit continuing uses, it would then follow that a court cannot look back under Carbone.

No matter how it is interpreted, Carbone is truly a case of national significance. Apart from the unfortunate unity of title aspect of the decision, the “easement by Carbone” aspect is revolutionary. Indeed, Carbone appears to be the first case in the country in which an easement has been recognized as permissibly benefiting non-dominant lands.135 This distinction makes it likely to be cited and discussed in other jurisdictions in the future.136


136As of the publication of this article, however, it appears that Carbone has yet to be cited in any reported out-of-state decisions or discussed in any law journals. The Third Restatement, however, does recognize the uniqueness of the Carbone rule. SERVITUDES, supra note 5, § 4.11, reporter’s notes at 625.
IV. THE ABOLITION OF UNITY OF TITLE: 
BOLAN v. AVALON PROPERTY OWNERS ASSOCIATION

Following Carbone, the next landmark Connecticut easement decision came in 1999, when the Supreme Court was finally presented with a fact pattern implicating the real “reservations to strangers” doctrine. Although Bolan v. Avalon Farms Property Owners Association marked the first time since 1866 that the doctrine was legitimately at issue in a Connecticut case, the Court was convinced that the doctrine had been implicated at least six times in the previous thirty-one years, in the cases of Curtin, Stankiewicz, Ozyck, Carbone, Heublein I, and Branch v. Occionero. The Court also still believed that the doctrine was equivalent to the Curtin appurtenance principle and that it should be referred to as the unity of title doctrine. In Bolan, the Court unequivocally abolished the unity of title doctrine, raising the question of what, exactly, was abolished.

A. The Bolan Facts

In Bolan, the plaintiff was the owner of landlocked, undeveloped real estate abutting a strip of land owned by the defendant, Avalon Farms Property Owners Association, Inc. (the “Association”). The Association was the product of a subdivision development created in 1978 by Pasquale DiNardo, who had recorded a set of subdivision maps with the town clerk at the time of the development. The disputed strip of land (an old abandoned road) was identified on the subdivision maps as follows: “This area reserved for open space & access area for landlocked abutters.”

137250 Conn. 135, 735 A.2d 798 (1999).
138246Conn. at 829. Heublein I did not involve a reservation to a stranger, but the Court decided the case on other grounds in any event. See supra at text accompanying notes 115-123.
139239 Conn. 199, 202 n.4, 681 A.2d 306 (1996). In Branch, the fact pattern involved a potential reservation to a stranger, but the Court decided the case on other grounds.
140“The way can become legally attached to the dominant estate only if the same person has unity of title to both the way and the dominant estate.” Curtin, 156 Conn. at 389; see supra Part I.C.
141Bolan, 250 Conn. at 137.
142Id. at 138.
143Id. at 139.
of the map’s recording, Bolan’s predecessor in title, Charles Phinny, was one of the “landlocked abutters.”

Based on the above facts, the trial court reached a conclusion later characterized by the Supreme Court as follows:

The trial court concluded that DiNardo ... had intended to grant Phinny an easement appurtenant over the defendant’s land. [R]elying on [the Supreme Court’s] opinion in Curtin v. Franchetti, however, the court concluded that the unity of title doctrine precluded it from giving effect to such intent. Accordingly, the trial court rendered judgment for the defendant.

Interestingly, the facts of Bolan present a perfect example of why the reservations to strangers doctrine is inequitable. In Bolan, the servient landowner, DiNardo, unequivocally recognized that abutters should have the right to traverse his property; and he attempted to express his intent in a recorded document. Under the reservations to strangers doctrine, however, DiNardo’s unfortunate use of the term “reserved” (which he probably meant in its ordinary sense, rather than in its technical real-estate sense), would render the apparent easement void. If easement law had progressed in Connecticut in a more usual fashion (i.e., without the confusion created by Curtin, Stankiewicz, Ozyck, and Carbone), Bolan likely would have resulted in a simple overruling of School District v. Lynch and an abolition of the reservations to strangers doctrine in Connecticut. But the fact that the Court had already entangled the doctrine with the appurtenance principle complicated matters, to say the very least.

B. Abolition of Unity of Title

The Supreme Court agreed with the trial court that DiNardo intended to create an easement in favor of Phinny in 1978. The Court also agreed that notwithstanding such intent, DiNardo did not create a valid easement in 1978, due to the mythical unity of title doctrine. In its analysis, the Court engaged in a thorough discussion of the reservations to

\[\text{\textsuperscript{144}}\text{id.}\]
\[\text{\textsuperscript{145}}\text{id. at 139-40.}\]
\[\text{\textsuperscript{146}}\text{id. at 142-43.}\]
strangers doctrine, all the while repeating the Ozyck error and confusing the feudal doctrine with the Curtin appurtenance principle. Then the inevitable happened: the Supreme Court abolished the unity of title doctrine.

We conclude, therefore, that the unity of title doctrine should be abandoned and that the intent of the deed creating an easement should be effectuated even if no unity of title exists between the servient estate and the dominant estate the easement is intended to serve. To the extent that Curtin approves the unity of title doctrine, it is hereby overruled.

In analyzing the impact of the Bolan decision, the obvious first question is: “What, exactly, was abolished?” The short answer is that the Court abolished the concept that an easement can be created only by a person who “has unity of title to both the way and the dominant estate,” with the term “way” referring to the fee to the servient estate. Since such a requirement never actually existed in the first place, its abolition would seem benign or, in fact, a welcome end to an eleven-year detour in Connecticut easement law. But since the unity of title era ended without the Court’s ever having discovered its own error, the precise holding of Bolan remains unclear in several respects.

First, it is unclear whether Bolan effectively abolishes the reservations to strangers doctrine in Connecticut. On the one hand, the Bolan opinion cites with favor numerous out-of-state cases in which the doctrine has been abolished.

148 Id. at 144-46.
149 The Bolan Court’s perpetuation of the Ozyck/Carbone error is truly astonishing, given the availability of two sources that should have alerted the Court to its earlier mistake. First, there was a relevant annotation from the American Law Reporter that was cited in the appellant’s brief, Brief for Appellant at 9, Bolan, 250 Conn. 135 (citing W.W. Allen, Annotation, Reservation or Exception in Deed in Favor of Strangers, 88 A.L.R.2d 1199 (1963)). The oft-cited annotation provided a comprehensive recitation of all reservations to strangers cases in the country as of 1963, including multiple citations to School District v. Lynch. 88 A.L.R.2d at 1203, 1219-20. This source, if explored, should have revealed at least part of the Ozyck error. Further, at the time of the Bolan decision, the Court had available to it the final version of the Third Restatement as evidenced by the Court’s citations within the decision. 230 Conn. at 145-46 nn. 9-12. Had the Court reviewed this source more diligently, it would have become clear that Lynch was the real source of the reservations to strangers doctrine, and that no other jurisdiction connected the doctrine with any unity of title concept. See Servitudes, supra note 5, § 2.6 at 111-12.
150 Id. at 144-45.
151 Id. at 146.
Further, the facts presented in Bolan clearly implicate the doctrine. On the other hand, the Bolan opinion never recognizes School District v. Lynch and therefore never properly identifies either the accurate origin or the accurate formulation of the doctrine in Connecticut. Thus the continuing viability of the doctrine remains a possibility.

Second, there is a real question as to whether Bolan effectively abolishes the appurtenance principle, as formulated in Curtin. Although such an abolition clearly was not the Court’s intent, as evidenced by the Court’s misinterpretation of two key words in the Curtin quote (“way” and “attach”), Bolan nevertheless expressly overruled Curtin, which was based not on the reservations to strangers doctrine, or even on any misconceived “unity of title” doctrine, but solely on the appurtenance principle.

Third, and perhaps most important, the holding in Bolan does not limit itself to express easements. Accordingly, given the Court’s broad statement that “the intent of the deed creating an easement should be effectuated even if no unity of title exists between the servient estate and the dominant estate the easement is intended to serve”, one might conclude that the Court has abolished the bedrock principle that implied easements based on prior use or necessity can be created only upon severance of the dominant and servient estates. Indeed, the Connecticut Appellate Court has already interpreted Bolan in this manner. In Murray v. Schroeder, the court expressly held that an implied easement based on necessity did not require proof of common ownership between the dominant and servient estates, resting its decision solely on the fact that the Bolan court had “abrogated the unity of title doctrine.” Thus, in an interesting spin-off to the comedy of errors at the Supreme Court level, the Appellate Court has now taken the confusion in an entirely new direction.

The Appellate Court’s interpretation of Bolan is certainly understandable, given that the fictional unity of title doc-
trine bears a remarkable resemblance to the standard for creation of implied easements, described under Connecticut case law as "unity of title" to the dominant and servient estates. Indeed, it is clear from the Bolan appellate record that the parties, as well as the trial court, equated the common ownership requirement of implied easements with the mythical unity of title doctrine. On the other hand, it appears that the Supreme Court never detected the coincidence in the "unity of title" language, as evidenced by the fact that the implied easement cases were never discussed or cited in Ozyck, Carbone, or Bolan. Nevertheless, the remarkable similarity in the formulation of the real doctrine and the illusory doctrine has already created understandable confusion.

The questions posed by Bolan are heightened by the 2000 decision of Il Giardino. This recent Supreme Court opinion does not involve the mythical unity of title doctrine, nor does it directly implicate either of the doctrine's roots (the appurtenance principle and the reservations to strangers doctrine). Further, the Il Giardino opinion does not cite or discuss Bolan. Yet Il Giardino is directly contrary to Ozyck, Carbone, and Bolan in two significant ways: (1) the decision strongly endorses the inalienability principle; and (2) the decision demonstrates a true understanding of Stankiewicz and the ownership principle.

In Il Giardino, a dominant landowner, with a right-of-way across abutting land, purported to transfer the right-of-way so that a non-dominant neighbor could use the easement as well. Recognizing that, "as a general rule, 'an appurtenant benefit may not be severed and transferred separately from all or part of the benefited property,'" the Court held that the alleged transferor "did not have the legal right to transfer his right to use the [easement] absent a conveyance of his property to which the easement was appurtenant." The Court therefore reaffirmed the inalienability principle while nonetheless

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155 See supra Part I.B.2.
157 254 Conn. 502.
158 Id. at 515 (quoting SERVITUDES, supra note 5, § 5.6 at 46).
159 Id. at 518.
maintaining Carbone as an exception to the rule.\textsuperscript{160} The Court also reaffirmed the ownership principle, correctly citing Stankiewicz for the principle that “one cannot convey a greater interest than one owns.”\textsuperscript{161}

V. CONCLUSION: THE LEGACY OF UNITY OF TITLE

It would have been impossible to predict the kind of changes that have taken place in Connecticut easement law within the past thirteen years. While the precise impact of Ozyck, Carbone, and Bolan is still unclear, especially in light of Il Giardino and Murray, one can make the following concluding observations:

First, the most significant legacy of unity of title is the revolutionary “easement by Carbone” concept, which might or might not have otherwise come into existence in the absence of the Ozyck error. Carbone clearly stands for the proposition that an easement may serve non-dominant parcels. For this reason, Carbone should become a primary focus of all disputes in which owners of non-dominant parcels claim easement rights. The apparent breadth of the Carbone Court’s pronouncement invites the possibility that Carbone can effectively expand dominant estates that are created by other non-record easement theories, namely prescription and implication. In this regard, the Carbone rule significantly modifies the ownership principle, the appurtenance principle, and the inalienability principle, insofar as Carbone recognizes easements benefiting lands that were not within the reasonable contemplation of the servient landowner at the time of the easement’s creation.

Second, although Ozyck once posed a serious threat to the very foundation of easement law, much of its potential damage was reversed (albeit accidentally) by Bolan. Further, the recent decision of Il Giardino may indicate a trend back to basic principles. Nevertheless, the existence of Bolan still poses some fairly serious questions, especially in light of the Appellate Court’s recent decision in Murray, which construes

\textsuperscript{160}See supra text accompanying notes 114-15.
\textsuperscript{161}254 Conn. at 527 (citing Stankiewicz, 191 Conn. at 170).
Bolan as dramatically changing the rules regarding the creation of implied easements based on prior use and necessity. If Murray's reasoning stands, a landlocked landowner would essentially be afforded non-prescriptive condemnation powers without any obligation to compensate the servient owner. Thus, Murray's interpretation of Bolan results in the complete obliteration of the ownership principle.

Third, although the reservations to strangers doctrine has not been explicitly overruled, the Bolan Court clearly intended to abandon rules that frustrate the grantor's intent based on inartful use of the words "reservation" or "exception." In this regard, Bolan should be construed as recognizing the creation of express easements where the grantor possesses the power to create the easement and demonstrates the requisite intent to do so.

Fourth, and perhaps most important, regardless of the actual impact of Ozyck, Carbone, and Bolan on future easement law in Connecticut, the infamous history of unity of title should be recognized and appreciated for what it is: a fascinating case study in how blind recitation of established doctrine, combined with inadequate comprehension, can result in new, ill-conceived, and sometimes revolutionary legal principles. One hopes that the Court, having partially righted itself with Il Giardino, will have an opportunity to recognize its errors and clarify this important area of property law.