

September 12, 1966

OPINION ON  
OREGON LAW ON EASEMENTS

In Oregon there are four ways an easement may be acquired. They are by recorded document, unrecorded document, prescription and estoppel. An easement may be acquired by a written recorded easement, and the effect of this document is covered under ORS 93.710 as set out below:

ORS 93.710 "Instruments creating certain interests in realty; effect of recording. Any instrument creating a license, easement, profit a prendre, or a leasehold interest or oil, gas or other mineral interest or estate in real property, which is executed by the person from whom the interest is intended to pass, and acknowledged or proved in the manner provided for the acknowledgment or proof of other conveyances, may be indexed and recorded in the records of deeds of real property in the county where such real property is located. Such recordation, whether the instrument be recorded prior to or subsequent to May 29, 1963, constitutes notice to third persons of the rights of the parties under the instrument irrespective of whether the party granted such interest or estate is in possession of the real property. Any such interest when so acknowledged or proved, or certified in the manner prescribed by law by any of the authorized officers, may be read in evidence without further proof thereof."

An easement may also be acquired by an unrecorded document, but it is not enforceable against the subsequent purchaser without notice where the nature of the easement is not apparent on the land purchased.

An easement may be acquired by prescription and the applicable statutes are ORS 12.050, 12.140 and 12.150 as set out below:

ORS 12.050 "Within 10 years; recovery of real property. An action for the recovery of real property, or for the recovery of the possession thereof, shall be commenced within 10 years. No action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within 10 years before the commencement of the action."

ORS 12.140 "Within 10 years; causes not otherwise provided for. An action for any cause not otherwise provided for shall be commenced within 10 years."

ORS 12.150 "Suspension of running of statute by absence or concealment. If, when a cause of action accrues against any person, he is out of the state or concealed therein, such action may be commenced within the applicable period of limitation in this chapter after his return into the state, or the time of his concealment; and if, after a cause of action has accrued against a person, he shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action."

The Oregon Supreme Court has uniformly held that the adverse use by a party under a claim of rights for a period of 10 years will give rise to an easement by prescription. The court has also held that a change of ownership of the dominant estate does not affect the running of the prescription period as the period of use by the prior owner may be tacked onto that of the subsequent owner as long as the use continues:

Coventon v. Seufert, 23 Or. 548, 32 P 508, 1893

Bowman v. Bradley, 127 Or. 45, 270 Pac. 919, 1928

Feldman et ux v. Knapp et ux, 196 Or. 453, 250  
P 2d 92, 1952

Where the length of time has not been sufficient to establish an easement by prescription or where circumstances (such as permission on the part of the owner for the establishment of the easement) take the factual situation out of the realm of an easement by prescription, the court has almost always held that there was an easement by estoppel. Where an express oral license has been given, it is held that until it is executed (licensee has expended money in making an improvement) it is merely a license. However, after the licensee expends money and installs materials and equipment or makes an improvement, and the licensor does not stop the licensee, the license then becomes an easement and is binding on the original licensor and all subsequent purchasers:

Sweetland v. Grants Pass Power Co., 46 Or 85,  
79 P 337, 1905

Shaw v. Proffitt, 57 Or 192, 109 P 584, 1910

Heisley et al v. Eastman et al, 102 Or 137, 201  
P 872, 1921

Willson v. Watts, 156 Or 134, 66 P 2d 1172, 1937

Baum et ux v. Denn et al, 187 Or 401, 211 P 2d 478,  
1949

Shepard et ux v. Purvine et al, 196 Or 348, 248  
P 2d 352, 1952

Luckey et ux v. Deatsman, 217 Or 628, 343 P 2d 723,  
1959

The above general statement regarding an easement by prescription or estoppel applies only to the situations where the easement claimed is observable so as to bind successors in interest of the servient estate by placing them on notice. The existence of an observable easement places the burden on a subsequent purchaser to determine by what right it exists, and if he does nothing then the prescriptive period continues to run or he becomes bound by the easement created by estoppel:

Zink v. Davis, 203 Or 49, 277 P 2d 1007, 1954

Ford v. White, 179 Or 490, 172 P 2d 822, 1946

Brown v. Kemp, 46 Or 517, 81 P 236, 1905

41 ALR 1442  
74 ALR 1250  
155 ALR 543

Sweetland v. Grants Pass Power Co., 46 Or 85,  
79 Pac. 337, 1905

Where the improvement is underground and is objectionable to the subsequent purchaser and the prescription period has not run, then an easement by prescription will not run against him until he has had actual notice of the claimed easement and the prescription period then starts from the time of the actual notice. This same theory applies to an easement by estoppel; thus the original owner may be estopped to deny the existence of an easement for an underground pipe. But if the subsequent purchaser is unaware of the existence of the pipe he is not bound by the prior easement against the original owner, and no rights may be enforced against him unless he does become aware of the claimed easement for the underground facility and does nothing:

Sheuchuk v. Kotchik, 96 Or 181, 189 p 399, 1920

Another important point is where a person makes an improvement on the land of another without his consent or permission and the other party does not object but allows the valuable improvement to be made, the court has held that the owner of the land is estopped to deny the existence of an easement by his passive acquiescence:

Curtis v. La Grande Water Co., 20 Or 34, 1890

As between a third party (example: the State Highway Department) and the owner of the land over which a utility or city claims an easement by adverse possession or by estoppel, the only party who can contest the claim of the utility is the owner of the land and not the third party:

Dodge v. Davies, 181 Or 13, 179 P 2d 735, 1947

Ringler v. Ruby, 117 Or 455, 244 P 509, 46 ALR 245, 1926

Clarke v. Philomath College, 99 Or 366, 195 P 822, 1921