

# UNWRITTEN TRANSFERS OF LAND

Salvatore A. Marsico

## Abstract

An area of law that is of extreme interest to surveyors is that of parties conveying interests in land without any evidence of a writing. While the rights of the respective parties are questions of law and the courts, surveyors play a crucial role. Thus it is important for the surveyor to understand how the rights of the parties come into being. It is the intent of this article to present the concept of unwritten rights that arise from the conveyance of land interest(s) as it relates to easements and adverse possession.

## Introduction

As with any retracement that a surveyor performs for a client, a need arises to gather all the information available about the parcel(s) involved. The information gathered enables the surveyor to tell the client or the court a story. This story takes each piece of information and places into a category such that all the elements of the legal theory are met. As with any case involving the law, a legal theory must be advanced. For example, the client requests relief from the court based on a theory that the land is owned under the theory of adverse possession. Thus the surveyor's story must weave the information into the elements of adverse possession. Therefore, the surveyor's retracement information is the evidence required by the court to adjudicate a case. Unwritten rights of ownership come into being because the land interest was not in writing and the parties now claim ownership and it's up to the courts to decide whether the unwritten rights turn into written ones.

## Statute of Frauds

There are certain transactions which we as a society have deemed to be quite important and as such should be evidenced by a writing. One such type of transaction involves the transfer of interests in real property. In general, owners of property have the right to alienate, or sell, exclude others from it and sell any interest that they may have to any other person(s). However, these interests must be supported by a writing<sup>1</sup> such as a deed or deed of easement, and if no such writing exists then the courts will not enforce the agreement. The statute of frauds is intended to protect the parties from fraud and thus it is "to be a shield and not a sword."<sup>2</sup> Most states have identical language, Nevada provides that:

"1. Every contract . . . for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom

the lease or sale is to be made.<sup>3</sup>”

Oregon courts have recognized that oral agreements for the use or transfer of real property can be enforced despite the Statute of Frauds, if the donee enters into possession and makes valuable improvements. *Thayer v. Thayer*, 69 Ore. 138, 138 P. 478 (1914); see also *Luckey, et ux v. Deatsman*, 217 Ore. 628, 632, 343 P.2d 723 (1959). This is based on the doctrine of part performance in reasonable reliance on the person making the promises can take an agreement out of the requirements of the statute of frauds. The courts of Oregon have also looked at cases involving “boundary by agreement,” whether by acquiescence or practical location. They have concluded an oral agreement on a boundary does not violate the statute of frauds because “it interprets, rather than alters, the property deed description and, therefore, does not effect a conveyance or transfer of real property.<sup>4</sup>” In comparison, California courts “have not considered the statute of frauds an insurmountable difficulty.<sup>5</sup>” Thus, it is imperative that the surveyor look to the courts of the particular jurisdiction for guidance on this issue.

### **Unwritten Land Transfers**

The concept of unwritten land transfers is not new. However, it is most significant because the concept enables individuals to gain or lose land and any associated rights that go along with land ownership. These rights to land that are gained without a writing must comply with Federal, State, and Local government entities. And in many states a person does not gain any rights against the public, i.e. roads. When boundary lines move someone may lose land, and this can happen by agreement of the parties, by acts of adverse relations, by acts of nature such as erosion, or by the police power of the state (i.e. eminent domain). The surveyor has a difficult road to travel because in many instances adjoining land owners enter into an agreement, later sell off their parcel and the new owner may be subjected to the agreement. The net effect is that the person receiving a title through an unwritten transfer will have a superior title, thereby becoming senior to written title rights. While there are a number of types of unwritten land interest transfers, the two most common are easements and adverse possession. Whereas the former grants the holder the right to use of someone else’s land, the latter vests title.

### **Easements and Adverse Possession**

Easements are interests in lands and must comply with the statute of frauds.<sup>6</sup> The easement confers the right to use another’s land and is usually created by private agreement.<sup>7</sup> However, the problems arise when an easement is purported to exist without any evidence of a written instrument in violation of the Statute of Frauds. In these instances the courts have developed easements under operation of law. The common types of easements that fall into this category are those that arise from implication, by necessity, or prescription which is a “permanent interest in another’s land<sup>8</sup>” that cannot become possessory<sup>9</sup>. Easements can be categorized as appurtenant or in gross, where the latter is a personal interest to use another’s land and does not require two estates.

However, when two estates are involved, the right to use belongs to the dominant while the burden is imposed on the servient. While the estates need not be contiguous the burdens and rights that flow are incorporeal; that is, they are intangible. However, these incorporeal rights are imposed on corporeal property, i.e. real property<sup>10</sup> until terminated properly.

Unless there is some statute to the contrary all easements that can be acquired by grant can also be acquired by prescription. Just like adverse possession, the person must show that the easement is open and notorious or visible, adverse or hostile, under a claim of right, continuous and uninterrupted, exclusive, with the knowledge and acquiescence of the owner of the servient estate, for the full prescriptive period.<sup>11</sup> Unlike adverse possession, a prescriptive easement will not give rise to fee title in the property because an easement is an incorporeal right incapable of becoming corporeal. That is, the right to use the property will not ripen or vest into a fee simple title.

Easement by implication is a creature of common law that requires three elements to show the existence of such. The first element is unity of ownership that must be a condition prior to the severance of the parcel(s).<sup>12</sup> The second required element deals with the length of time that the easement was used so as to show that it was meant to be permanent, and the third required element mandates that the benefit of the easement continue after severance of title.<sup>13</sup> In addition, an implied easement can arise from necessity where a landowner sells off a tract of land without any access to a public road.<sup>14</sup> Thus when one conveys property he also conveys what is necessary for its use and enjoyment and not to have access prevents any enjoyment. And just like any other easement certain elements must exist to create an easement by necessity. First there must be unity of ownership as to the dominant and servient estates, two the unity of title must have been severed by the conveyance of at least one tract, and the use of the servient estate must be necessary.

Unlike easements adverse possession will vest title to property to a person who did not have record title. A claim for adverse possession will survive if and only if all the elements are present and the burden is on the person claiming the right. The burden of proof in civil cases is one of preponderance; however, in cases involving adverse possession the burden is increased to clear and convincing.<sup>15</sup> To vest title after a lapse of the required time, it is required that the possession be actual, open and notorious, exclusive, hostile, under a claim of right, and continuous and uninterrupted. All these elements must be present, lack of one defeats the claim of vesting title through adverse possession. Possession is adverse when the occupier of land intends to occupy a particular piece as his own and as such the parties' intent is the crucial factor in the analysis.<sup>16</sup> While entry unto the land with the intent to possess it is necessary to begin the actual possession by exercising control that owners usually exercise over lands. In general, there are no hard and fast rules as to what acts establish actual possession; however, uses are placed into context as they relate to the nature, location, and character of the land.<sup>17</sup>

Open, visible, and notorious possession is required so that the title owner is placed on notice of the adverse possession. Notorious contemplates a possession of a type that is known and talked about by the people in the neighborhood<sup>18</sup> but the actual owner need not have actual notice of the possession.<sup>19</sup> In the event that the owner has no actual notice, then constructive notice of such character that an owner of ordinary prudence visiting the premises would have reason to believe that a claim of ownership adverse to his is being asserted must be present. A charge of constructive notice requires that the nature and character of the parcel, as well as the quantity or portion of the land be considered. In addition, the possession of the land by the claimant must be exclusive, holding the land as his own and not for another shown by acts consistent with ownership. The claimant is exercising dominion as the sole owner and carries on all activities consistent with the nature and use of the land. An additional requirement is that of hostility where the one in possession is claiming ownership not in subordination to the true owner and under a claim of right to the parcel. The claim of right accompanies an express declaration that the claimant is in possession and has acted in such a way as to indicate he claimed title.<sup>20</sup> In addition, the claimant must possess the parcel in whole or in part for the full statutory period. The question that always must be answered is whether the use has been for the entire period without any break in the possession

Generally, continuity of possession refers to possession which has not been abandoned by the claimant and uninterrupted refers to a possession which has not been claimed by another.<sup>21</sup> In other words, for the entire statutory period the true owner can begin an action to remove the adverse claimant. However, it also sufficient that the adverse claimant maintain continuity by intermittent or seasonal use of the land if the land is used seasonally, such as fishing, schools, or raising crops.<sup>22</sup>

### **Conclusion**

While it is true that a surveyor cannot interpret law in the eyes of the court, they play a crucial role in gathering evidence. It is this evidence that a judge or jury will use to evaluate the facts as applied to the law to reach the ultimate conclusion as to ownership of a land interest, whether an easement or title to lands. Thus as the surveyor retraces the step of the previous surveyor information that is not recorded in the courthouse may play a crucial part in the retracement effort. The surveyor must look to signs of possession of adjoiningers to evaluate whether any unwritten rights exist as they relate to his client. However, the surveyor must not lose sight of the fact that he is not the one who is going to evaluate the evidence found on the ground or through parol and as such should supply his client and or attorney with all the information either in filtered or unfiltered form.

---

<sup>1</sup> 33 P.S. § 1

<sup>2</sup> Empire Properties, Inc. v. Equireal, Inc. 674 A.2d 297,302

<sup>3</sup> NRS 111.210

<sup>4</sup> Blaisdell v. Nelson, 66 Or App 511, 674 P2d 1208 (1984)

<sup>5</sup> Oliver v. Burnett, 10 Cal.App. 403

<sup>6</sup> Restatement of Property § 467, comment F

<sup>7</sup> Dukeminier, J., and Krier, E., *Property* (3<sup>rd</sup> ed 1993)

<sup>8</sup> Town of East Troy v. Flynn, 485 N.W.2d 415

- 
- <sup>9</sup> McDonald v. Board of Mississippi Levee Com'rs, 646 F.Supp 449, affirmed
- <sup>10</sup> Brasington v. Williams, 141 S.E. 375
- <sup>11</sup> Brewer v. U.S., 562 F.Supp. 128
- <sup>12</sup> Graham v. Mack, 699 P.2d 590
- <sup>13</sup> Carver v. Jones, 773 S.W.2d 842
- <sup>14</sup> LeMay v. Anderson, 397 A.2d 984
- <sup>15</sup> Empire Properties, Inc. v. Equireal, Inc. 674 A.2d 297, 304
- <sup>16</sup> Reynolds v. Rutland, 365 So.2d 656
- <sup>17</sup> Lee v. Hansen, 578 P.2d 784
- <sup>18</sup> Hunt v. Matthews, 505 P.2d 819
- <sup>19</sup> Somon v. Murphy Fabrication &Erection, 232 So.2d 753
- <sup>20</sup> Seddon v. Harpster, App., 369 So.2d 662
- <sup>21</sup> Whitley v. Texaco, Inc. 434 So.2d 96
- <sup>22</sup> Walker v. Bell, 47 N.W.2d 504

Salvatore A. Marsico is an Assistant Professor of Mechanical Engineering and Legal Issues in Engineering in the Commonwealth College of Penn State. He received the Bachelor and Master in Mechanical Engineering from Manhattan College, New York, and the Juris Doctor from Temple University's Beasley School of Law, Philadelphia, Pennsylvania.