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Land Boundary Surveys I

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Land Boundary I

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Module 1

These introductory ideas are first presented cursorily and will be developed more fully.

Real Property

Land is real property certainly, but what exactly is real property? Here are a few comparisons between real property (realty) and personal property (personalty) to bring the answer into some focus.

Personal property is moveable and real property isn't. Real property is land and things fixed to land, both physical and nonphysical. Real property or personal property can undergo transformation that is each can be changed into the other. For example, land in place is immovable and real property, but if it is severed from the earth, like a truckload of gravel or topsoil, it becomes personal property. In its natural state, water is real property, but generally when it is put in containers, it becomes personal property. On the other hand, personal property can become part of the land when it is attached with the intention of making it permanent. State statutes usually include ground or soil as real property certainly, but also things that are attached it, whether by nature, i.e. trees and other vegetation, or by man, i.e. a house.

Real property might be attached to the land by roots, i.e. trees, vines, or shrubs. Trees, shrubs, vines, and crops that are a product of nature alone, termed "fructus naturales," and are regarded as part of the land in which their roots grow. They continue to be real property until severed. Grain, garden vegetables, and other crops that are the result of cultivation are classified as "fructus industriales," and are either real property or personal property, depending upon the circumstances.

Real property might simply rest on the land, i.e. walls, buildings and etc. For example, lumber at a lumber yard is personal property, but when it is used in the construction of a residence on a parcel of land, it becomes real property. And it need not be in actual contact with the soil itself. It may be attached to a building that is considered part of the land. A piece of plumbing, as an example, may be real property.

Different Laws

These contrasts in the two classes of property have resulted in different rules of law regulating their ownership. Real property is exclusively subject to the laws and jurisdiction of the state within which it is located. And transactions in real property are governed by the laws of that state, except where title is in the United States, or where it is specifically under the jurisdiction of the federal government. State law controls the form, execution, validity, and effect of instruments relating to land in that state, for example, state laws determine inheritability. Courts of one state do not have the power to render decrees that directly affect title to land in another state. Personal property, on the other hand, is usually regarded as

situated at the home of its owner, regardless of its actual location; it is governed by the law of the owner's home.

The distinction between real and personal property is also of importance as to method of transfer. A voluntary transfer of title to real property is usually made in an instrument in writing, whereas title to personal property generally passes by delivery of possession. A written instrument may be used in connection with the transfer of personal property, but is not necessary to its validity unless required by statute.

A Bundle of Rights

Land is composed of a bundle of rights. And for a particular parcel of land it is usual that those rights are divided among many. It is important to note that rights and title are not the same thing. Here are a few examples.

Included in real property are things incidental to the use of land, such as easements and rights of way. And real property includes not only the surface of the earth, but things under it and above it as well. For example, land includes ores, metals, coal and other minerals in or on the land, while in place they are real property. The rights to them can be divided and subdivided in various ways. For example, the owner of the title to a tract of land might convey the land and retain the rights to the minerals for himself. Or he could convey the rights to the minerals to another person and retain ownership of the land. But consider that if he did convey the rights to the minerals to another, he might automatically create an implied right of entry for their extraction

even though he still owned the land. But suppose he wished to avoid that. In that case, he might specifically exclude right of entry from the surface and convey just the rights to the minerals 500 feet or more below the ground so they would need to be removed from neighboring areas.

Here is another example, oil and gas are minerals, but are not fixed and stationary like solid minerals. They shift and move. In this case the owner of the title to the land might control of the right to drill for them and may in some cases retain all brought to the surface as his property. And this right may be conveyed to someone else linked to or separate from a grant conveying the ownership to the land on the surface.

Boundaries

Land and rights in land are divided by boundaries, and that, as they say, is where we come in.

To establish the location of a boundary land surveyors examine written deeds and other documents. We take testimony of adjoining owners and neighbors. We evaluate various bits of other information to find the best available evidence of the location. Usually the job requires tracing on the ground the written conveyance, the deed used to convey the property as supplied by the client. And due diligence usually demands that we examine the adjoiners, conveyances, maps, and surveys called for in that deed. Most often this includes recorded adjoining surveys, rights-of-way, utility easements, and dedications in the area as well as government field notes

and maps. In short we must become familiar with the history of both the particular parcel, and adjoining parcels.

And when ambiguities or other difficulties appear the land surveyor must be thoroughly prepared to present simply and clearly the strongest possible evidence to substantiate and justify his decisions. Because should a boundary dispute arise and court action result, the court's decisions will likely be based on an interpretation of boundary law and the evidence presented in the particular case, including the surveyor's work.

While one cannot depend that a particular court will act in accordance with what has generally been accepted by other courts, fortunately there are guidelines that have stood the test of time. Therefore, when conflicts occur between written instruments, maps and the actual measurements on the ground or when ambiguities are revealed in the instruments themselves there is some recourse to a generally accepted order of importance. But remember, this ordering can vary from state to state, or even within one jurisdiction.

1. Rights of possession and unwritten transfer of title. These can even alter or overcome a written conveyance. Unwritten rights can include:
    a. Agreements between adjoiners, expressed or implied;
    b. Adverse claims;
    c. Acts of nature;
    d. Statutory proceedings;
    e. Prescription, etc.

2. Senior Rights (when overlaps occur)
    a. Senior rights can come to bear in sequential conveyances. First come, first served, in other words the first deed to be served from an existing tract is called the senior deed. Any later severances acquire seniority in the chronological order of execution.

    b. Senior rights generally do not come into play in simultaneous conveyances. Lot boundaries shown on a recorded subdivision plat, for example, are assumed to have all been created on the same day of recordation.

3. Written intentions of the parties, usually expressed in a deed.
    a. Call for a survey
    b. Call for monuments. The actual position of the called-for monument at the date of the conveyance.
        i. Natural Monuments: Trees, rocks, creek banks, etc., are some examples of natural monuments.
        ii. Artificial Monuments: Fence corners, the centerlines of roads, rock piles, as well as iron pipes, concrete monuments, these are all artificial monuments.
    c. Distance or Direction;
    d. Area;
    e. Coordinates and calculated or interpolated evidence.

Estates in Land

Several concepts were cursorily presented above, now begins the process of developing them into a more coherent whole. Words that may be unfamiliar will be defined.

Returning for a moment to the concept of real property, in most states, it is held to mean not only the physical land and appurtenances, structures that are affixed to it, but also interests, rights and benefits inherent in the ownership of the physical land. In other words, there are a bundle of rights with which the ownership of real estate is endowed. “It not only includes land and tenements but also all the legal rights tangible or intangible and corporeal or incorporeal” (Brown, Robillard and Wilson 1986).

In other words, real property isn't just the land itself it’s also the historical and legal baggage we call rights and interests in the land. "Legislatures and courts have allowed the transfer of nearly every conceivable benefit or right and combination of such benefits or rights that can exist in land," (Brown, Robillard and Wilson 1986). And the definition of an estate in land is the definition of the degree nature, or extent of interest which a person has in land. It is a right or interest in property that may be called a fee ownership interest, a lease interest for a period of years or some other category altogether.

Fee Simple Absolute

A fee is an estate of inheritance in real property. The word is derived from fief, and it means a freehold estate in land, freehold and fee are synonymous for all intents and purposes. The highest type of interest in land that a person can hold in the United States is fee simple absolute.

Fee simple absolute is a fee, an inheritable estate that is created by deed or will in most states. The word simple in the phrase means that it is without limitations to any particular class of heirs or restrictions. And the word absolute here means that there are no conditions or limitations in time. In theory the estate could continue forever. A fee simple absolute is sometimes said to be indefeasible, meaning that there are no strings attached. Its continuance is not dependent on some future event.

Fee simple absolute is subject to four limitations. They are eminent domain, escheat, police power and taxation. Eminent Domain is the right by which a sovereign government or some persons acting in its name and under its authority may acquire private property for public or quasi-public use without consent of the owner. Escheat is the reversion of property to the state when there is no one competent or available to inherit. Concerning police power:

> "Police power is the right exercised for the purpose of regulating use of property; it is not for the purpose of taking property. Property taken by eminent domain must be

> compensated for, but property regulated by the police power requires no compensation. The right to enact legislation to protect the safety, welfare, peace and, lives of people comes under police power; and although this does interfere with private rights and does seem to take away private rights, no compensation is necessary.
>
> In general, building or zoning regulations, set-back ordinances, restrictions on signs, and like ordinances are enforced under the police power without compensation to the property owners." (Brown, Robillard and Wilson 1981:428)

In other words, despite some limitations, the holder of a fee simple absolute is the owner of all possible rights in land the political philosophy of the time permits. As mentioned earlier, both the materials and the rights that are included in the term real property can be said to be determined by jurisdiction, and can change with the various states laws. However, as a general rule, today a deed conveys a fee simple absolute unless there is language specifically showing that something else was intended. For example

From the 12th century when the king began to make grants to a vassal "et sui haeredes", and his heirs, such grants descended on the owner's death to his legal heirs rather than reverting to the king. Today it isn't necessary for a conveyance to contain the words, "and his heirs and assigns", if a deed conveys a fee simple absolute estate inheritability is assured. But for centuries unless the words "and his heirs" were added a grantee, or devisee, in the case of a will, took only a life estate.

Life Estate

A life estate is an estate in property the duration of which is confined to the life of one or more persons. In other words, a life estate is exactly what you would expect: the right of possession, use, rents and issue of property for a lifetime, though not always the life of the owner of the estate.

There are of two types- the legal life estate and the life estate created by a deed or a will. Concerning the legal life estate there are two further subdivisions; curtesy which is a husbands right to possess a wife's real estate after her death and until he dies and dower which is the similar right for a surviving wife.

Fee simple determinable

A fee simple determinable is a fee simple but the ownership continues only as long as a particular situation continues. In other words, there are strings attached. It is defeasible.

The words "as long as" or "until" are often used in conveying a fee simple determinable. The original grantor holds reversionary rights, the property may come back to him automatically if an event occurs or fails to occur as he stipulated. It is interesting to note that this reversion may happen even after several subsequent changes in title.

Reversion

Reversionary refers to the right to of the grantor to repossess the property and resume the full and sole use and proprietorship from which he was temporarily separated. Another way of describing a reversion is the residue of an estate left in the grantor, his successors, or in the successors of a testator. A testator is a man who leaves a will or testament when he dies. While a deed can be said to grant or convey property, a will is said to devise property.

For example, suppose A owns an estate in fee and devises a life estate or a fee simple determinable to B on his death which leaves a residue in A's heirs. That residue is called a reversion, so called because possession of the property reverts to A's successors when B's lesser estate ends.

Fee upon condition subsequent

A fee upon condition subsequent makes the title held by the grantee somewhat precarious. The grantor can stipulate that if something particular comes to pass, the original grantor, or devisor may re-enter, which means re-take, the title. It might include language such as, "to A, but if A dies childless, then to revert."

In other words, in a fee upon condition subsequent the grantor retains a right of re-entry, a power of termination. However, note the difference from a fee simple determinable; a fee upon

condition subsequent doesn't end automatically but only if some condition happens and the grantor re-takes the property. In fact, if he does not act within a certain period of time he may actually be prevented from re-taking it.

Remainder

A remainder is an estate that is created at the same time as another estate, both by a single grant. The remainder consists of rights and interest that continue after the ending of other. An example of the wording of a remainder would be if a grantor were to specify, “to B for life and upon his death to C ".

Briefly: lease, easement, right-of-way and license

A fee simple absolute is the highest fee around, but it still may be subject to a right-of-way, easement, license or lease.

A lease can be granted by a written document by which the possession of land is given by the owner to another person for a specified period and for rent specified. The right of possession and use of land for a limited period may be at the sufferance of the owner meaning that if the tenant holds the property after his term has expired the landlord may evict him.

An easement is a non-possessory right to make a specific use of a definite portion of land owned by another. The owner of the underlying ground has the right to also make use of it to the extent that his use does not interfere with the exercise of the easement he granted. For his part the holder of the easement cannot use it for purposes other than intended by the easement.

Some states recognize a right-of-way as a superior type of easement where the holder of the right-of-way may let others use the property for other purposes. In some jurisdictions a right-of-way given to the public, either a state or a public utility may convey an interest in the land itself that enables the holder to permit others to use the right-of-way for other purposes. For example, a railroad might permit a power company to erect lines. In some cases the grant may even permit removal of the underlying ground or minerals. But more often a right-of-way is considered a peculiar type of easement being limited to use for passage only.

A license is a revocable non-possessory interest in land which grants the right to enter the land without being subject to an action in trespass. A license is a privilege, not a right, given by the licensor to the licensee to use land for a limited purpose. It is revocable at will.

We have taken a very brief look at some of the rights in real property. A voluntary transfer of those rights is accomplished by a written instrument, a deed. Why must it be a written instrument?

Livery in Seisin

One of the earliest methods of transferring land was known as, “livery of seisin”. The buyer was known to be, "seized of the land". Under this theory a written instrument was not sufficient to transfer a land title without actual delivery. Since it was physically impossible to take the land to the buyer, the buyer was taken on the land, and there in the presence of friends and neighbors as witnesses, the delivery was made.

This was quite a ceremony with the chief characters repeating, a required form. The seller giving the buyer a twig from a tree symbolized the delivery, a handful of soil, or the doorknob. Transfers effected in this manner were livery in deed, but if the ceremony were performed in sight of the land and not on it was constructive delivery and sufficient in law.

Deeds

Today a deed can be broadly defined as a written instrument under seal. A more complete definition is an instrument in writing which when executed and delivered conveys an estate in real property or interest therein. The person from whom the property is transferred is the grantor. The person to whom it is transferred is the grantee. And it is usual that only the grantor’s signature is required. Requirements for a valid deed may include: competent parties, a proper subject matter, a valid consideration, a written or printed form, sufficient and legal wording, execution, signing, sealing, delivery and acceptance. Each of these elements but the written or

printed form has a foundation in the "livery of seisin" of history. The stipulation that a deed be in writing is also traceable to historical precedent.

"The Statute of Frauds enacted by the English parliament in the reign of Charles II, 1672 made void any oral transfers of land, this statute has been re-enacted in one form or another in all the states of the Union. As so re-enacted in most states any oral agreement by the party conveying land changing fixed boundaries is at best voidable. And in most states an oral agreement as to where the true boundary is, is not binding upon the party, at least unless they have so acted on the agreement that an injustice would arise if one of the parties was permitted to deny the validity of the agreement." (Grimes 1976:6)

More about deeds in the next module.

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