

CHAPTER 1

INTRODUCTION

Easements are not real property, but they are treated like real property and are often confused by the uninitiated, who believe they are real property, when they are in fact not. Therein lies a major source of confusion among the general public, which, over time, has led to an astounding number of problems and controversies. To understand the nature and impact of easements first requires at least a basic understanding of real property law and ownership, in many cases much more than just a basic grasp of the subject.

The other common source of confusion is that an easement, being a right, or an interest, is invisible. Some characteristics of the ultimate result of an easement, such as pavement in the case of a road, for instance, may be visible, but the easement itself cannot be seen. Many would look at these characteristics and conclude that that is the easement, when in reality, it is the *result of the easement* or *evidence of the location* of the easement.

RIGHTS AND INTERESTS IN LAND; TRANSFER OF OWNERSHIP

Ownership in General

Land ownership. When something is owned, it is generally thought that someone has *title* to it, or in it. Title may be in several forms, however. Title, by definition, can be regarded as the right to or ownership of property. The word is used to designate the means by which an owner of lands has the just possession of his property, the legal evidence of his ownership, or the means by which his right to the property has accrued.¹

A fee-simple estate is the highest and greatest estate in land that one can obtain. Those who possess a fee-simple or fee simple absolute estate are, for all purposes,

¹ *Patton on Titles*, § 1.

the owners of the land. The words *fee-simple absolute* in reality are not a single term; each distinct word carries a meaning that explains the entire term. *Fee* denotes that the estate is one that can be inherited or devised by a will. *Simple* denotes that the estate is not a fee tail estate, wherein the estate must be inherited by a specific individual. *Absolute* means that there are no conditions or limitations so far as time is concerned on the estate, and this estate may continue forever (not like a fee or an estate that may be determinable upon the happening of an event).²

Fee tail, or an estate tail, is an early English type of estate, which in all probability was borrowed from the Romans. It is a true freehold estate limited by the grantor to the heirs of the grantee's body or to a special class of individuals, either male or female (e.g., the eldest, the youngest, or other). If the conditions are breached (no male or female is produced by the grantee), the estate reverts to the grantor or his heirs. In the United States, individual states have determined that this type of estate was never adopted as part of the English common law that a conditional fee was present and that, upon the birth of a child, it was converted to a fee-simple estate, or that statutes eliminated the estate and any reference to fee tail connotes fee-simple absolute.³

A *life estate* is considered a freehold estate since it can be conveyed to a third party, yet its duration is only measurable by some life. In essence the life estate lasts only for the life of some person. An "ordinary" life estate is normally worded "to Jones for life and then to Brown in fee-simple." An estate *per autre vie* has a measured life other than that of the holder of the estate and may be worded "to Jones for the life of Brown and then to Smith in fee-simple." This estate terminates with the death of Brown.

Life estates may be created by expressed provisions or words in a will or deed or by contract between heirs or parties in interest. If a question exists as to the creation of a life estate, the courts will look at the precise words used.⁴

Nature of modern estates. By law, an estate is the interest a person has in real or personal property. The word is sometimes used to mean the property or assets of a person, as in "the estate of John Doe." In general, real estates are classified by the time of enjoyment, and they are (1) estate in fee, (2) estate for life, (3) estate for years, and (4) estate at will.

An *estate in fee*, sometimes called an *estate in fee-simple*, is the most absolute interest a person can have in land. It is of indefinite duration and is freely transferable and inheritable. More than one fee can be held on a given parcel of land; for example, one person may have the fee to minerals and another the fee to the land, excepting the minerals.

² Brown, Curtis M., Walter G. Robillard, & Donald A. Wilson. *Boundary Control and Legal Principles*. New York: John Wiley & Sons, Inc., 1986.

³ Ibid.

⁴ Ibid.

A *defeasible fee-simple estate* is one in which a future event must be met. It is an estate in fee that is liable to be defeated by some future contingency.⁵ The title is conveyed on the condition that certain things will be done within a time limit or that certain things will never be done. A fee may pass on the condition that a storm drain is installed, or that the property is never used for the sale of alcoholic beverages.

An *indefeasible estate* is one which cannot be defeated, revoked, or made void. The term is usually applied to an estate or right that cannot be defeated.⁶

A *life estate* is an estate limited to the life of the person or persons holding it, and will automatically revert upon the death of the individual. However, the holder of interest may, in some cases, transfer their interest to another, which will terminate upon the death of the original holder of the life estate. This is known as an estate *per autre vie* (for the life of another).

An *estate for years* is usually created by a lease between two parties whose relationship is that of landlord and tenant, such as a lease to use a parcel for 10 years, conditioned on payment of a given amount of money or other consideration.

An *estate at will* may be terminated at any time.⁷ It is an estate less than freehold, where lands and tenements are let by one person to another, to have and to hold at the will of the lessor, and the tenant, by force of this lease obtains possession.⁸

Transfer of Title and Property Rights Whatever title or interest a person or entity has may be transferred, or acquired. The means by which this is accomplished may be categorized as follows:⁹

MEANS OF TRANSFERRING OR OBTAINING TITLE OR RIGHTS IN LAND¹⁰

Public grant. A public grant is defined as a grant from the public; a grant of a power, license, privilege, or property, from the state or government to one or more individuals, contained in or shown by a record, conveyance, patent, charter, or similar entity.¹¹

⁵ *Black's Law Dictionary.*

⁶ *Black's Law Dictionary.*

⁷ Brown, Robillard, & Wilson, *supra*.

⁸ *Black's Law Dictionary.*

⁹ Brown, Curtis M., Walter G. Robillard, & Donald A. Wilson. *Brown's Boundary Control & Legal Principles*. 4th Edition. Hoboken, NJ: John Wiley & Sons, Inc., 1995.

¹⁰ Subject titles taken in part from Robillard, Wilson, & Brown, *Brown's Boundary Control & Legal Principles*, 6th edition, Hoboken, NJ: John Wiley & Sons, 2009.

¹¹ *Black's Law Dictionary.*

A *grant* is the generic term applicable to all transfers of real property.¹² A *charter* is an instrument emanating from the sovereign power, in the nature of a grant, either to the whole nation, or to a class or portion of the people, or to a colony or dependency, and assuring to them certain rights, liberties, or powers. Such were the charters granted to certain of the English colonies in America.¹³ A *patent* is a document issued by the government to one to whom it has transferred or agreed to transfer land, in order to vest in the transferee the complete legal title, or to furnish evidence of the transfer.¹⁴ It is frequently a conveyance by which the United States passes title to portions of the public domain.¹⁵ It is equivalent to a deed, and often passes fee-simple title.

Often overlooked is the transfer of title by *vote of proprietors*. Proprietorships generally had the authority to transfer parcels of land, and did so by vote, there being neither further conveyance nor record of transfer other than the notation in the proprietors records. Such a transfer generally resulted in fee-simple title,¹⁶ although necessary easements may be part of the grant, frequently by implication.

Act of a legislature. Legislative acts frequently result in fee-simple title being granted.¹⁷ Often found as the subject of legislative acts are mill grants, turnpikes, plank roads, canals, and similar entities, along with major highways, especially when they cover long distances, or are in more than one state or colony. Post roads and similar entities are included in this latter category.

Private grant. A private grant is a grant by a public authority vesting title to public land in a private person. *United Land Ass'n v. Knight*, 85 Cal. 448, 24 P. 818 (1890).¹⁸

The most common private grant is a deed. Deeds may come in a variety of forms, and there are also similar instruments that may pass property rights from one person to another

Will. With a will, the decedent has the right to designate whom the next title holder will be of the items contained in the estate. The next transfer may found either from one or more of the devisees or from the executor of the will, if empowered to sell.

Intestate succession. Where there is no will, the statute current at the time of the death of owner dictates who are the legal heirs. In conducting title research or

¹² *Black's Law Dictionary*.

¹³ *Black's Law Dictionary*.

¹⁴ *American Law of Property*, § 949.

¹⁵ *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636, 26 L.Ed. 875.

¹⁶ The proprietors of common and undivided lands may divide the same among themselves by metes and bounds, and lots and ranges. They may make partition either by a vote or deed, or they may convey their undivided interests without partition. *Corbett v. Norcross & al.*, 35 N.H. 99 (1857).

¹⁷ A grant of land by an act of the legislature vests an actual seizin in the grantee. *The Proprietors of Enfield v. Permit*, 8 N.H. 512, 31 Am. Dec. 207 (1837).

¹⁸ *Black's Law Dictionary*.

compiling chains of title back in time, it is important to keep track of which statute applies at any particular point in time.

Involuntary alienation. This category includes bankruptcies and foreclosures, including takings through the statutory lien process for nonpayment of taxes.

Adverse possession. This is the process whereby long-term occupation and possession can ripen into title. This also includes unwritten agreements. Each state has a statute of limitations for bringing an action for the recovery of real property when occupied by one other than the record title holder. Requirements, as well as the time(s) required under different sets of circumstances, vary considerably. The definition is the actual, open, and notorious possession and enjoyment of real property, or of any estate lying in grant, continued for a certain length of time, held adversely and in denial and opposition to the title of another claimant, or under circumstances which indicate an assertion or color of right or title on the part of the person maintaining it, as against another person who is out of possession.¹⁹

Title acquired by adverse possession is a new and independent title by operation of law and is not in privity in any way with any former title. Generally, it is as effective as a formal conveyance by deed or patent from the government or by deed from the original owner. In fact, it is a good, actual, absolute, complete, and perfect title in fee-simple, carrying all of the remedies attached thereto. The title acquired will pass by deed. After the running of the statute, the adverse possessor has an indefeasible title, which can only be divested by conveyance of the land to another, or by a subsequent ouster for the statutory limitation period.²⁰

When the occupation is through use rather than possession, an easement generally results, although essentially the same requirements must be fulfilled. The process is known as *prescription*. With any type of occupation against another title holder, one can only acquire the extent of title that the title holder holds.

Eminent domain. Eminent domain is the power of the state to take private property for public use.²¹ The process is known as condemnation, and the condemnor can only acquire the extent of the title held by the condemnee. It requires a formal procedure outlined in the law of the state.

Escheat. Escheat signifies a reversion of property to the state in consequence of a want of any individual competent to inherit. The state is deemed to occupy the place and hold the rights.²² When a property holder dies without will or legal heirs, generally the law provides for such property to automatically become state property through the process of escheat.

Dedication. An appropriation of land to some public use, made by the owner. A dedication may be express, as where the intention to dedicate is expressly manifested by a deed or an explicit oral or written declaration of the owner, or

¹⁹ Black's Law Dictionary.

²⁰ 3 Am Jur 2d, *Adverse Possession*, § 298.

²¹ Black's Law Dictionary.

²² Black's Law Dictionary.

it may be implied, shown by some act or course of conduct on the part of the owner from which a reasonable inference of intent may be drawn. A dedication may also occur according to common law and may be either express or implied, or it may be statutory, made under and in conformity with provisions of a statute regulating the subject, making it necessarily express.²³

Dedication is the devotion. In order for the public to acquire the dedicated rights, there must also be an acceptance by the appropriate governing authority. The acceptance is a discrete event.

Containing the element of estoppel. An estoppel is a bar or impediment raised by the law, which precludes a person from alleging or from denying a certain fact or state of facts, in consequence of his previous allegation or denial or conduct or admission, or in consequence of a final adjudication of a matter in a court of law.²⁴

The doctrine of estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result. The rule is grounded in the premise that it offends every principle of equity and morality to permit a party to enjoy the benefits of a transaction and at the same time deny its terms or qualifications.²⁵

In brief, estoppel is an equitable principle utilized to prevent one who has failed to act when he should have acted from reaping a profit to the detriment of his adversary.²⁶

Regarding easements, estoppels may fall into three possible categories: estoppel by deed, estoppel by record, or estoppel by conduct.

Accretion. Accretion is the increase of real estate by the addition of portions of soil, by gradual deposition through the operation of natural causes, to that already in possession of the owner.²⁷ It may be by water, which is the most common, or by wind, which is often subtle, long-term, and not considered by the average person. Ownership of accretion generally is in the owner(s) of the land it attaches to.

Parol gift. While generally transfers of real property fall under the English Statute of Frauds (1677) and therefore must be in writing, under certain circumstances there may be a parol transfer of property, or property rights. In addition, transfers made prior to the adoption of the statute of frauds by a particular state, are not affected, and therefore may be valid although not in writing.

Operation of law. Situations not covered by the foregoing, affected by law or legal requirements, may be included in this category. Most of them are not a matter of record and take place automatically upon the satisfaction of specified requirement. *Reversion* is a classic example, whereby an estate, or part

²³ *Black's Law Dictionary.*

²⁴ *Black's Law Dictionary.*

²⁵ *Thompson v. Soles*, 299 N.C. 484, 263 S.E.2d 599 (1980).

²⁶ *Sizemore v. Bennett*, 408 S.W.2d 449 (Ky., 1966).

²⁷ *Black's Law Dictionary.*

thereof,²⁸ automatically returns to its origin when a certain situation arises. It is defined as the manner in which rights, and sometimes liabilities, devolve upon a person by the mere application to the particular transaction of the established rules of law, without the act or cooperation of the party himself.

Custom. Custom is a usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject matter to which it relates. It is a law not written, established by long usage, and the consent of our ancestors. If it be universal, it is common law; if particular to this or that place, it is then properly *custom*.

Customs result from a long series of actions constantly repeated, which have, by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent.²⁹

Prior appropriation. This is a doctrine developed by Sir William Blackstone in his *Commentaries on the Laws of England*. Distinct from the prior appropriation doctrine of the western United States pertaining to water rights, Blackstone labeled flowing water as “transient property,” usable by the owner(s) of land against whom it touched. He stated that water was a corporeal right, a transient element to the public but subject to a qualified individual property or title during use. Title subsists only during time of use, as water cannot be possessed or appropriated in the same manner as land. The prior appropriation theory is distinct from theories of acquisition of incorporeal rights by prescriptive long user.³⁰

Any one of the foregoing may play a role in the creation, termination, alteration, or transfer of one or more easements.

Corporeal and Incorporeal Hereditaments Corporeal hereditaments are substantial permanent objects that may be inherited. The term “land” will include all such.

Incorporeal rights are those rights in things that can neither be seen nor handled, that are creatures of the mind and exist only in contemplation.³¹ They are *rights* and *interests* acquired by one person in and over the land of another, and include rights of way, rights to water, support, air, light, view, and a multitude of similar interests that are appurtenant to and constitute the enjoyment of land. They are known as easements or servitudes.³²

An incorporeal hereditament has been defined to mean a right growing out of, or concerning, or annexed to, a corporeal thing, but not the substance of the thing itself.³³

²⁸ *Black's Law Dictionary*.

²⁹ *Black's Law Dictionary*.

³⁰ Blackstone, *Commentaries*, 1765-1769.

³¹ Blackstone op. cit.

³² *Black's Law Dictionary*.

³³ *Huston v. Cox*, 103 Kan. 73, 172 P. 992.