

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

For the Years
1967 through 1972

“ ‘Let any man, acquainted with the subject of charters, look at this [one], and then say, whether it would be wise in us to surrender it. It secures to us all the privileges and immunities which can be desired – and *it is free from legislative embarrassments*; a circumstance of unspeakable moment, in these days of asperity and opposition to the truth. Ask the legislature of Maine, or of Massachusetts, at the present time, for an Instrument like the one before us, and what would be their reply? The religious institutions of the present day are looked upon with a jealous eye. In some of the States they are unable to obtain charters of any description. In others, they are obtained only with extreme difficulty, and, after all, are so entangled with legislative interference and restrictions, as to be little better than useless.’ ” *Id.*, at p. 25-26.

JOHN W. BENOIT, JR.
Deputy Attorney General

June 7, 1972
Indian Affairs

S. Glenn Starbird, Jr. DEPUTY COMMISSIONER

Easements on Indian Island

SYLLABUS:

Utility easement across Indian Reservation can be granted only by State Legislature. Contracts signed by individual Indians resident upon the reservation are void.

FACTS:

Individual members of the Penobscot Indian Tribe signed “easement contracts” in 1931 with the Bangor Hydro-Electric Co. Electric power transmission lines and towers have been constructed across Indian Island along a course specified in the several “easement contracts”.

The contracts in question all bear the statement “the easements herein granted being subject to the approval of the Agent for the Penobscot Indians”. Although the contracts provide a space for signing by the Indian agent, beneath the word “approved”, none bear his signature.

QUESTION NO. 1:

Is it legally effective for a Penobscot Indian to grant an easement across his land on the Penobscot Reservation?

QUESTION NO. 2:

If the easements are invalid, how can they be made valid?

ANSWER NO. 1:

No. Any attempt is void and of no legal effect.

ANSWER NO. 2:

Only the Legislature could grant a valid easement, being an interest in land. The Department of Indian Affairs can give a license, not an interest in land, for continued operation of the power transmission lines.

REASONS:

The Penobscot reservation land on which an Indian resides is not "owned" by that Indian. Attorney General's Report 1951-54, page 110. The nature of the interest held by an Indian has been said to be a qualified fee and a fee simple determinable. *John V. Sabattis*, 69 Me. 473, 478; Attorney General's Opinion December 21, 1966. Conveyance of lots assigned to him may be made only to other Penobscot Indians. 22 M.R.S.A. §§ 4777, 4778. The actual control of tribal lands has long been in the State. The reservation, held for the use of the Indians, is State land. Attorney General's Report 1903-04, page 51.

An easement is a right in the owner of one parcel of land to use the land of another, for a specific purpose. *Black's Law Dictionary*, 4th ed., page 599. It is an interest in land. An easement over State land can be conveyed only by authority of the Legislature, while a license (which does not convey an interest in land) can be granted by a State department without legislative approval. Attorney General's Report 1961-62, page 125.

The 1931 writings purporting to grant easements could only be valid if done pursuant to legislative authorization. No such authorization has been found to exist then or now. Moreover, by its terms, the sample "contract of easement" submitted for our inspection is made subject to approval of the Penobscot Indian Agent, and his signature of approval does not appear. We can only conclude that the writings are void and of no legal effect.

Additionally, there can have been no easement acquired by prescription (similar to land titles passing by adverse possession) where State land is involved. See C.J.S. *Easements* § 9.a. As the question was analyzed and answered in *Woodworth v. Raymond*, 51 C. 71, 70, involving Indians forbidden by statute from conveying their farm, since a prescriptive easement is based on the presumption of a grant, it follows that no prescriptive rights can be acquired as against a party who is legally incapable of making a grant.

JOHN KENDRICK
Assistant Attorney General