

A man owned 80 acres of land, fronting on a town road. Two years ago, the man sold the back 40 acres to his cousin. The 40 acres sold to the cousin did not adjoin any public road. The man's deed to the cousin expressly granted a right-of-way over a specified strip of the man's retained 40 acres, so the cousin could reach the town road. The deed was promptly and properly recorded.

Last year, the cousin conveyed the back 40 acres to his friend. They had discussed the right-of-way over the man's land to the road, but the cousin's deed to the friend made no mention of it. The friend began to use the right-of-way as the cousin had, but the man sued to enjoin such use by the friend.

For whom should the court decide?

- A. The friend, because he has an easement by implication.
- B. The friend, because the easement appurtenant passed to him as a result of the cousin's deed to him.
- C. The man, because the cousin's deed failed expressly to transfer the right-of-way to the friend.
- D. The man, because the cousin's easement in gross was not transferable.

## Explanation:

### Distinctions between easements

<b>Type</b>	Appurtenant	Benefits easement holder's land Benefit & burden automatically transfer when land is conveyed
	In gross	Benefits easement holder personally Burden (not benefit) automatically transfers when land is conveyed
<b>Purpose</b>	Affirmative	Allows easement holder to do something on servient estate
	Negative	Restricts servient-estate owner's lawful use of servient estate
<b>Creation</b>	Express	Created by parties in writing that satisfies statute of frauds
	Irrevocable license	License becomes irrevocable due to estoppel or coupling with another servitude
	Implied	Implied by law due to necessity (easement by necessity) Implied by fact due to prior use (easement by implication)
	By prescription	Adversely acquired through <b>OCAN</b> —open/notorious, actual, continuous & nonpermissive use

An **easement appurtenant** is an easement that **benefits** a parcel of land (**dominant estate**) by allowing the easement holder to use or control another parcel of land (servient estate) in a limited way. One common example is a **right-of-way** over the servient estate that provides access to the dominant estate. This type of easement is **attached to the land**, so **subsequent owners** of both estates are **bound** by the easement.\*

Here, the man conveyed the back 40 acres to the cousin, along with an express right-of-way that allowed the cousin to cross the man's land to access the town road. Since that easement appurtenant is attached to the land, it passed to the friend when the cousin conveyed the back 40 acres to the friend—even though the deed did not expressly transfer the easement to the friend (**Choice C**). Therefore, the court should decide for the friend.

\*However, an easement will not bind subsequent owners of the servient estate who take without actual, record, or inquiry **notice** of the easement.

**(Choice A)** An **easement by implication** will be created by law only if it is necessary for the use and enjoyment of property—eg, if the property cannot be accessed from a public road or existing easement. Here, an easement need not be implied because the friend has an easement appurtenant that provides access to the road.

**(Choice D)** Unlike an easement appurtenant (as seen here), an easement in gross benefits the easement holder *personally* but does not benefit a parcel of land (ie, has no dominant estate).

**Educational objective:**

An easement appurtenant benefits one parcel of land (dominant estate) by allowing the easement holder to use or control another parcel of land (servient estate) in a limited way. This type of easement is attached to the land, so subsequent owners of both the dominant and servient estates are bound by the easement.

**References**

Restatement (Third) of Property: Servitudes § 1.5 (Am. Law Inst. 2000) (defining appurtenant and in gross).

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