Chapter 4
Conveyances and Recording
Correspondence Course Information

Please read and become familiar with this information prior to the class date.

This part of the class will be taken correspondence. You will be required to take a test on this information and the test must be returned prior to taking the classroom portion of the course. The remainder of the class may be taken in the classroom or by correspondence.

If you have registered for the correspondence course, the test as well as the evaluation sheet must returned for grading and issuance of you graduation certificate. You may take the tests all at once or one chapter at a time. The test may be taken open book and the answer sheet must be sent back to:

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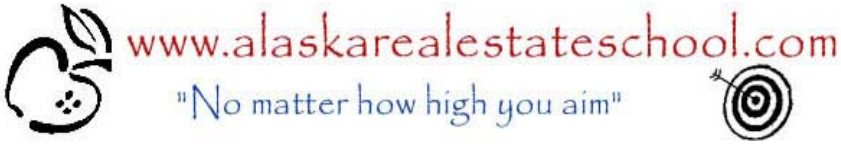


Chapter 4 Conveyances and Recording

Conveyancing

Conveyancing is the act of transferring the legal title in a property from one person to another. The buyer must ensure that he or she obtains a good and marketable 'title' to the land; *i.e.*, that the person selling the house actually has the right to sell it and there is no factor which would impede a mortgage or re-sale. A system of conveyancing is usually designed to ensure that the buyer secures title to the land together with all the rights that run with the land, and is notified of any restrictions in advance of purchase.

A typical conveyancing transaction, whether a sale or purchase contains two major 'landmarks', which are exchange of contracts (whereby equitable title passes) and completion (whereby legal title passes), plus the three stages: before contract, before completion and after completion.

In most mature jurisdictions, conveyancing is facilitated by a system of land registration which, in the near future, is likely to lead to widespread (if not mandatory) use of electronic conveyancing. Electronic or Digital Conveyancing can be defined as –

1. the system of exchanging sales & mortgage documentation and property data electronically
2. between vendor & buyer, agent & lawyer, brokers & banks, government & land registry
3. from point of sale to contract to settlement
4. with or without printed documentation.

United States

The conveyancing process in the United States varies from state to state depending on local legal requirements and historical practice. In most situations, three attorneys will be involved in the process: one each to represent the buyer, seller, and mortgage holder; frequently all three will sit around a table with the buyer and seller and literally "pass papers" to effect the transaction. (Some states do not require all parties to be present simultaneously.) In order to protect themselves from defects in the title, buyers will frequently purchase title insurance at this time, either for themselves or for their lender.

In most states, a prospective buyer's offer to purchase is made in the form of a written contract and bound with a deposit on the purchase price. The offer will set out conditions (such as appraisal, title clearance, inspection, occupancy, and financing) under which the buyer may withdraw the offer without forfeiting the deposit. Once the conditions have been met (or waived), the buyer has "equitable

title" and conveyancing proceeds or may be compelled by court order. There may be other last-minute conditions to closing, such as "broom clean" premises, evictions, and repairs.

Typical papers at a conveyancing include: deed(s), certified checks, promissory note, mortgage, certificate of liens, *pro rata* property taxes, title insurance binder, and fire insurance binder. There may also be side agreements (e.g., holdover tenants, delivery contracts, payment holdback for unacceptable repairs), seller's right of first refusal for resale, declaration of trust, or other entity formation or consolidation (incorporation, limited partnership investors, etc). Where "time is of the essence," there have been cases where the entire deposit is forfeited (as liquidated damages) if the conveyancing is delayed beyond the time limits of the buyer's contingencies, even if the purchase is completed.

Title (property)

Title is a legal term for a bundle of rights in a piece of property in which a party may own an equitable interest. The rights in the bundle may be separated and held by different parties. It may also refer to a formal document that serves as evidence of ownership. Conveyance of the document may be required in order to transfer ownership in the property to another person. Title is distinct from possession, a right that often accompanies ownership but is not necessarily sufficient to prove it. In many cases, both possession and title may be transferred independently of each other.

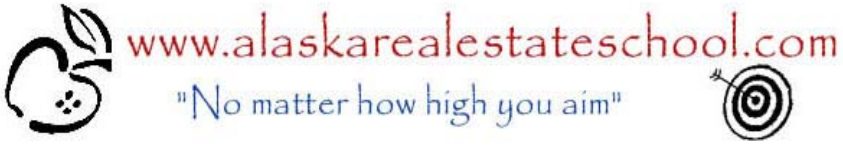
Elements

The main rights in the title bundle are usually:

- Exclusive possession
- Exclusive use and enclosure
- Acquisition
- Conveyance, including by bequest
- Access easement
- Hypothecation
- Partition

The rights in real property may be separated further, examples including:

- Water rights, including riparian rights and runoff rights
- Mineral rights



Chapter 4 Conveyances and Recording

Easement to neighboring property, for utility lines, etc.
Tenancy or tenure in improvements
Timber rights
Farming rights
Grazing rights
Hunting rights
Air rights
Development rights to erect improvements under various restrictions
Appearance rights, often subjected to local zoning ordinances and deed restrictions

Possession is the actual holding of a thing, whether or not one has any right to do so. The *right of possession* is the legitimacy of possession (with or without actual possession), the evidence for which is such that the law will uphold it unless a better claim is proven. The *right of property* is that right which, if all relevant facts were known (and allowed), would defeat all other claims. Each of these may be in a different person.

For example, suppose A steals from B, what B had previously bought in good faith from C, which C had earlier stolen from D, which had been an heirloom of D's family for generations, but had originally been stolen centuries earlier (though this fact is now forgotten by all) from E. Here A has the possession, B has an *apparent* right of possession (as evidenced by the purchase), D has the *absolute* right of possession (being the best claim that can be proven), and the heirs of E, if they knew it, have the right of property, which they cannot prove. Good title consists in uniting these three (possession, right of possession, and right of property) in the same person(s).

A simpler example is when someone purchases an automobile and finances it. The party "buying" the automobile has possession and is the "registered owner." The bank or finance company has legal ownership and is listed as the "lienholder." In the event the registered owner fails to make payments to the lienholder, the lienholder has the right to repossess the automobile, presumably to sell it. The registered owner has *possession* and *right of possession*, while the lienholder retains *right of property*.

Now, if the financed automobile referenced above was purchased by a company and was being loaned out by a car rental organization, the person who rented the vehicle would have *possession;*

the rental company would be the registered owner and have *right of possession*, while again, the lienholder would have *right of property*.

The extinguishing of ancient, forgotten, or unasserted claims, such as E's in the example above, was the original purpose of statutes of limitations. Otherwise, title to property would always be uncertain.

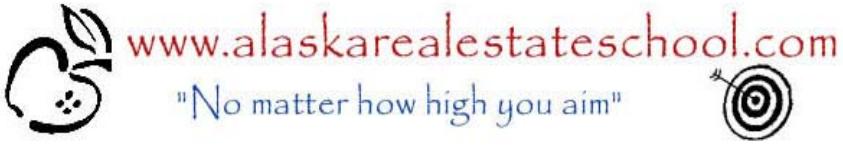
Applications

In countries with a sophisticated private property system, documents of title are commonly used for real estate, motor vehicles, and some types of intangible property. When such documents are used, they are often part of a registration system whereby ownership of such property can be verified. In some cases, a title can also serve as a permanent legal record of condemnation of property, such as in the case of an automobile junk or salvage title. In the case of real estate, the legal instrument used to transfer title is the deed. A famous rule is that a thief cannot convey good title, so title searches are routine (or highly recommended) for purchases of many types of expensive property (especially real estate). In several counties and municipalities a standard Title search (generally accompanied by Title Insurance) is required under the law as a part of ownership transfer.

Paramount title is the best title in Fee simple available for the true owner. The person who is owner of real property with paramount title has the higher (or better, or "superior") right in an action to Quiet title. The concept is inherently a relative one. Technically, paramount title is not always the best (or highest) title, since it is necessarily based on some other person's title. [1] [2]

Fee simple

Fee simple is an estate in land in common law. It is the most common way real estate is owned in common law countries, and is ordinarily the most complete ownership interest that can be had in real property short of allodial title, which is often reserved for governments. Fee simple ownership represents absolute ownership of real property but it is limited by the four basic government powers of taxation, eminent domain, police power, and escheat and could also be limited by certain encumbrances or a condition in the deed. How ownership is limited by these government powers often involves the shift from allodial title to fee simple such as when uniting with other property owners acceding to property restrictions or municipal regulation.



Chapter 4 Conveyances and Recording

Common law and history

In English common law theory, the Crown has radical title or the allodium of all land in England, meaning that it is the ultimate "owner" of all land. However, the Crown can grant an abstract entity—called an estate in land—which is what is owned. The fee simple estate is also called "estate in fee simple" or "fee-simple title" and sometimes simply **freehold** in England and Wales. In the early Norman period, the holder of an estate in fee simple could not sell it, but instead could grant subordinate fee simple estates to third parties in the same parcel of land, a process known as "subinfeudation." The Statute of Quia Emptores adopted in 1290 abolished subinfeudation and instead allowed the sale of fee simple estates.

The concept of a "fee" has its origins in feudalism. According to William Blackstone, the great common law commentator, fee simple is the estate in land that a person has when the lands are given to him and his heirs absolutely, without any end or limit put to his estate. Land held in fee simple can be conveyed to whomever its owner pleases; it can be mortgaged or put up as security as well.

The owner(s) of real property in fee simple title have the right to own the property during their lifetime and typically have a say in determining who gets to own the property after their death. In a sense, one might say fee simple owners "own" the property "forever".

Historically, estates could be limited in time, such as a life estate, which is an interest in lands that terminates upon the grantee's (or another person's) death, even if the land had been granted to a third party, or a term of years (a lease for a specified term, such as in an estate for years). It also could be limited in the way that it was inherited, such as by what was called an "entailment" which created a fee tail. Traditionally, fee tail was created by words of grant such as "to N. and the male heirs of his body"; which would restrict those who could inherit the property. When all those heirs ran out the property would revert to the original grantor's heirs. Most common law countries have abolished entailment by statute.

Estate in land

An estate in land is an interest in real property that is or may become possessory.

This should be distinguished from an "estate" as used in reference to an area of land, and "estate" as used to refer to property in general.

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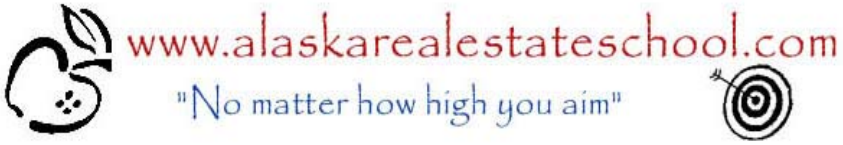
In property law, the rights and interests associated with an estate in land may be conceptually understood as a "bundle of rights" because of the potential for different parties having different interests in the same real property.

Categories of estates

Estates in land can be divided into four basic categories:

1. **Freehold estates**: rights of *ownership*
   - fee simple (fee simple absolute)—most rights, least limitations, indefeasible
   - fee tail—inalienable rights of inheritance
   - conditional, defeasible, or determinable fee—voidable ownership
   - life estate—ownership for duration of someone's life
2. **Leasehold estates**: rights of *possession* and *use* but not *ownership*. The lessor (owner/landlord) gives this right to the lessee (tenant). There are four categories of leasehold estates:
   1. estate for years (tenancy for years)—lease of any length with specific begin and end date
   2. periodic estate (periodic tenancy)—automatically renewing lease (month to month, week to week)
   3. estate at will (tenancy at will)—leasehold for no fixed time or period. It lasts as long as both parties desire. Termination is bilateral (either party may terminate at any time) or by operation of law.
   4. tenancy at sufferance—created when tenant remains after lease expires and becomes a holdover tenant, converts to holdover tenancy upon landlord acceptance; see Forcible Entry and Detainer Statutes
   - Types of leases:
     - gross lease
     - net lease
     - percentage lease
3. **Statutory estates**: created by law
   - community property
   - homestead



- dower—interest a wife has in the property of her husband
- curtesy—interest a husband has in the property of his wife
- tenancy by entirety

4. **Equitable Estates**: neither *ownership* nor *possession*
   - lien
     - general
     - specific
   - easement
     - easement in gross
     - easement appurtenant
       - ingress
       - egress

Life estate

A **life estate**, is a term used in common law to describe the ownership of land for the duration of a person's life. In legal terms it is an estate in real property that ends at death. The owner of a life estate is called a "life tenant".

Although the ownership of a life estate is technically temporary because it ends at a person's death (a tenancy), it is treated as complete ownership (fee simple) for the duration of the person's life, subject to limitations. Because a life estate ceases to exist upon death, the owner of the life estate cannot leave it to heirs, and the life estate cannot be inherited.

An owner of a life estate cannot also give a greater interest than is owned. That is, a life estate owner cannot give complete and indefinite ownership (fee simple) to another person because ownership in the property ends when the life tenant dies. If, however, the original grantee has sold his life estate [ex. from A to B], B's interest lasts until A dies, allowing B to bequest his interest, sell the land, etc. until that point. Once A dies, however, whoever possesses the land loses it (with the land likely reverting back to its original grantor). This is a life estate "pur autre vie," or the life of another. Such a life estate can also be conveyed originally, such as "to A until B dies."

Another limitation on a life estate is the doctrine of waste, which prohibits life tenants from damaging or devaluing the land, as their ownership is technically only temporary.

Chapter 4 Conveyances and Recording

Uses of a life estate

In the United States, a life estate is typically used as an estate planning tool. The use of a life estate can avoid probate and ensure an intended heir will receive title to real property. For example, A may own a home and desire that B inherit the home after A's death. A can effecuate that desire by transferring title to the home to B and retaining a life estate in the home. A keeps a life estate interest and B receives a vested fee simple remainder interest. As soon as A dies, the life estate interest merges with B's remainder interest and B has a fee simple title. This avoids the use of a will and the probate process. The danger to A though, is that the grant to B is irrevocable. "Beneficiary deeds" have been statutorily created in some states to address this issue.

It is less well known that the intestacy laws of certain American states, such as Arkansas, Delaware, and Rhode Island, still limit the surviving spouse's rights to the deceased spouse's real estate to a life estate. (As shown by the programs linked to the state names.)

Duration of a life estate

Life estates are measured either by the life of the property recipient, or by the life of some other person; these latter are called life estates *pur autre vie*, (French for "for the life of another"). A life estate *pur autre vie* is most commonly created in one of two circumstances.

First, when the owner of property conveys his interest in that property to another person, for the life of a third person. For example if A conveys land to B during the life of C, then B owns the land for as long as C lives; if B dies before C, B's heirs will inherit the land, and will continue to own it for as long as C lives.

Second, if A conveys land to C for life, C can then sell the life estate to B. Again, B and B's heirs will own the land for as long as C lives.

In either scenario, once C dies, the ownership of the land will revert to A. If A has died, ownership will revert to A's heirs. The right to succeed to ownership of the property upon the expiration of the life estate is called a *remainder*.

Validity of a life estate

The early common law did not recognize a life estate in personal property, but such interests were cognizable in equity. Thus, although life estates in real estate are still created today, the life estate is more commonly used in trust instruments, typically in an attempt to minimize the effect of the inheritance tax or other taxes on transfers of wealth.

Types of fee simple

If previous grantors of a fee simple estate do not create any conditions for subsequent grantees to own the conveyed property in fee simple title, which is commonly the case these days, then the title is called **fee simple absolute**. Other fee simple estates in real property include **fee simple defeasible** (or **fee simple determinable**) estates. A defeasible estate is created when a grantor places a condition on a fee simple estate (in the deed). Upon the happening of a specified event, the estate may become void or subject to annulment. Two types of defeasible estates are the fee simple determinable and the fee simple subject to condition subsequent. If the grantor uses durational language in the condition such as "to A as long as the land is used for a park" then upon the happening of the specified event, the estate will automatically terminate and revert to the grantor or the grantor's estate. If the grantor uses language such as "but if alcohol is served" then the grantor or the heirs have a right of entry, but the estate does not automatically revert to the grantor. In the United States many of these concepts have been modified by statute in some states.

Rent

It is often said that no rent or similar obligations are due from the owner of property in fee simple. That is only partially true. For example a rentcharge may exist requiring a freeholder to pay a fixed sum of money closely resembling rent, and many jurisdictions have created financial obligations that may be imposed on a freehold estate, for example in England and Wales, the estate charge. In the United States, fee simple owners are subject to property tax and its funds directed to the municipality's general fund. Other local tax assessments called "specials" may be assessed in addition to the property tax to be applied to specific purposes such as road and water/sewer improvements. Real estate owned as a condominium is usually similarly owned in fee simple, but typically subject to rules in the declaration of condominium or created by the condominium association, such as paying required monthly fees for maintaining the property's common areas.

Chapter 4 Conveyances and Recording

A **Quiet title** action is a lawsuit to settle competing claims or rights to real property, for example, missing heirs, tenants, reverters, remainders and lien holders all competing to get ownership to the house or land. Each of the United States has different procedures for a *quiet title action*.

However, most personal property items do not have a formal document of title. For such items, possession is the simplest indication of title, unless the circumstances give rise to suspicion about the possessor's ownership of the item. Proof of legal acquisition, such as a bill of sale or purchase receipt, is contributory. Transfer of possession to a good faith purchaser will normally convey title if no document is required.

Political implications

Title laws have been manipulated by governments to discriminate against ethnic groups whom they perceived to be of a minority group, not necessarily undesirable or inferior. For example, California prevented aliens (mainly Asians) from holding title to land until the law was declared unconstitutional in 1952. Currently there are no restrictions on foreign ownership of land in the United States, although sales of real estate by non-resident aliens are subject to certain special taxation rules.

Deed

A **deed** is a legal instrument used to grant a right. Deeds are part of the broader category of **documents under seal**. Deeds can best be described as quasi-contracts, requiring the agreement of more than one person. Deeds can therefore be distinguished from covenants, which being also under seal, are unilateral promises. The deed is best known as the method of transferring title to real estate from one person to another, often using a description of its "metes and bounds." However, by the general definition, powers of attorney, commissions, patents, and even diplomas conferring academic degrees are also deeds.

Historically at common law, for an instrument to be a valid deed it needed five things:

- It must indicate that the instrument itself conveys some privilege or thing to someone. This is indicated by using the word *hereby* or the phrase *by these presents* in the sentence indicating the gift.
- The grantor must have the legal ability to grant the thing or privilege.
- The person receiving the privilege or thing must have the legal capacity to receive it.
- A seal must be affixed to it. Most jurisdictions have eliminated this requirement and replaced it with the signature of the grantor. However, for conveyances of real estate, most jurisdictions

require that the deed be acknowledged before a notary public or a civil law notary and some may require a witness or witnesses in addition.
- It must be delivered to and accepted by the recipient.

Conditions attached to the acceptance of a deed are known as covenants.

Types of deeds

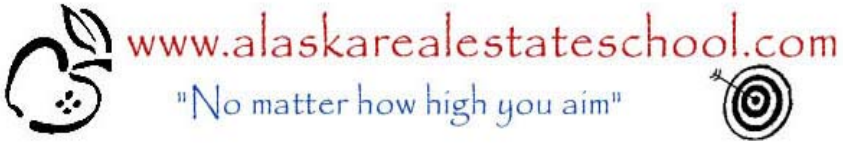
General warranty and special warranty

In the transfer of real estate, a deed conveys ownership from the old owner (the grantor) to the new owner (the grantee), and can include various warranties. The precise name of these warranties differ by jurisdiction. However the basic difference between them is the degree to which the grantor warrants the title. The grantor may give a general warranty of title against any claims, or the warranty may be limited only to claims which occurred after the grantor obtained the real estate. The latter type of deed is usually known as a *special warranty deed*. While a *general warranty deed* is normally used for residential real estate sales and transfers, special warranty deeds are more commonly used in commercial transactions.

A general **warranty deed** is a type of deed where the grantor (seller) guarantees that he or she holds clear title to a piece of real estate and has a right to sell it to the grantee (buyer). The guarantee is not limited to the time the grantor owned the property—it extends back to the property's origins. A General Warranty Deed includes five traditional forms of Covenants for Title. Those five traditional forms of covenants can be broken down into two categories: *present covenants* and *future covenants*.

- **Present Covenants**
  - *Covenant of Seisin & Covenant of Right to Convey* - Covenants that represent the seller's promise that he has title and possession and can validly claim both (marketable title).
  - *Covenant Against Encumbrances* - Seller promises that there are no encumbrances, other than those that have been previously disclosed
- **Future Covenants**
  - *Covenant of Warranty and Covenant of Quiet Enjoyment* - Covenants that represent seller's promise to protect the buyer against anyone who comes along later and claims paramount title to the property
  - *Covenant of Further Assurances* - If seller omitted something required to pass valid title, seller promises to do whatever is necessary to pass title to buyer
  - *Covenant of Warranty Forever* - The grantor promises to compensate the

grantee for the loss sustained if the title falls at any time in the future.



Chapter 4 Conveyances and Recording

These covenants in a general warranty deed are not limited to matters that occurred during the time the grantor owned the property; they extend back to its origins. The grantor defends the title against both himself or herself and all those who previously held title.

Note - Not all states recognizes the Covenant of Further Assurances (e.g. Ohio)

Most people hire someone to perform a title search to determine if there are defects that must be resolved before they purchase real property. They can also purchase title insurance, which covers many types of losses that occur if problems are discovered later, but title insurance raises a number of other legal issues.

Bargain and sale deed

A third type of deed, known as a *bargain and sale deed*, implies that the grantor has the right to convey title but makes no warranties against encumbrances. This type of deed is most commonly used by court officials or fiduciaries that hold the property by force of law rather than title, such as properties seized for unpaid taxes and sold at sheriff's sale, or an Executor.

A **bargain and sale deed** is in United States real property law, a deed "conveying real property without covenants".

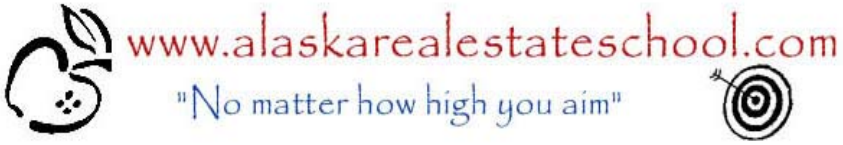
This is a deed "for which the grantor implies to have or have had an interest in the property but offers no warranties of title to the grantee. This type of deed is typically used in many states to transfer title."

Under common law, this type of deed technically created a use (law) in the buyer who then gets title. Under the Statute of uses, modern real property law disregards this subtle distinction. A *bargain and sale deed* is especially used by local governments, fiduciaries such as executors, and in foreclosure sales by sheriffs and referees. The fact that it comes without any warranties from the government means that the new owner may not have good title. However, if the city did not have good title, then the new landowner may seek a remedy against the local government.

Some states require a specific form to be used. Some states also allow a grantor (or seller) to add warranties. In such case, it may be called a *bargain and sale with covenants deed*.

Quitclaim deed

A so-called *quitclaim deed* is (in most states) actually not a deed at all--it is actually an estoppel disclaiming rights of the person signing it to property.



Chapter 4 Conveyances and Recording

A **quitclaim deed** is a term used in property law to describe a document by which a person (the "grantor") disclaims any interest the grantor may have in a piece of real property and passes that claim to another person (the grantee). A quitclaim deed neither warrants nor professes that the grantor's claim is actually valid. By comparison, a grant deed (or in some U.S. states, a warranty deed), which is normally used for real estate sales, contains certain warranties that vary from state to state. Quitclaim deeds are sometimes used for transfers between family members, gifts, or to eliminate clouds on title, or in other special or unusual circumstances.

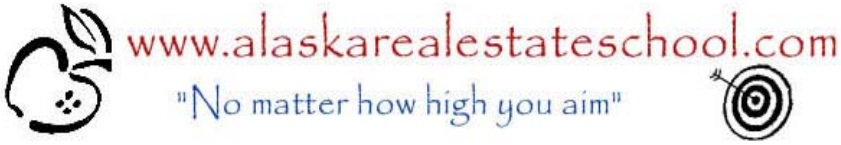
An example of a circumstance where a quitclaim may be used is where one spouse (grantor) is disclaiming any interest in property that the other spouse (grantee) owns. A quitclaim deed would typically be used in this circumstance.

Another common form of deed similar to a quitclaim deed is the tax deed, which is used by government authorities when selling properties seized for nonpayment of taxes, as the authority will not promise that the buyer will obtain clear title to the property. It may be possible to obtain such assurances, for a fee, from a title insurance company or an attorney who performs a title search.

Of the different types of deeds, the quitclaim has the least assurance that the person receiving it will actually get any rights. In most common law jurisdictions, a quitclaim deed is not technically considered to be a deed at all, and, in some jurisdictions, a buyer who receives a quitclaim deed may not be considered a bona fide purchaser for value unless the quitclaim deed meets certain requirements. It fails to meet all five traditional tests of a true deed found in common law. Instead, it is considered to be an instrument of estoppel, which means it stops or prevents the grantor of the quitclaim deed from later claiming that he or she has an interest in the property. Title companies may be unwilling to issue title insurance based on a quitclaim deed; thus, quitclaim deed holders may have to obtain further proof that a bona fide sale occurred or institute a "quiet title" action in a court to obtain clear title.

The grantee in a quitclaim deed (or a grant deed or warranty deed) receives no better title than what the grantor possessed.

A quitclaim deed does not release the party quitting claim to real property from their obligations under any mortgage or other lien secured against said property. The most accessible means of being released from one's obligations under a mortgage pursuant to the execution of a quitclaim deed is through refinancing. The party to whom the property was conveyed must refinance the property using their own income, assets and credit, and may not use the income, assets or credit of the party who has quitclaim.



Chapter 4 Conveyances and Recording

Deed of trust

In some jurisdictions, a deed of trust is used as an equivalent to a mortgage. A trust deed isn't like the other types of deeds; it's not used to transfer property directly. It is commonly used in some states (California, for example) to transfer title to land to a "trustee," usually a trust or title company, which holds the title as security ("in escrow") for a loan. When the loan is paid off, title is transferred to the borrower by recording a release of the obligation and the trustee's contingent ownership is extinguished. Otherwise (upon default), the trustee will liquidate the property (with a new deed) and offset the lender's loss with the proceeds.

Land contract

A **land contract** (sometimes known as a "contract for deed" or an "installment sale agreement") is a contract between the owner of a property and a person who wants to buy the property for an agreed-upon purchase price. Under a land contract, the seller retains the legal title to the property, while permitting the buyer to take possession of it for most purposes other than legal ownership. The sale price is typically paid in periodic installments, many times with a balloon payment to make the length of payments shorter than a fully amortized loan. When the full purchase price has been paid, the seller is obligated to deliver legal title to the property to the buyer. The legal status of land contracts varies from region to region.

It is common for the installment payments of the purchase price to be similar to mortgage payments in amount and effect. The amount is often determined according to a mortgage amortization schedule. In effect, each installment payment is partially payment of the purchase price and partially payment of interest on the unpaid purchase price. This is similar to mortgage payments which are part repayment of the principal amount of the mortgage loan and part interest. However, since land contracts can easily be written or modified by any seller or buyer; one may come across any variety of repayment plans. Interest only, negative amortizations, short balloons, extremely long amortizations just to name a few. Typical land contracts are easy to understand and usually only make up 3-5 pages. It is not uncommon for land contracts to go unrecorded. For several reasons the buyer or seller may decide that the contract is not to be recorded in the register of deeds. This does not make the contract invalid, but it does increase exposure to undesirable side effects.

Although land contracts can be used for a variety of reasons, their most common use is as a form of short-term seller financing. Usually, but not always, the date on which the full amount of the purchase price is due will be years sooner than when the purchase price would be paid in full according to the

amortization schedule. This results in the final payment being a large balloon payment. Since the amount of the final payment is so large, the buyer may obtain a conventional mortgage loan from a bank to make the final payment. Land contracts are sometimes used by buyers who do not qualify for conventional mortgage loans offered by traditional lending institutional, for reasons of poor credit or an insufficient down payment. Land contracts are also used when the seller is anxious to sell and the buyer is not given enough time to arrange for conventional financing.

Recording

Usually the transfer of ownership of real estate is registered at a cadastre in the United Kingdom. In most parts of the United States, deeds must be submitted to the Recorder of deeds, who acts as a cadastre, to be registered. An unrecorded deed may be valid proof of ownership between the parties, but may have no effect upon third-party claims until disclosed or recorded. A local statute may prescribe a period beyond which unrecorded deeds become void as to third-parties, at least as to intervening acts.

Joint ownership

Ownership transfer may also be crafted within deeds to pass by demise, as where a property is held in concurrent estate such as "joint tenants with right of survivorship" (JTWROS), "tenants by the entirety", or as a life estate. In each case, the title to the property immediately and automatically vests in the named survivor(s) upon the death of the other tenant(s).

Pardons as deeds

In the United States of America, a pardon of the President was at one time considered to be a deed and thus needed to be accepted by the recipient. This made it impossible to grant a pardon posthumously. However, in the case of Henry Ossian Flipper, this view was altered when President Bill Clinton pardoned him in 1999.

Deeds FAQ

Quitclaim deeds, grant deeds, warranty deeds, trust deeds -- answers to frequently asked questions about deeds.

What is a deed?

A deed is the document that transfers ownership of real estate. It contains the names of the old and new owners and a legal description of the property, and is signed by the person transferring the property.

Chapter 4 Conveyances and Recording

Do I need a deed to transfer property?

Almost always. You can't transfer real estate without having something in writing. In some situations, a document other than a deed is used -- for example, in a divorce, a court order may transfer real estate from the couple to just one of them.

I'm confused by all the different kinds of deeds -- quitclaim deed, grant deed, warranty deed. Does it matter which kind of deed I use?

Probably not. Usually, what's most important is the substance of the deed: the description of the property being transferred and the names of the old and new owners. Here's a brief rundown of the most common types of deeds:

A *quitclaim* deed transfers whatever ownership interest you have in the property. It makes no guarantees about the extent of your interest. Quitclaim deeds are commonly used by divorcing couples; one spouse signs all his or her rights in the couple's real estate over to the other. This can be especially useful if it isn't clear how much of an interest, if any, one spouse has in property that's held in another spouse's name.

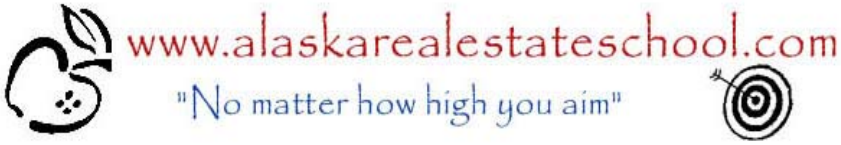
A *grant deed* transfers your ownership and implies certain promises -- that the title hasn't already been transferred to someone else or been encumbered, except as set out in the deed. This is the most commonly used kind of deed, in most states.

A *warranty deed* transfers your ownership and explicitly promises the buyer that you have good title to the property. It may make other promises as well, to address particular problems with the transaction.

What's a trust deed?

A trust deed (also called a deed of trust) isn't like the other types of deeds; it's not used to transfer property. It's really just a version of a mortgage, commonly used in some states (California, for example).

A trust deed transfers title to land to a "trustee," usually a trust or title company, which holds the land as security for a loan. When the loan is paid off, title is transferred to the borrower. The trustee has no powers unless the borrower defaults on the loan; then the trustee can sell the property and pay the lender back from the proceeds, without first going to court.



Chapter 4 Conveyances and Recording

What is a contract for deed?

A contract for deed is not really a deed at all. Also known as a "contract of sale," "land sale contract," or "installment sales contract," it's used when a seller finances a property for a buyer. The contract states that the seller will keep title to the property until the buyer pays off the loan.

Does a deed have to be notarized?

Yes. The person who signs the deed (the person who is transferring the property) should take the deed to a notary public, who will sign and stamp it. The notarization means that a notary public has verified that the signature on the deed is genuine. The signature must be notarized before the deed will be accepted for recording.

After a deed is signed and notarized, do I have to put it on file anywhere?

Yes. You should "record" (file) the deed in the land records office in the county where the property is located. This office goes by different names in different states; it's usually called the County Recorder's Office, Land Registry Office, or Register of Deeds. In most counties, you'll find it in the courthouse.

Recording a deed is simple. Just take the signed, original deed to the land records office. The clerk will take the deed, stamp it with the date and some numbers, make a copy, and give the original back to you. The numbers are usually book and page numbers, which show where the deed will be found in the county's filing system. There will be a small fee, probably no more than $15 a page, for recording.

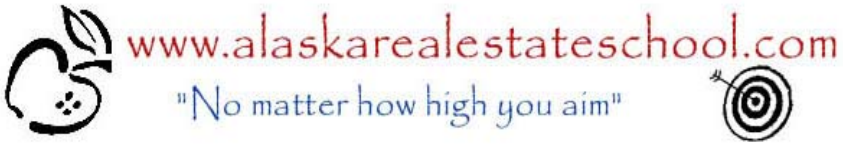
Wills

The real estate of an owner who makes a properly witnessed valid **will** (who dies **testate**) passes to the devisees through the probating of the will. The maker of the will must be of legal age and of sound mind. The title of an owner who dies **without a will** (**intestate**) passes according to the provisions of the law of descent and distribution of the state in which the real estate is located.

Involuntary alienation

Adverse Possession

In common law, **adverse possession** is the process by which title to another's real property is acquired without compensation, by, as the name suggests, holding the property in a manner that conflicts with



the true owner's rights for a specified period of time. Circumstances of the adverse possession determine the type of title acquired by the adverse possessor, which may be fee simple title, mineral rights, or another interest in real property.

The law of adverse possession is partly statutory and partly common law. The required period of uninterrupted possession arises out of a statutory limitation period or statute of limitations. Other elements of adverse possession are judicial constructs.

Requirements for adverse possession

Adverse possession requires three elements in regards to the possession of the property[1]:

1. **physical**: open and notorious (visible); actual; exclusive;
2. **mental**: hostile;
3. **temporal**: continuous (uninterrupted).

In simple terms, this means that those attempting to claim the property are occupying it exclusively (keeping out others) and openly as if it were their own. Some jurisdictions permit accidental adverse possession as might occur with a surveying error. Generally, the openly hostile possession must be continuous (although not necessarily constant) without challenge or permission from the lawful owner, for a fixed statutory period in order to acquire title. Where the property is of a type ordinarily only occupied during certain times (such as a summer cottage), the adverse possessor may only need to have exclusive, open, and hostile possession during those successive useful periods, making the same use of the property as an owner would for the required number of years.

Effect of adverse possession

An adverse possessor will be committing a trespass on the property that they have taken and the owner of the property could cause them to be evicted by an action in trespass ("ejectment") or by bringing an action for possession. All common law jurisdictions require that the action of trespass is brought within a specified time, after which the true owner is assumed to have acquiesced. The effect of a failure by the land owner to evict the adverse possessor depends on the jurisdiction.

In some jurisdictions (such as England and Wales), the title of the landowner will be automatically extinguished once the relevant limitation period has passed. This process now only applies to unregistered land.

In other jurisdictions, the adverse possessor acquires merely an equitable title: the land owner being a trustee of the property for them.

Adverse possession only extends to the property adversely possessed. If the original owner had a title to a greater area (or volume) of property, the adverse possessor does not obtain all of it.

In some jurisdictions, a person who has successfully obtained title to property by adverse possession may (optionally) bring an action in land court to "quiet title" of record in their names on some or all of the former owner's property. Such action will make it simpler to convey the interest to others in a definitive manner, and also serves as notice that there is a new "owner" of record, which may be a pre-requisite to certain benefits (including equity loans, or judicial standing as an abutter). However, even if such action is not taken, the title is legally theirs, with most of the benefits and duties, including paying property taxes to avoid losing title to the tax collector. The effects of having a stranger to the title paying taxes on property may vary from one jurisdiction to another.

Adverse possession does not typically work against property owned by a government agency. However, there will be a more complicated analysis if private property were taken by eminent domain, control given to a private corporation (such as a railroad), then abandoned.

Where land is registered under a Torrens title registration system or similar, special rules apply. It may be that the land cannot be affected by adverse possession (as was the case in England and Wales from 1875 to 1926), or that special rules apply.

Adverse possession may also apply to territorial rights. In the United States, Georgia lost an island in the Savannah River to South Carolina, when that state used fill from dredging to attach the island to its own shore. Since Georgia knew of this yet did nothing about it, the U.S. Supreme Court (which has original jurisdiction in such matters) granted this land to South Carolina, even though the Treaty of Beaufort (1787) explicitly specified that the river's islands belonged to Georgia.

Squatter's rights

Adverse possession is sometimes called "squatters' rights". If the squatter abandons the property for a period, or if the rightful owner effectively removes the squatter's access even temporarily during the statutory period, or even gives his permission, the "clock" usually stops. For example, if the required period in a given jurisdiction is twenty years and the squatter is removed after only fifteen years, the squatter loses the benefit of that 15 year possession (i.e., the "clock" is re-set to "zero"). If that squatter later retakes possession of the property, that squatter must, in order to acquire title, remain on the

property for a full twenty years after the date on which the squatter retook possession. In this example, the squatter would have to have held the property for a total of 35 years (the 15 original years plus the 20 later years) to acquire title.

However, one squatter may pass along continuous possession to another squatter, known as "tacking", until the adverse possession period is complete. A lawful owner may also restart the "clock" at "zero" by giving temporary permission for the occupation of the property, thus defeating the necessary "continuous and hostile" element. Evidence that a "squatter" paid rent to the owner would defeat adverse possession for that period.

Comparison to homesteading

Adverse possession is in some ways similar to homesteading. Like the adverse possessor, the homesteader may gain title to property by using the land and fulfilling certain other conditions. In homesteading, however, the possession of the property is not hostile; the land is either considered to have no legal owner or it is owned by the government. The government allows the homesteader to use the land with the expectation that the homesteader who fulfills the requirements necessary for the homestead will gain title to the property.

The homestead principle and squatter's rights embody the most basic concept of property and ownership, which can be summed up by the adage "possession is nine-tenths of the law"; in other words, "the person who uses the property owns it". The homestead principle and squatter's rights pre-date formal property laws and to a large degree modern property law is a formalization and expansion of these simple ideas.

The homestead principle is the idea that if no one is using or possessing property, the first person to claim it and use it consistently over a period of time owns the property. Squatter's rights embodies the idea that if one property owner neglects property and fails to use it, and a second person starts to tend and use the property, then after a certain period of time the first person's claim to the property is lost and ownership transfers to the second person, who is actually using the property.

The legal principle of homesteading, then, is a formalization of the fundamental homestead principle in the same way that the right of adverse possession is a formalization of the fundamental and pre-existing principle of squatter's rights.

The essential ideas behind the homestead principle and squatter's rights hold generally for any type of item or property of which ownership can be asserted by simple use or possession. In modern law,

homesteading and the right of adverse possession refer exclusively to real property. In the realm of personal property, the same impulse is summarized by the adage "finders keepers" and formalized by laws and conventions about abandoned property.

Adverse easements

Adverse possession grants only those rights in the adversely possessed property which are 'taken' by the adverse possesser. For example, an adverse possesser might choose to take an easement, rather than the entire fee title to the property. In this manner, it is possible to adversely possess an easement, under the legal doctrine of prescription. This must also be done openly but need not be exclusive, and must outlast the same required statutory eviction period. It is common practice in cities such as New York, where builders often leave sidewalk space or plazas in front of their buildings to meet zoning requirements, to close public areas they own periodically in order to prevent the creation of a permanent easement and compromise their exclusive property rights.

Furthermore, if a property owner interferes with an easement upon his property in a manner that satisfies the requirements for adverse prescription (e.g., locking the gates to a commonly used area, and nobody does anything about it), they will successfully extinguish the easement. This is another reason to quiet title after a successful adverse possession or adverse prescription; it clarifies the record of who should take action to preserve the adverse title or easement while evidence is still fresh.

For example, given a deeded easement to use someone else's driveway to reach a garage, if a fence or permanently locked gate prevents the use, and nothing is done to remove or circumvent the obstacle, and the statutory period expires, then the easement ceases to have any legal force, even though the deed held by the fee simple owner stated that the owner's interest was subject to the easement.

Non-common law jurisdictions

Some non-common law jurisdictions have laws similar to adverse possession. For example, Louisiana has a legal doctrine called acquisitive prescription.

In Roman law, *usucapio* laws allowed someone who was in possession of a good without title to become the lawful proprietor if the original owner didn't show up after some time (one or two years), unless the good was obtained illegally (by theft or force).

Eminent domain

Chapter 4 Conveyances and Recording

Eminent domain in common law legal systems is the inherent power of the state to seize a citizen's private property, expropriate property, or rights in property, without the owner's consent. The property is taken either for government use or by delegation to third parties who will devote it to "public use." The most common uses of property taken by eminent domain are public utilities, highways, and railroads. Some states require that the government body offer to purchase the property before resorting to the use of eminent domain.

The term *expropriation* as used in the law of eminent domain is not to be confused with situations in which private property is seized by revolutionary governments from its former owners and confiscated without payment. It should also be differentiated from forfeiture which is an uncompensated seizure of contraband from criminals and its confiscation by the government.

The term condemnation is used to describe the act of a government exercising its power of eminent domain to transfer title to private property from its rightful owner to itself. It is not to be confused with the same term that describes a declaration that real property, generally a building, has become so dilapidated as to be legally unfit for human habitation due to its physical defects. This type of condemnation of buildings (on grounds of health and safety hazards or gross zoning violation) usually does not deprive the owners of the title to the property condemned but requires them to rectify the offending situation or have the government do it for them and bill them for the cost.

Condemnation via eminent domain indicates the government is taking the property or an interest in it, such as an easement. In most cases the only thing that remains to be decided when a condemnation action is filed is the amount of just compensation, although in some cases the right to take may be challenged by the property owner on the grounds that the attempted taking is not for a public use, or has not been authorized by the legislature, or because the condemnor has not followed the proper procedure required by law.

The exercise of eminent domain is not limited to real property. Governments may also condemn personal property, such as supplies for the military in wartime, franchises, as well as intangible property such as contracts, patents, trade secrets, and copyrights.

History

The first case of eminent domain in English law is called the "Dobbie Process" or the "King's Prerogative in Saltpeter Case". The English king needed saltpeter for munitions and took a saltpeter mine from a private individual. The private party sued the king and the court established the right of the sovereign to take "private property for public use" without liability for trespass but requiring

payment of compensation for the taken saltpeter. When the colonies became the United States and the English Common Law was adopted as the law of the new nation, this principle was recognized. Contrary to popular belief, the Fifth Amendment to the Constitution did not establish this right in the U.S., as it was already inherent in common law. The Fifth Amendment limited the right of eminent domain by requiring that takings be for "public use" and that "just compensation" be paid for the taken property. The term *eminent domain* is used primarily in the States, where the term was derived in the mid-19th century from the legal treatise, *De Jure Belli et Pacis*, written by the Dutch jurist Hugo Grotius in 1625, who used the term *dominium eminens* and described the power as follows:

"... the property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property."

However, another noted jurist, Samuel von Pufendorf, in his work, *De Jure Naturae et Gentium* criticized the usage of the term "eminent domain". In his analysis of the control ("potestas") of property he made a classification as follows:

(a) Control, in the proprietary sense, as of that which is one's own, he termed "*dominium*";

(b) Control, in the governmental or sovereign sense, as of that which belongs to others, he termed "*imperium*". It was his conclusion that a more accurate term for the power to take property for public use would be "*imperium eminens*".

Many other jurists, like Cornelius Bynkershoek and Heineccius also were of the same opinion as Puffendorf. However, Heineccius noted that though there is a difference and it is *imperium* that belongs to rulers, still it would be futile to condemn the term when it has been so widely accepted.

The legal principle is that all property in a jurisdiction is "owned" by the sovereign of it, and that authority to make law for that property is ultimate ownership. In a democratic nation the sovereign is the people, collectively, over all the territory of that nation. What private parties can "own" is not the land itself, but an equitable interest in title to an estate in the land or property, and it is that equitable interest to which they are entitled for compensation if the title to the estate is taken.

The term *compulsory purchase*, also originating in the mid-19th century, is used primarily in England and Wales (see compulsory purchase order, and other jurisdictions that follow the elements of English

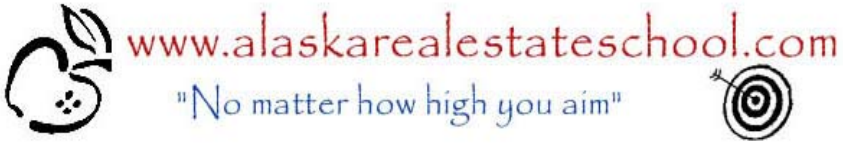
law. Originally, the power of eminent domain was assumed to arise from natural law as an inherent power of the sovereign. Some states (New York, Louisiana) use the term *appropriation* as a synonym for the exercising of eminent domain.

United States

In the United States, the Fifth Amendment to the Constitution has been interpreted to require that just compensation be paid when the power of eminent domain is used, and has also been interpreted so that, as a pre-requisite to the use of eminent domain, the property must be taken for "public use". These requirements are sometimes called the *takings clause*.

The original judicial construction of "public use" was relatively strict: it required that the land be used by the public, the common example being military installations, government buildings and public roads, as well as railroads and public utility facilities. The term "public use" became interpreted more expansively in ***Berman v. Parker*** (1954), in which the U.S. Supreme Court reviewed an effort by the District of Columbia to raze properties that were primarily--but not entirely--blighted, in order to transfer their sites to private redevelopers who would construct condos, private office buildings and a shopping center. The Supreme Court ruled against the owners of non-blighted properties within the area sought to be seized on the grounds that the project should be judged on its plans as a whole, not on a parcel by parcel basis. The Court held that the term "public use" encompassed a broader notion of public benefit than simply providing government facilities, railways and other utilities commonly used by the public. The elimination of blight was held to be such a clear responsibility of government, that it justified the use of the eminent domain power. ***Hawaii Housing Authority v. Midkiff*** (1984) arose from the Hawaii legislature's determination that private ownership of land on the Island of Oahu was concentrated in so few hands as to form an oligopoly, causing the private market in land to malfunction. In response, the Hawaiian government proposed to increase the number of owners by, among other things, granting full ownership rights to those who previously used land as a tenancy. Again, while on its surface the case involved a transfer of land from one private party to another, the Court held that the elimination of an oligopolistic market in land was a sufficient public benefit justifying the redistributional takings.

The Supreme Court has largely given the public use requirement an expansive interpretation and has allowed takings of private property for reconveyance to other private parties, or in some cases by private parties directly, on the theory that the new owners will put the taken land to more lucrative uses that are likely to generate more tax revenues. This is known as "economic redevelopment." It uses



eminent domain to enable acquitre and then convey land to commercial development or redevelopment to increase tax revenues. The Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which affirmed the majority decision of the Connecticut Supreme Court and allowed such takings, was heavily publicized in the media. This increased awareness of eminent domain post-*Kelo,* inspired a great public outcry. Several states have enacted or are considering state legislation that would drastically restrict the state's own power of eminent domain. The Supreme Courts of Illinois, Michigan (County of Wayne v. Hathcock)(2004), and Ohio (Norwood, Ohio v. Horney)(2006) have recently ruled to disallow such takings under their state constitutions.

The protesters maintain that the *Kelo* judicial approach favors wealthy redevelopers at the expense of lower middle class individual home owners, and encourages profligate municipal expenditures in support of dubious private projects that sometimes fail to achieve the promised public benefits.

Most courts have held the fair market value of the condemned property to be the constitutionally required "just compensation." Its determination is a judicial question, and it is usually determined in a trial by jury, on the basis of the parties' appraisal testimony. Some states (Connecticut, New York, and Rhode Island) do not use juries. There, condemnation awards are made by judges. Critics contend this damages personal property rights.

Public use

The current Supreme Court understanding dates back to 1984 when Sandra Day O'Connor held in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) that Hawaii's redistribution of land was constitutional. One must understand what the High Court had held as "public"; for local government in zoning cases as in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) and in city urban renewal projects like in *Berman v. Parker*, 348 U.S. 26 (1954) public use was quite expansive. O'Connor tried to craft an opinion which, allowing for the state's actions, tried to limit incentives for expansive views of public use.

The current rule on public use upholding the eminent domain power of state government was generally affirmed by *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), though the justices recognized that the several states have the authority to pass statutes or state constitutional amendments further restricting eminent domain by either defining *public use* narrowly in their states or by granting property owners more rights than the federal Constitution if they so chose. Many have taken up the challenge, with Alabama, New Hampshire, and several other states passing temporary statutes as well as constitutional amendments to restrict eminent domain strictly to uses in which the property will be

owned by a government entity. One such amendment was approved in Florida's 2006 statewide elections.

Economic argument of hold outs

Supporters contend that seizures of private property are necessary to the improvement of communities when transaction costs prevent private parties from agreeing on the most efficient use of land.[1] Opponents point out that, over a period of 200 years, American city-dwellers created large land assemblages and major structures without the coercive power of eminent domain, which they never got to use for urban redevelopment until the 1950s. Critics also point out that even successful redevelopment revives only limited areas (such as downtowns), leaving other city areas in decline. Moreover, with the ongoing migration of the past half-century from cities to suburbs, it is inevitable that cities lose population and jobs, resulting in blighted areas that cannot be revived by taking more low- and moderate-cost city housing, thus driving more people out to the suburbs.

Eminent domain has driven the development of railroads and defense infrastructure, permitting the construction of many otherwise impossible connections. In the 20th century, it was used to construct World War II and Cold War defense installations. From the early 1950s on, more than 42,000 miles of roadways were acquired by eminent domain to build the Interstate Highway System. Ports, airports, and government buildings have also been constructed on land appropriated through eminent domain.

More recently, eminent domain has come to be used for private purposes (such as shopping malls), which has led to the current controversy. In some cases, the non-government entities using eminent domain have been community groups trying to take control of planning and development. Such is the case of the Dudley Street Initiative, a community group in Boston, Massachusetts, which attained the right to eminent domain and has used it to claim vacant properties for the purpose of "positive community development". In other cases, well connected firms persuade local governments to take property (sometimes that of their competitors) and turn it over to them.[2]

The controversy is further fired up by the courts defining the "just compensation" promised by the Constitution so narrowly that displaced home-owners and businesses are not fully compensated for their demonstrable economic losses, which are sometimes deemed "noncompensable". This is particularly controversial in cases where business properties are taken, the owners are not compensated for lost business, and the taken land is turned over to another business at no cost.

Back in 1798, Justice Samuel Chase in *Calder v. Bull* (3 U.S. 386) held that it was preposterous for the government to take one person's property with no restriction and give it to another private party for

their own profit. Indeed, it was this very lack of restrictions on Donald Trump's use of the land that he sought in *Coking vs. C.R.D.A* that caused New Jersey Superior Court Judge Richard Williams to rule against Trump and Atlantic City. But journalists in the Coking case referred to this as a victory on a "technicality", rather than one of principle, and while today, many still adhere to this traditional view, which they see as morally sound, most courts have not lent much support to it.

Private economic use of properties acquired through eminent domain

Since the Supreme Court's Kelo decision, more than 5,783 properties have been threatened or condemned by local governments. Some of the examples cataloged in Dana Berliner's *Opening the Floodgates* follow:

In March 2005, officials in Garfield Heights, Ohio, called for the seizure of 52 homes and 13 undeveloped properties. The 52 homes were blighted, according to city's development plan, because they were too old and too small. The next month, the City engaged a private developer who hopes to build Bridgeview Crossing, a shopping center that will be anchored by a Lowe's and a Target.

In July 2005, the city of Oakland, California, evicted two auto repair and supply businesses in order to replace them with 1,000 new condos and apartments as well as with a Sears tire and auto shop.

In December 2005, the city of Riviera Beach, Florida, approved a plan to acquire 283 properties and displace one thousand renters in order to build luxury housing and a marina. The city attempted to get the plan started before Florida eminent reform legislation went into effect.

In January 2006, the city of Baltimore, Maryland planned to seize 75 properties for the Charles North development project. Seven of those properties had been sold in 2005 to investors who planned to redevelop the land. The city also decided to acquire the 90-year-old Parkway Theater while it was under active restoration.

In September 2006, city of Burlington, Iowa, officials voted unanimously to demolish all 72 properties in a 23.7-acre neighborhood known as "The Manor." The affordable housing would be replaced by a commercial development yet to be determined by the city.

In September 2006, the City Council members of Auburn, Washington voted unanimously to approve a Community Renewal Plan, which labels blight as anything that impedes economic development. 490 properties are currently under threat, including 248 homes, a hospital, a church, several banks and restaurants as well as a Masonic temple.

Chapter 4 Conveyances and Recording

In January 2007, the Supreme Court of the United States declined to hear the case of Bart Didden against the village of Port Chester, New York. Didden owned a property in the village's urban renewal district that he hoped to develop into a CVS pharmacy. The village's chosen developer demanded that Didden and his business partner either pay $800,000 not to have their land condemned or enter into a 50-50 partnership with the developer, whose plans called for a Walgreens pharmacy on the site.

On November 26, 2006, a private landmark restaurant called the Metro Diner in Tulsa OK was closed as a result of eminent domain. The private University of Tulsa wanted the land for its own development and forced the diner to close.

Long Branch, New Jersey, a city with six redevelopment zones, three of which are part of the 12-acre beach front project. The city wishes to replace the Victorians and beach bungalows currently on the site with condominiums and townhouses. 140 properties were condemned before Kelo and the city hopes to condemn 63 more properties to complete the project.

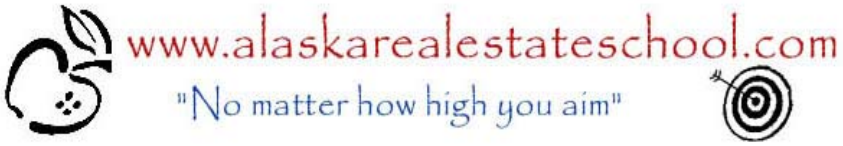
Also, Atlantic Yards project in Brooklyn, New York, promoted by mayor Michael Bloomberg, will be a private use project, yet it will involve eminent domain appropriation of 68 private homes and businesses.

Nuisance law

When a property owner's use is improper, the state under its broad police power may ban it as in *Hadacheck v. Sebastian* 239 U.S. 394 (1915) in which Justice McKenna held that an owner of a brickyard business was not entitled to compensation because the zoning laws in Los Angeles prohibited his use because it was a nuisance.

Safeguards against government action

The Fifth Amendment to the U.S. Constitution requires that property may only be taken for "public use", and upon payment of "just compensation". But the U.S. Supreme Court has diluted the meaning of "public use" to such an extent that virtually anything that a local condemning authority declares to be "public use" will be accepted by the Supreme Court and the lower federal courts. Some state courts disagree and in recent years the courts of Illinois, Michigan, Oklahoma, South Carolina and Pennsylvania have taken the position that the taking of private land for so-called "economic redevelopment" -- i.e., for re conveyance of the taken land to private companies for the construction of private, profit-making enterprises such as shopping malls, factories, office buildings and even gambling casinos does not meet the "public use" limitation under the state Constitution.



Property-rights advocates contend that abuses of the exercise of these powers in the past require substantial additional safeguards to protect the people from having their homes and businesses taken for what are obviously private, not public, uses.

Federal statutes (and their state counterparts) require relocation assistance programs to be administered by the various states in order to receive Federal participation in the costs of the improvements (often 80%), and further require full certification that the public process and benefits were offered to the claimants and that the benefits were actually paid to the correct claimants and displacees. However, the benefits payable under the Act provide only partial compensation to the displaced loaners (for example $20,000 is the maximum payable under the Act for the destruction of a business), and the Act does not allow the owners to sue to enforce its provisions.

The use of eminent domain has slowed nationwide as the full build-out of the Interstate System approaches and reflects the fact that needs in the future will be for mostly projects of a local nature such as schools, roads, and other local improvements. The extensive use of eminent domain for such purposes as economic development are currently under attack in many jurisdictions and there is a movement to pass state statutes to limit this use. Seven out of nine states that had such initiatives on the ballot in the 2006 election, have adopted laws or state constitutional amendments limiting or eliminating the use of eminent domain for "economic redevelopment" that does not eliminate slums or blight, and only finances redevelopment by private profit-making entities.

As of January 2007, 34 states had enacted some kind of legislation reforming eminent domain laws, while 13 had failed to enact any legislation regarding eminent domain (three state legislatures did not hold sessions in 2006). Seventeen of those thirty-four states either prohibited the use of eminent domain for private development purposes or substantially strengthened their definitions of blight, while the other seventeen increased eminent domain protections.

Governor Richardson of New Mexico became the first governor to veto eminent domain reform legislation resulting from this recent surge in public interest.

Bush Executive Order

On June 23, 2006 - on the one-year anniversary of the *Kelo* decision (see above), President George W. Bush issued an executive order stating in Section I that the Federal Government must limit its use of taking private property for "public use" with "just compensation", which is also stated in the constitution, for the "purpose of benefiting the general public." He limits this use by stating that it may

not be used "for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken."

Escheat

Escheat is a common law doctrine that operates to ensure that property is not left in limbo and ownerless. It originally referred to a number of situations where a legal interest in land was destroyed by operation of law, so that the ownership of the land reverted to the immediately superior feudal lord.

Most common-law jurisdictions have abolished the concept of feudal tenure of property, and so the concept of escheat has lost something of its meaning. Even in England and Wales, where escheat still operates as a doctrine of land law, there are unlikely to be any feudal lords to take property on an escheat, so that in practice the recipient of an escheated property is the Crown.

The term is often now applied to the transfer of the title to a person's property to the state when the person dies intestate without any other person capable of taking the property as heir. For example, a common-law jurisdiction's intestacy statute might provide that when someone dies without a will, and is not survived by a spouse, descendants, parents, grandparents, descendants of parents, children or grandchildren of grandparents, or great-grandchildren of grandparents, then the person's estate will escheat to the state.

In some jurisdictions, escheat can also occur when an entity (such as a bank) holds money or property (such as an account in that bank) and the property goes unclaimed. In many jurisdictions, if the owner cannot be located, such property can be revocably escheated to the government.

In business, it is the process of turning over unclaimed or abandoned payroll checks to a state authority (US). Every company is required to file unclaimed property reports with state annually and to make a good-faith effort to find the owners of their dormant accounts. The escheating criteria are driven by individual state regulations.

Origins in feudalism

In feudal England, escheat referred to the situation where the tenant of a fief died without an heir or committed a felony. The fief reverted back to ownership of the King for one year and one day, by right of *primer seisin*, after which it reverted back to the original lord who had granted it. From the time of Henry III, the monarchy took particular interest in escheat as a source of revenue.

From the 12th century onward, the Crown appointed *escheators* to manage escheats and report to the Exchequer, with one escheator per county established by the middle of the 14th century. Upon learning

the death of a tenant, the escheator would hold an "inquisition" to learn if the king had any rights to the land. If there was any doubt, the escheator would seize the land and refer the case to Westminster where it would be settled, ensuring that not one day's revenue would be lost. This would be a source of concern with land owners when there were delays from Westminster.

English common law

Thus, under English common law, there were two main ways an escheat could happen:

1. A person's property escheated if they were convicted of a felony (other than treason, when the property was forfeited to the Crown). If the person was executed for the crime, their heirs were ineligible to inherit. (In most common-law jurisdictions, this type of escheat has been abolished outright. For example, the rule has been abolished in the United States under Article 3 § 3 of the United States Constitution, which states that attainders for treason do not give rise to forfeiture or "corruption of blood".)
2. If a person had no heirs to receive their property under a will or under the laws of intestacy, then any property that they owned at death would escheat. (Again, this rule has been replaced in most common-law jurisdictions by *bona vacantia* or a similar concept.)

Recording

What is recording title all about?

When you purchase real property, you will receive a written document (called "the deed") which transfers the ownership (title) of the property to you as the purchaser. The deed gives you formal title in exchange usually for a specified amount of money. The conveyance of real property is not complete until the deed is delivered to you or your authorized agent.

When you get the deed, you should record it with the county recorder in the county where the property is located. The purpose of recording the deed is to give "notice to the world" (constructive notice) that you now have an ownership interest in that particular piece of real property.

Recording also tracks the chronological chain of title. Anyone who wants to know who owns a piece of real property can check the records of the county recorder for the county where the property is located. Before you purchase real property, you can follow the chain of sales and transfers of the property - from the original grant of the land all the way to the current owner. When title insurance is purchased, the title insurer checks the change of title to determine whether any defects occurred in prior conveyances and transfers - defects may then be pointed out and excluded from coverage. As a purchaser of property, you want to check that every time in the past, when the property was transferred, the grantor had clear title to the property and the previous purchasers obtained clear title. If someone in the past got less than "the whole bundle of sticks" you will not get clear title.

Chapter 4 Conveyances and Recording

Abstract of title

An **abstract of title** is the condensed history of title to a particular parcel of real estate, consisting of a summary of the original grant and all subsequent conveyances and encumbrances affecting the property and a certification by the abstractor that the history is complete and accurate. In the United States, the abstract of title furnishes the raw data for the preparation of a policy of title insurance for the parcel of land in question.

An abstract of title should be distinguished from an *opinion of title*. While an abstract states that all of the public record documents concerning the property in question are contained therein, an opinion states the professional judgment of the person giving the opinion as to the vesting of the title and other matters concerning the status of the chain of title. Many jurisdictions define the giving of an opinion of title as the practice of law, thus making it unlawful for a non-attorney to do so.

Chain of title

A **chain of title** is the sequence of historical transfers of title to a property. The "chain" runs from the present owner back to the original owner of the property. In situations where documentation of ownership is important, it is often necessary to reconstruct the chain of title. To facilitate this, a record of title documents may be maintained by a registry office or civil law notary.

Chain of title for real property

Real estate is one field where the chain of title has considerable significance. Various registration systems, such as the Torrens title system, have developed to track the ownership of individual pieces of real property. In real estate transactions in the United States, insurance companies issue title insurance based upon the chain of title to the property when it is transferred. Title insurance companies sometimes maintain private title plants that track real estate titles in addition to the official records. In other cases, the chain of title is established by an abstract of title, sometimes, although not always, certified by an attorney.

Torrens title

Torrens title is a system of land title where a register of land holdings maintained by the state guarantees indefeasible title to those included in the register. The system was formulated to combat the

problems of uncertainty, complexity and cost associated with old system title, which depends on proof of an unbroken chain of title back to a good root of title.

The Torrens title system was introduced in South Australia in 1858, formulated by then colonial Premier of South Australia Sir Robert Torrens. Since then, it has become pervasive around the Commonwealth of Nations and very common around the globe.

In the United States, only Iowa has all its land under the Torrens system; other states with a limited implementation include Minnesota, Massachusetts, Colorado, Georgia, Hawaii, New York, North Carolina, Ohio and Washington.

Also, mortgage liens are only valid if registered on the original Torrens certificate.

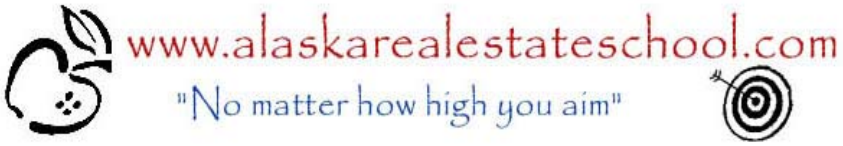
Background

Common law

At common law, land owners needed to prove their ownership of a particular piece of land back to the earliest grant of land by the Crown to its first owner. The documents relating to transactions with the land were collectively known as the "title deeds" or the "chain of title". This event could have occurred hundreds of years prior and could have been intervened by dozens of changes in the land's ownership. A person's ownership over land could also be challenged, potentially causing great legal expense to land owners and hindering development.

Even an exhaustive search of the chain of title would not give the purchaser complete security, largely because of the principle *nemo dat quod non habet* ("no one gives what he does not have") and the ever-present possibility of undetected outstanding interests. For example, in *Pilcher v Rawlins* (1872) the vendor conveyed the fee simple estate to P1, but retained the title deeds and fraudulently purported to convey the fee simple estate to P2. The latter could receive only the title retained by the vendor - in short, nothing. The case referred to here was actually decided in favor of the subsequent purchaser of the legal title, over the owners of the equitable title. The courts of equity could not bring themselves to decide against a totally innocent (without notice) purchaser. (Pilcher v Rawlins (1872) Ch App 259, Court of Appeal, viewed in Bradbrook, MacCallum and Moore, 2007, Australian Property Law; Cases and Materials, Lawbook Co., NSW)

The common law position has been changed in minor respects by legislation designed to minimise the searches that should be undertaken by a prospective purchaser. In some jurisdictions, a limitation has been placed on the period of commencement of title a purchaser may require.



Chapter 4 Conveyances and Recording

Deeds registration

The effect of registration under the deeds registration system was to give the instrument registered "priority" over all instruments that are either unregistered or not registered until later. The basic difference between the deeds registration and Torrens systems is that the former involves registration of instruments while the latter involves registration of title.

Moreover, though a register of who owned what land was maintained, it was unreliable and could be challenged in the courts at any time. The limits of the deeds registration system meant that transfers of land were slow, expensive, and often unable to create certainty of title.

Creation of the Torrens system

Under the system many maps showing Australian property boundaries need to be kept.

In order to resolve the deficiencies of the common law and deeds registration system, Robert Torrens introduced the new title system in 1858, after a boom in land speculation and a haphazard grant system resulted in the loss of over 75% of the 40,000 land grants issued in the colony (now state) of South Australia. He established a system based around a central registry of all the land in the jurisdiction of South Australia, embodied in the Real Property Act 1886 (SA). All transfers of land are recorded in the register. Most importantly, the owner of the land is established by virtue of his name being recorded in the government's register. The Torrens title also records easements and the creation and discharge of mortgages.

The historical origins of the Torrens title are a matter of considerable controversy. Torrens himself acknowledged adapting his proposals from earlier systems of transfer and registration, particularly the

system of registration of merchant ships in the United Kingdom. James E. Hogg, in *Australian Torrens System with Statutes* (1905), has shown that Torrens derived ideas from many other sources and that he received assistance from a number of persons within South Australia. Stanley Robinson, in *Transfer of Land in Victoria* (1979) has argued that Ulrich Hübbe, a German lawyer living in South Australia in the 1850s, made the most important single contribution by adapting principles borrowed from the Hanseatic registration system in Hamburg.

Nevertheless, it cannot be denied that Torrens' political activities were substantially responsible for securing acceptance of the new system in South Australia and eventually, in other Australian colonies. He oversaw the introduction of the system in the face of often vicious attack from his opponents, many of whom were lawyers, who feared loss of work in conveyancing because of the introduction of a simple scheme. The Torrens system was also a marked departure from the common law of real property and its further development has been characterised by the reluctance of common law judges to accept it.

Overview of the Torrens system

The Torrens title system was designed to obviate the need for a chain of title and the necessity of tracing the vendor's title through a series of documents. The fundamental principle of the Torrens system is *title by registration* rather than *registration of title* (i.e. the indefeasibility of a registered interest). Essentially, Torrens is a system of State guaranteed title that is usually supported by a compensation scheme for those who lose their title due to its operation. Further, each parcel of land is identified by reference to a numbered deposited plan. Each lot of land is the subject of a separate folio in the register. The folio records the dimensions of the land and its boundaries, the names of the registered proprietors, and any legal interests that affect title to the land. There are other parcels of land which simply await conversion.

Indefeasibility of title

Indefeasibility of title applies to the registered proprietor or joint-proprietors of land.

Different States have different laws and provisions. The following relates to Victorian jurisdiction where the Torrens system is manifested in the *Transfer of Land Act 1958* (Vic). Upon registration of his interest and subsequent recording on Title of his interest, the registered owner's claim to his interest in that land is superior to all other interests in the land other than the circumstances listed in s.42 *Transfer of Land Act 1958* (Vic).

Chapter 4 Conveyances and Recording

This section indicates that the registered interest holder will be free from all encumbrances other than inter alia:

• THOSE listed on the title;

• THOSE claiming the land on a prior folio (s42(1)(a));

• WHERE the land is included by wrong description on the part of the Registrar and the proprietor is not or has not derived title from a purchaser ‘for value’(s 42(1)(b);

• PARAMOUNT interests (s 42(2)(a)-(f)) - these interests, although even possibly unregistered, are 'superior' to interests that are registered.

Additionally, there exist exceptions or circumstances that can 'penetrate' the indefeasibility. Common factors that, when evidenced by a party, may penetrate and defeat the registered holder's claim include:

• FRAUD - where fraud is committed by the registered interest holder [principle of immediate indefeasibility];

• IN PERSONAM - where it can be shown that there was some contractual promise or undertaking by the registered party vis-a-vis the unregistered party.

• INCONSISTENT LEGISLATION - where legislation is enacted after the Torrens legislation is inconsistent with the Torrens legislation, the later piece of legislation will prevail;

• VOLUNTEER - where the registering party acquires the interest for no consideration (e.g. bequeathed in a will). Note, contrast with Victorian law, in NSW volunteers will become indefeasible.

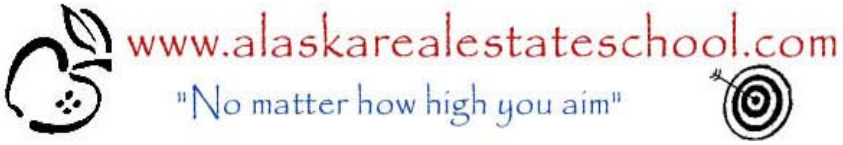
Three principles of Torrens system

The Torrens system works on three principles:[1]

- Mirror principle - the register (Certificate of Title) reflects (mirrors) accurately and completely the current facts about a person's title. This means if a person sells an estate, the new title has to be identical to the old one in terms of description of lands, except for the owner's name.

- Curtain principle - one does not need to go behind the Certificate of Title as it contains all the information about the title. This means that ownership need not be proved by long complicated documents that are kept by the owner, as in Private Conveyancing system. All the necessary information regarding ownership is on the Certificate of Title.

- Insurance principle - provides for compensation of loss if there are errors made by the Registrar of Titles. Note that this is not relevant to oil companies due to maximum claims.



Adoption

Other Australian colonies introduced similar legislation between 1862 and 1875. New Zealand also adopted a similar system in 1875.

Nevertheless, it has since become popular throughout the globe as it addresses two major problems identified with poverty in the third world by Hernando de Soto: that of uncertainty surrounding land ownership, and confusion around land transactions.

Civil law

The more or less equivalent concept in the French civil law is that of the cadastre.

Strata title is an enhancement of Torrens Title intended for apartment buildings and house type units.

Title insurance

Title insurance is insurance against loss from defects in title to real property and from the invalidity or unenforceability of mortgage liens and is proof of marketable title in land. It is available in many countries but it is principally a product developed and sold in the United States. It is meant to protect an owner's or lender's financial interest in real property against loss due to title defects, liens or other matters. It will defend against a lawsuit attacking the title as it is insured, or reimburse the insured for the actual monetary loss incurred, up to the dollar amount of insurance provided by the policy. The first title insurance company, the Law Property Assurance and Trust Society, was formed in Pennsylvania in 1853. Title insurance was created in the United States and the vast majority of title insurance policies are written on land within the U.S. It is, however, available in many other countries, such as Canada, Australia, United Kingdom, Northern Ireland, Mexico, New Zealand, China, Korea and throughout Europe.

Typically the real property interests insured are fee simple ownership or a mortgage. However, title insurance can be purchased to insure any interest in real property, including an easement, lease or life estate. Just as lenders require fire insurance and other types of insurance coverage to protect their investment, nearly all institutional lenders also require title insurance to protect their interest in the collateral of loans secured by real estate. Some mortgage lenders, especially non-institutional lenders, may not require title insurance.

The following focuses on title insurance as issued in the United States.

Chapter 4 Conveyances and Recording

Who chooses what Title Insurance Company will be Used?

The individual homeowner. A federal law called the Real Estate Settlement and Procedures Act [*RESPA*] entitles the individual homeowner to choose a title insurance company when purchasing or refinancing residential property. Typically, homeowners don't make this decision for themselves, instead relying on their bank's or attorney's choice; however, the homeowner retains the right. RESPA makes it *unlawful* for any bank, broker or attorney to mandate that a particular title insurance company be used. Doing so is a gross violation of federal law and any person or business doing so can be heavily fined or lose its license.

The only exception to this rule applies to commercial real estate transactions, which is not within the parameters of RESPA.

How much does Title Insurance Cost?

Unlike car insurance and life insurance, in the United States, the vast majority of individual state governments regulate and set the insurance premiums for properties in the state. New York and New Jersey are perfect examples. In these situations it is *illegal* for title insurance companies to charge any higher or lower than the statutory premiums set by the state government.

In addition to the insurance premium, most title companies charge fees for searching the public records and compiling a report, which is used as a basis for issuing the insurance policy. Some states, like New York, do not regulate these fees and will therefore change from one company to another. Other states, like New Jersey, regulate these fees much like the premiums.

Why Title Insurance Exists in the United States

Title insurance exists in the US in great part because of a comparative deficiency in the US land records laws. Most of the industrialized world uses land registration systems for the transfer of land titles or interests in them. Under these systems, the government makes the determination of title ownership and encumbrances on the title based on the registration of the instruments transferring or otherwise affecting the title in the applicable government office. With only a few exceptions, the government's determination is conclusive. Governmental errors lead to monetary compensation to the person damaged by the error but that aggrieved party usually cannot recover the property.

A few jurisdictions in the United States have adopted a form of this system, e.g., Minneapolis, Minnesota and Boston, Massachusetts. However, for the most part, the states have opted for a system of document recording in which no governmental official makes any determination of who owns the

title or whether the instruments transferring it are valid. The reason for this is probably that it is much less expensive to operate than a land registration system; it doesn't require the number of legally skilled employees that the registration systems do.

Greatly simplified, in the recording system, each time a land title transaction takes place, the transfer instrument is recorded with a local government recorder located in the jurisdiction (usually the county) where the land lies. The instrument is then indexed by the names of the grantor (transferor) and the grantee (transferee) and photographed so it can be found and examined by anyone who wants to see it. Usually, the failure by the grantee to record the transfer instrument voids it as to subsequent purchasers of the property who don't actually know of its existence.

Under this system, determining who owns the title requires the examination of the indexes in the recorders' offices pursuant to various rules established by state legislatures and courts, scrutinizing the instruments to which they refer and making the determination of how they affect the title under applicable law. (The final arbiters of title matters are the courts, which make decisions in suits brought by parties having disagreements.) Initially, this was done by hiring an abstractor to search for the documents affecting the title to the land in question and an attorney to opine on their meaning under the law, and this is still done in some places. However, this procedure has been found to be cumbersome and inefficient in most of the US. Substantial errors made by the abstractor or the attorney will be compensated only to the limit of the financial responsibility of these parties (including their liability insurance). Some errors may not be compensated at all, depending on whether the error was the result of negligence. The opinions given by attorneys as to each title are not uniform and often require time consuming analysis to determine their meanings.

Title insurers use this recording system to produce an insurance policy for any purchaser of land, or interest in it, or mortgage lender if the premium is paid. Title insurers use their employees or agents to perform the necessary searches of the recorders' offices records and to make the determinations of who owns the title and to what interests it is subject. The policies are fairly uniform (a fact that greatly pleases lenders and others in the real estate business) and the insurers carry, at a minimum, the financial reserves required by insurance regulation to compensate their insureds for valid claims they make under the policies. This is especially important in large commercial real estate transactions where many millions of dollars are invested or loaned in reliance on the validity of real estate titles. As stated above, the policies also require the insurers to pay for the costs of defense of their insureds in legal contests over what they have insured. Abstractors and attorneys have no such obligation.

Comparison with other insurance

Title insurance differs in several respects from other types of insurance. Where most insurance is a contract where the insurer indemnifies or guarantees another party against a possible specific type of loss (such as an accident or death) at a future date, title insurance generally insures against losses caused by title problems that have their source in past events. This often results in the curing of title defects or the elimination of adverse interests from the title before a transaction takes place. Title insurance companies attempt to achieve this by searching public records to develop and document the chain of title and to detect known claims against or defects in the title to the subject property. If liens or encumbrances are found, the insurer may require that steps be taken to eliminate them (for example, obtaining a release of an old mortgage or deed of trust that has been paid off, or requiring the payoff) before issuing the title policy. In the alternative, it may "except" those items not eliminated from coverage. Title plants are sometimes maintained to index the public records geographically, with the goal of increasing searching efficiency and reducing claims.

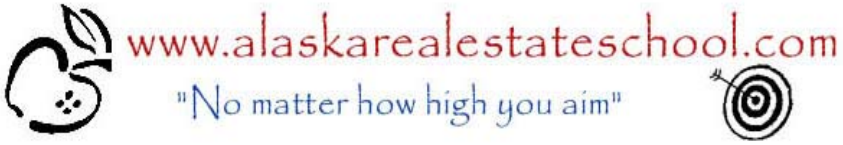
The explanation above discloses another difference between title insurance and other types: title insurance premiums are not principally calculated on the basis of actuarial science, as is true in most other types of insurance. Instead of correlating the probability of losses with their projected costs, title insurance seeks to eliminate the source of the losses through the use of the recording system (see Recording (real estate)) and other underwriting practices. As a result, a relatively small fraction of title insurance premiums are used to pay insured losses. The great majority of the premiums are used to finance the title research on each piece of property and to maintain the title plants used to efficiently do that research. There is significant social utility in this approach as the result conforms with the expectations of most property purchasers and mortgage lenders. Generally, they want the real estate they purchased or loaned money on to have the title condition they expected when they entered the transaction, rather than money compensation and litigation over unexpected defects.

Types of policies

Standardized forms of title insurance exist for owners and lenders. The lender's policies include a form specifically for construction loans, though this is rarely used today.

Owner's policy

The owner's policy insures a purchaser that the title to the property is vested in that purchaser and that it is free from all defects, liens and encumbrances except those which are listed as exceptions in the policy or are excluded from the scope of the policy's coverage. It also covers losses and damages



suffered if the title is unmarketable The policy also provides coverage for loss if there is no right of access to the land. Although these are the basic coverages, expanded forms of residential owner's policy exist that cover additional items of loss.

The liability limit of the owner's policy is typically the purchase price paid for the property. As with other types of insurance, coverages can also be added or deleted with an endorsement. There are many forms of standard endorsements to cover a variety of common issues. The premium for the policy may be paid by the seller or buyer as the parties agree; usually there is a custom in a particular state or county on this matter which is reflected in most local real estate contracts. Consumers should inquire about the cost of title insurance before signing a real estate contract which provide that they pay for title charges. A real estate attorney, broker, escrow officer (in the western states), or loan officer can provide detailed information to the consumer as to the price of title search and insurance before the real estate contract is signed. Title insurance coverage lasts as long as the insured retains an interest in the land insured and typically no additional premium is paid after the policy is issued.

Lender's policy

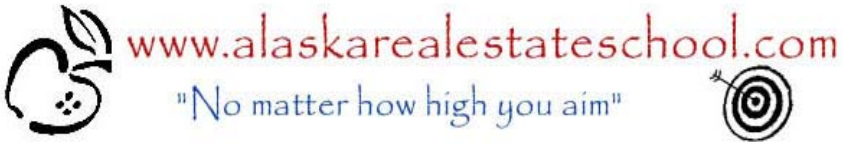
This is sometimes called a loan policy and it is issued only to mortgage lenders. Generally speaking, it follows the assignment of the mortgage loan, meaning that the policy benefits the purchaser of the loan if the loan is sold. For this reason, these policies greatly facilitate the sale of mortgages into the secondary market. That market is made up of high volume purchasers such as Fannie Mae and the Federal Home Loan Mortgage Corporation as well as private institutions.

The American Land Title Association ("ALTA") forms are almost universally used in the country though they have been modified in some states. In general, the basic elements of insurance they provide to the lender cover losses from the following matters:

1. The title to the property on which the mortgage is being made is either
    - Not in the mortgage loan borrower,
    - Subject to defects, liens or encumbrances, or
    - Unmarketable.

2. There is no right of access to the land.

3. The lien created by the mortgage:
    - is invalid or unenforceable,
    - is not prior to any other lien existing on the property on the date the policy is written, or
    - is subject to mechanic's liens under certain circumstances.



As with all of the ALTA forms, the policy also covers the cost of defending insured matters against attack.

Elements 1 and 2 are important to the lender because they cover its expectations of the title it will receive if it must foreclose its mortgage. Element 3 covers matters that will interfere with its foreclosure.

Of course, all of the policies except or exclude certain matters and are subject to various conditions.

There are also ALTA mortgage policies covering single or one-to-four family housing mortgages. These cover the elements of loss listed above plus others. Examples of the other coverages are loss from forged releases of the mortgage and loss resulting from encroachments of improvements on adjoining land onto the mortgaged property when the improvements are constructed after the loan is made.

American Land Title Association

The **American Land Title Association** or **ALTA**, is a national trade association representing the interests of the abstract of title and title insurance industries. In addition to active members engaged in the title industry, associate members cover a wide range of businesses and occupations relating to real estate law, sales, development, design, construction, and financing.

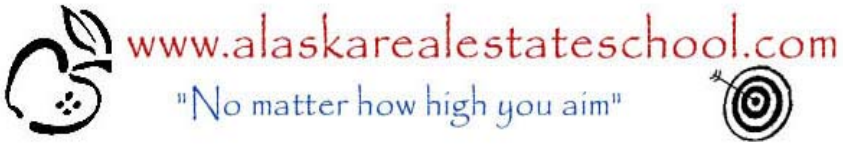
The organization's best known function is the promulgation of standardized forms for the terms and conditions of title insurance policies: these forms are adopted by all major title insurers except where state law requires the issuance of different terms, although most of the state-regulated forms are similar or identical to the ALTA forms.

Construction loan policy

In many states, separate policies exist for construction loans. Title insurance for construction loans require a Date Down endorsement which recognizes that the insured amount for the property has increased due to construction funds that have been vested into the property.

Land title associations

In the United States, the American Land Title Association (ALTA) is a national trade association of title insurers. ALTA has created standard forms of title insurance policy "jackets" (standard terms and conditions) for Owner's, Lender's and Construction Loan policies. ALTA forms are used in most, but not all, U.S. states. ALTA also offers special endorsement forms for the various policies; endorsements



amend and typically broaden the coverage given under a basic title insurance policy. ALTA does not issue title insurance; they provide the policy forms that title insurers issue.

Some states, including Texas and New York, may mandate the use of forms of title insurance policy jackets and endorsements approved by the state insurance commissioner for properties located in those jurisdictions, but these forms are usually similar or identical to ALTA forms.

While title insurance generally insures owners and lenders against things that have occurred in the past, in some limited circumstances, in some states, coverage is available for certain events that can occur after a title insurance policy is issued. Most notably, coverage is now available that includes the risk that a third party may place a forged mortgage or deed of trust against a property after the owner's policy has been issued. This coverage is included in the "Homeowners Policy of Title Insurance" (a specific policy form), published by ALTA and the California Land Title Association (CLTA). Note that this is not the same as a so-called CLTA Standard Policy, which provides much less coverage than the Homeowners Policy of Title Insurance.

Industry profitability

The title insurance industry is a profitable one. In 2003, according to ALTA, the industry paid out about $662 million in claims, about 4.3% percent of the $15.7 billion taken in as premiums. By comparison, the boiler insurance industry, which like title insurance requires an emphasis on inspections and risk analysis, pays 25% of its premiums in claims.

Comparing claims with premiums tells only part of the story, because, for example, title insurance companies have marketing expenses not incurred by the boiler insurance industry. Also, the boiler insurance inspections do not provide the certainty of risk level that the recording laws provide for title insurers. But the industry's profitability is also hinted at by the repeated instances of state regulators uncovering cases where title insurers have engaged in illegal marketing tactics. Although owners are free to shop around for title insurance, many owners defer such decisions to lenders or real estate agents, and title insurance companies have sometimes used illegal tactics in marketing to those decision-makers. Illegal tactics noted in a CNN/*Money* article include kickbacks, free vacations, and the free use of office space and equipment. The article noted that in 2005 alone over a dozen title insurers settled with regulators for tens of millions of dollars over these practices.

Further evidence of the industry's profitability can be found by comparing the title insurance costs in the 49 states where such insurance is issued with the costs associated with the state-run Title Guaranty Program in Iowa, where title insurance is illegal. The program is run by the Iowa Finance Authority. It

costs $110 for up to $500,000 in coverage in the state; after adding costs for the services of an abstractor (who does the research on the property) and the legal fees, such a title guaranty costs about $400.00, versus the $1,100.00 paid for that same home in other states (based on figures cited by the Iowa Bar Association).

In many states, the price of title insurance is regulated by a state Insurance Commissioner. In these states, such as Florida, the rate for the insurance premium cannot be controlled by the industry. Unlike other forms of insurance such as life, medical or home owners; title insurance is not paid for annually, it has one payment for the term of the policy, which is in effect until the property is resold.

Uniform Commercial Code

The **Uniform Commercial Code** (**UCC** or the Code) is one of a number of uniform acts that have been promulgated in conjunction with efforts to harmonize the law of sales and other commercial transactions in all 50 states within the United States of America. This objective is deemed important because of the prevalence today of commercial transactions that extend beyond one state (for example, where the goods are manufactured in state A, warehoused in state B, sold from state C and delivered in state D). The UCC deals primarily with transactions involving personal property (moveable property), not real property (immovable property), primarily the sale of goods, security agreements, financing statements, negotiable instruments, and bulk transfers..

The UCC is the longest and most elaborate of the uniform acts. It has been a long-term, joint project of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). Judge Herbert F. Goodrich was the Chairman of the Editorial Board of the original 1952 edition, and the Code itself was drafted by some of the top legal scholars in the United States, including such luminaries as Karl N. Llewellyn, Soia Mentschikoff, and Grant Gilmore. The Code, as the product of private organizations, is not itself the law, but only recommendation of the laws that should be adopted in the states. Once enacted in a state by the state's legislature, it becomes true law and is codified into the state’s code of statutes. When the Code is adopted by a state, it may be adopted verbatim as written by ALI/NCCUSL, or may be adopted with specific changes deemed necessary by the state legislature. Unless such changes are minor, they can affect the purpose of the Code in promoting uniformity of law among the various states.

The ALI/NCCUSL have also established a permanent editorial board for the Code. This board has issued a number of official comments and other published papers concerning the Code. Although these

commentaries do not have the force of law, courts interpreting the Code often cite them as persuasive authority in determining the effect of one or more provisions. Courts interpreting the Code generally seek to harmonize their interpretations with those of other states that have adopted the same or a similar provision, except where specific aspects of the Code were changed by that state when adopting it, or where other aspects of state law require a different decision.

The Code, in one or another of its several revisions, has been enacted in all of the 50 states, as well as in the District of Columbia, the Commonwealth of Puerto Rico, Guam and the U.S. Virgin Islands. Louisiana has enacted most provisions of the UCC with the exception of Article 2, preferring to maintain its own civil law tradition for governing the sale of goods.

Louisiana jurisprudence refers to the sections of the UCC as “chapters” instead of articles, since the term “articles” is used to refer to provisions of the state’s Civil Code. However, the use of different terms for UCC articles is not unique to Louisiana; neighboring Arkansas also refers to UCC articles as “chapters”, the term for equivalent subdivisions in its code of statutes. (“Article” in that state's law generally refers to a subdivision of the Arkansas Constitution.)

Chapter 4 Conveyances and Recording

UCC Articles

The Uniform Commercial Code deals with the following subjects under consecutively numbered Articles:

ART.	TITLE	CONTENTS
1	**General Provisions**	Definitions, rules of interpretation
2	**Sales**	Sales of goods
2A	**Leases**	Leases of goods
3	**Negotiable Instruments**	Banknotes and drafts (commercial paper)
4	**Bank Deposits**	Banks and banking, check collection process
4A	**Funds Transfers**	Transfers of money between banks
5	**Letters of Credit**	Transactions involving letters of credit
6	**Bulk Transfers and Bulk Sales**	Auctions and liquidations of assets
7	**Warehouse Receipts, Bills of Lading and Other Documents of Title**	Storage and bailment of goods
8	**Investment Securities**	Securities and financial assets

9	**Secured Transactions**	Transactions secured by security interests

In 2003, a major revision of Article 2 modernizing many aspects (as well as changes to Article 2A and Article 7) was proposed by the NCCUSL and the ALI. Although being considered, there are no states that have yet adopted the revised version of Article 2.

In 1989, the National Conference of Commissioners on Uniform State Laws recommended that Article 6 of the UCC, dealing with bulk sales, be repealed as obsolete. It remains in force in several jurisdictions.

A major revision of Article 9, dealing primarily with transactions in which personal property is used as security for a loan or extension of credit, was enacted in many states with an effective date of July 1, 2001.

The controversy surrounding with what is now termed the Uniform Computer Information Transactions Act (UCITA) originated in the process of revising Article 2 of the UCC. The provisions of what is now UCITA were originally meant to be "Article 2B" within a revised Article 2 on Sales. As the UCC is the only uniform law that is a joint project of NCCUSL and the ALI, both associations must agree to any revision of the UCC (i.e., the model act; revisions to the law of a particular state only require enactment in that state). The proposed final draft of Article 2B met with controversy within the ALI, and as a consequence the ALI did not grant its assent. The NCCUSL responded by renaming Article 2B and promulgating it as the UCITA. As of October 12, 2004, only Maryland and Virginia have adopted UCITA.

The overriding philosophy of the Uniform Commercial Code is to allow people to make the contracts they want, but to fill in any missing provisions where the agreements they make are silent. The law also seeks to impose uniformity and streamlining of routine transactions like the processing of checks, notes, and other routine commercial paper. The law frequently distinguishes between merchants, who customarily deal in a commodity and are presumed to know well the business they are in, and consumers, who are not.

The UCC also seeks to discourage the use of legal formalities in making business contracts, in order to allow business to move forward without the intervention of lawyers or the preparation of elaborate documents. This last point is perhaps the most questionable part of its underlying philosophy; many in the legal profession have argued that legal formalities discourage litigation by requiring some kind of

ritual that provides a clear dividing line that tells people when they have made a final deal over which they could be sued.

Section 2-207 / Battle of the Forms

One of the most tested sections of the UCC, Section 2-207, governs a "battle of the forms" between two business, giving rules as to whose boilerplate terms will survive a commercial transaction where multiple forms are exchanged.

The first step in a "battle of the forms" analysis is determining whether the UCC or the common law governs the transaction. Once it is determined that the UCC governs, courts will usually try to find which form constitutes the "offer." Usually this is a purchase order. Next, the acceptance with varying terms is examined. It is important to note whether the acceptance is expressly conditional to its own terms. If it is expressly conditional, it is a counteroffer, not an acceptance. If performance is completed after the counteroffer, with no express acceptance, then, under 2-207(3), the contract will exist of those terms on which the parties agree, together with UCC gap-fillers.

Assuming that the acceptance does not expressly limit acceptance to its own terms, it counts as an acceptance, even though it contains additional or different terms. The different terms from both the offer and acceptance are commonly "knocked out" of the contract and replaced with UCC gap-fillers. The additional terms go into the contract if they pass a three-part test in 2-207(2). First, the offer must not expressly limit acceptance to the terms of the offer. Second, the terms must not materially alter the contract (see Comments to 2-207). Third, the terms in question must not have been objected to.

Lien

In law, a **lien** is a form of security interest granted over an item of property to secure the payment of a debt or performance of some other obligation. The owner of the property, who grants the lien, is referred to as the *lienor* and the person who has the benefit of the lien is referred to as the *lienee*.

In the United States, the term lien generally refers to a wide range of encumbrances and would include other forms of mortgage or charge. In the U.S., a lien characteristically refers to *non-possessory* security interests (see generally: Security interest - categories).

In other common law countries, the term lien refers to a very specific type of security interest, being a passive right to retain (but not sell) property until the debt or other obligation is

discharged. In contrast to the usage of the term in the U.S., in other countries it refers to a purely *possessory* form of security interest; indeed, when possession of the property is lost, the lien is released. However, common law countries also recognize a slightly anomalous form of security interest called an "equitable lien" which arises in certain rare instances.

Another distinction between the U.S. and other common law countries is in the pronunciation. In the U.S. the word is usually pronounced "leen", whereas in other countries is more normally enunciated as "lee-yen".

Despite their differences in terminology and application, there are a number of similarities between liens in the U.S. and elsewhere in the common law world.

United States

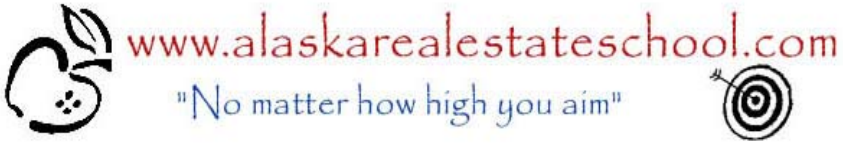
Liens can be consensual or non-consensual. Consensual liens are imposed by a contract between the creditor and the debtor. These liens include:

mortgages;
car loans;
security interests;
chattel mortgages;
Property Improvements (Mechanics lien)

Non-consensual liens typically arise by statute or by the operation of the common law. These laws give a creditor the right to impose a lien on an item of real property or a chattel by the existence of the relationship of creditor and debtor. These liens include:

tax liens, imposed to secure payment of a tax;
"weed liens" and "demolition liens", assessed by the government to rectify a property from being a nuisance and public hazard;
attorney's liens, against funds and documents to secure payment of fees;
mechanic's liens, which secure payment for work done on property or land;
judgment liens, imposed to secure payment of a judgment
maritime liens, imposed on ships by admiralty law.

Liens are also "perfected" or "unperfected" . Perfected liens are those liens for which a creditor has established a priority right in the encumbered property with respect to third party creditors.



Perfection is generally accomplished by taking steps required by law to give third party creditors notice of the lien. The fact that an item of property is in the hands of the creditor usually constitutes perfection. Where the property remains in the hands of the debtor, some further step must be taken, like recording a notice of the security interest with the appropriate office.

Perfecting a lien is an important part of the task of protecting the secured creditor's interest in the property. A perfected lien is valid against bona fide purchasers of property, and even against a trustee in bankruptcy; an unperfected lien may not be.

Equitable lien (U.S.)

In the United States, references to an "equitable lien" is a right, enforceable only in equity, to have a demand satisfied out of a particular fund or specific property without having possession of the fund or property. In U.S. law, such liens characteristically arise in four circumstances:

1. when an occupant of land, believing in good faith to be the owner of the land, makes improvements, repairs or other expenditure that permanently increases the land's value;
2. when one of two or more joint owners makes expenditures of the kind described above;
3. when a tenant for life completes permanent and beneficial improvements to the estate begun earlier by the testator; and
4. when land or other property is transferred subject to the payment of debts, legacies, portions or annuities to third persons.

Common law lien

Common law liens are divided into *special liens* and *general liens*. A special lien, the more common kind, requires a close connection between the property and the service rendered. A special lien can only be exercised in respect of fees relating to the instant transaction; the lienee cannot use the property held as security for past debts as well. A general lien affects all of the property of the lienor in the possession of the lienee, and stands as security of all of the debts of the lienor to the lienee. A special lien can be extended to a general lien by contract, and this is commonly done in the case of carriers.[3] A common law lien only gives a passive right to retain; there is no power of sale which arises at common law,[4] although some statutes have also conferred an additional power of sale,[5] and it is possible to confer a separate power of sale by contract.

The common law liens are closely aligned to the so-called "common callings", but are not co-extensive with them.

A common law lien is a very limited type of security interest. Apart from the fact that it only amounts to a passive right to retain, a lien cannot be transferred; it cannot be asserted by a third party to whom possession of the goods is given to perform the same services that the original party should have performed; and if the chattel is surrendered to the lienor, the lien entitlement is lost forever (except for where the parties agree that the lien shall survive a temporary re-possession by the lienor). A lienee who sells the chattel unlawfully may be liable in conversion as well as surrendering the lien.

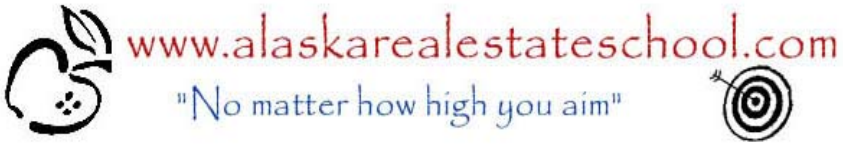
Equitable lien

In common law countries, equitable liens give rise to unique and difficult issues. An equitable lien is a non-possessory security right conferred by operation of law, which is similar in effect to an equitable charge. It differs from a charge in that it is non-consensual. It is conferred only in very limited circumstances, the most common (and least ambiguous) of which is in relation to the sale of land; an unpaid vendor has an equitable lien over the land for the purchase price, notwithstanding that the purchaser has gone into occupation of the property. It is seen as a counterweight to the equitable rule which confers a beneficial interest in the land on the purchaser once contracts are exchanged for purchase.

It is a matter of conjecture how for equitable liens extend outside of the unpaid vendor's lien. Equitable liens have been held to exist in a number of cases involving chooses in action, but not yet in relation to chattels. The Australian courts have been the most receptive towards equitable liens in relation to personal property (see *Hewett v Court* (1983) 57 ALJR 211, but a review of the cases still leaves a lack of clarity in relation to the principles upon which an equitable lien will be imposed.

In *Re Stucley* [1906] 1 Ch 67 a vendor of a reversionary interest in a trust fund, who sold the interest to the trustee, was held to have an equitable lien in the subject matter, although it was clearly personalty and not realty.

In *Barker v Cox* (1876) 4 Ch D 464 the purchaser of property which was included in a matrimonial settlement paid the price in advance to one of the trustees, and the purchaser was held to have an equitable lien in investments which the trustees subsequently acquired with the purchase price.



In *Langen and Wing v Bell* [1972] Ch 685 a director's service agreement required him to assign his shares in the company if he was terminated, and he was to receive a price calculated at a later date when the annual accounts were available; he was held to have an equitable lien over the transferred shares to secure the payment of the eventual purchase price.

In *Lord Napier & Etterick v Hunter* [1993] 2 WLR 42 it was held that an indemnity insurer's subrogation rights in relation to funds improperly paid directly to the insured were subject to an equitable lien.

Statutory liens and contractual liens

Although arguably not liens as such, two other forms of encumbrance are sometimes referred to as liens.

Statutory liens

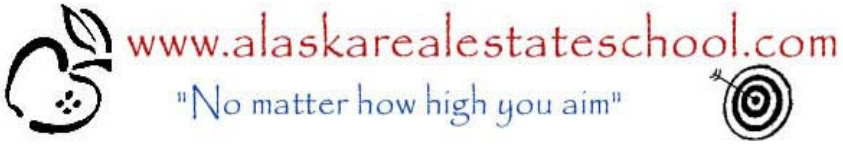
Certain statutes provide for a passive right to retain property against its owner as security for obligations. For example, section 88 of the Civil Aviation Act 1982 of the United Kingdom permits an airport to detain aircraft for unpaid airport charges and aviation fuel. Although this right has been treated as a lien under UK insolvency law,[12] it has been argued that such statutory rights are not in fact liens, but rights analogous to liens,[13] although some might say that this is a distinction without a difference.

Contractual liens

It has also been argued that an agreement by contract that one party may retain the goods of another party until paid is not a lien, as under the common law, liens could only be non-consensual. However, it appears that under insolvency law, such rights will be treated as liens even if they are not expressed to be liens.

Maritime liens

A **maritime lien** is a lien on a vessel, given to secure the claim of a creditor who provided maritime services to the vessel or who suffered an injury from the vessel's use. Maritime liens are sometimes referred to as *tacit hypothecation*. Maritime liens have little in common with other liens under the laws of most jurisdictions.



Chapter 4 Conveyances and Recording AlaskaRealEstateSchool.com

The maritime lien has been described as "one of the most striking peculiarities of Admiralty law". A maritime lien constitutes a security interest upon ships of a nature otherwise unknown to the common law or equity. It arises purely by operation of law and exists as a claim upon the property concerned, both secret and invisible, often given priority by statute over other forms of registered security interest. Although characteristics vary under the laws of different countries, it can be described as: (1) a privileged claim, (2) upon maritime property, (3) for service to it or damage done by it, (4) accruing from the moment that the claim attaches, (5) travelling with the property unconditionally, (6) enforced by an action *in rem (in lawsuit)*.

Ad valorem tax

The term "ad-valorem" is Latin for "according to value."

An **ad-valorem tax** (Latin: *by value*) is a tax based on the value of real estate or personal property. An ad-valorem tax is typically imposed at the time of a transaction (a sales tax or value-added tax (VAT)), but it may be imposed on an annual basis (real or personal property tax) or in connection with another significant event (inheritance tax or tariffs).

Sales tax

A sales tax is a consumption tax charged at the point of purchase for certain goods and services. The tax is usually set as a percentage by the government charging the tax. There is usually a list of exemptions. The tax can be included in the price (tax-inclusive) or added at the point of sale (tax-exclusive).

Ideally, a sales tax is fair, has a high compliance rate, is difficult to avoid, is charged exactly once on any one item, and is simple to calculate and simple to collect. A conventional or retail sales tax attempts to achieve this by charging the tax only on the final end user, unlike a gross receipts tax levied on the intermediate business who purchases materials for production or ordinary operating expenses prior to delivering a service or product to the marketplace. This prevents so-called tax "cascading" or "pyramiding," in which an item is taxed more than once as it makes its way from production to final retail sale. There are several types of sales taxes: Seller or Vendor Taxes, Consumer Excise Taxes, Retail Transaction Taxes, or Value Added Taxes.

Value added tax

A value added tax (VAT), or goods and services tax (GST), is tax on exchanges. It is levied on the added value that results from each exchange. It differs from a sales tax because a sales tax is levied on the total value of the exchange. For this reason, a VAT is neutral with respect to the number of

passages that there are between the producer and the final consumer. A VAT is an indirect tax, in that the tax is collected from someone other than the person who actually bears the cost of the tax (namely the seller rather than the consumer). To avoid double taxation on final consumption, exports (which by definition, are *consumed* abroad) are usually not subject to VAT and VAT charged under such circumstances is usually refundable.

Property tax

A property tax, millage tax is an ad valorem tax that an owner of real estate or other property pays on the value of the property being taxed. There are three species or types of property: Land, Improvements to Land (immovable man made things), and Personalty (movable man made things). Real estate, real property or realty are all terms for the combination of land and improvements. The taxing authority requires and/or performs an appraisal of the monetary value of the property, and tax is assessed in proportion to that value. Forms of property tax used vary between countries and jurisdictions.

History

The VAT was invented by a French economist in 1954. Maurice Lauré, joint director of the French tax authority, the *Direction générale des impôts*, as *taxe sur la valeur ajoutée* (TVA in French) was first to introduce VAT with effect from 10 April 1954 for large businesses, and extended over time to all business sectors. In France, it is the most important source of state finance, accounting for approximately 45% of state revenues.

Application of a sales or property tax

United States of America

Ad-valorem duties are important to those importing goods into the United States of America because the amount of duty owed is often based on the value of the imported commodity. Ad-valorem taxes (mainly real property tax and sales taxes) are a major source of revenues for state and municipal governments, especially in jurisdictions that do not employ a personal income tax.

"Ad-valorem" is used frequently to refer to property values by county tax assessors. In many states, the central appraisal district sends certified values to the county tax assessor, who determines the final tax rate to be imposed on the property. Other states use a state tax commission, which notifies the appropriate taxing authorities of the assessed value of property within their billing jurisdiction.

Ad valorem tax relates to a tax with a rate given as a proportion of the price. An example would be the state of Tennessee having a 6% sales tax on the purchase of food. Virtually all state and local taxes on restaurant meals and clothing are ad valorem.

Mechanics lien

A **mechanic's lien** is a security interest in the title to property for the benefit of those who have supplied labor or materials that improve the property. The lien exists for both real property and personal property. In the realm of real property, it is called by various names, including, generically, **construction lien**. It is also called a **materialman's lien** or **supplier's lien** when referring to those supplying materials, a **laborer's lien** when referring to those supplying labor, and a **design professional's lien** when referring to architects or designers who contribute to a work of improvement. In the realm of personal property, it is also called an **artisan's lien**. The term "lien" comes from a French root (via William the Conqueror), with a meaning similar to link; it is related to "liaison." Mechanics liens on property in the United States date from the 1700s.

Reasons for existence

With respect to real property, mechanic's liens are purely statutory devices that exist in every state. The reason they exist is a legislative public policy to protect the contractors. More specifically, the state legislatures have determined that, due to the economics of the construction business, contractors and subcontractors need a greater remedy for non-payment for their work than merely the right to sue on their contracts. In particular, without the mechanics' lien, subcontractors providing either labor or materials may have no effective remedy if their general contractor isn't sufficiently financially responsible because their only contractual right is with that general contractor. Without the mechanic's lien, the contractor would have a limited number of options to enforce payment of the amounts owed. Further, there is usually a long list of claimants on any failed project. To avoid the specter of various trades, materialmen and suppliers attempting to remove the improvements they have made, and to maintain a degree of equality between the various lienors on a project, the statutory lien scheme was created. Without it, Tradesperson A may try to "race" Supplier B to the courthouse, the project site or the construction lender to obtain payment. Most lien statutes instead mandate strict compliance with the formalized process they create in return for the timely resolution and balancing of claims between all parties involved - both owners and lien claimants.

Creation

Mechanic's liens exist to secure payment for services, labor and material on both personal and real property. However, the creation and enforcement mechanisms differ depending on whether real or personal property is involved. The law of mechanic's liens on real property governs the creation and enforcement of these liens on items of personal property that have been attached to real property in such a way as to be a fixture.

Creation and Enforcement - Personal property

The English common law recognized mechanic's liens respecting only personal property. The lien was created by the fact of the artisan working on the personal property item or attaching additional material to it. However, to maintain the lien, the artisan had to retain possession of the article until he or she was paid. If the property were returned to the owner before that time, the lien was lost. The lien was enforced by a sale of the property and applying the sale proceeds to payment of the amount owed for the workmanship. The sales were non-judicial, i.e., they were held in the same way as a sale of property pawned for a debt.

Some 34 states now appear to have statutes providing for mechanic's liens on personal property.

Creation, Perfection, Priority and Enforcement - Real property

Mechanic's liens on the title to real property are exclusively the result of legislation. Each state has its own laws regarding the creation and enforcement of these liens, but, overall, there are some similar elements among them.

Real property of the government (public property) is ordinarily not subject to the claims of private parties. Therefore, unless the state specifically so provides, mechanic's liens do not attach to the title owned by the state or its administrative subdivisions, such as cities. Similarly, mechanic's liens under state law are invalid on federal construction projects. To protect subcontractors and suppliers federal projects, where the contract price exceeds $100,000.00, the Miller Act requires general contractors to provide a surety bond which guarantees payment for work done in accordance with the terms of the contract. Many state and municipal governments similarly require contractors on public works projects to be bonded.

Chapter 4 Conveyances and Recording

Creation and perfection

Under the statutes, the lien is usually created by the performance of labor or the supplying of material that improves the property. Just what type of contribution counts as a valid basis for a mechanics lien varies, depending on the particular state statute that applies. Some common examples are:

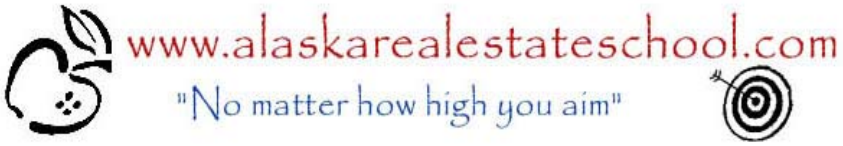
- Laborers, carpenters, electricians, and plumbers working on the project site;
- Lumber yards, plumbing supply houses and electrical suppliers;
- Architects and civil engineers who drew up the construction plans and specifications; and
- Offsite fabricators of specialty items that are ultimately incorporated into the project.

Often, there is no simple dividing line that is useful in every state, or even in every case, for determining this eligibility. Deciding whether a party has a legitimate lien right may depend on examining court cases that have either upheld or rejected lien claims in the same state.

Unlike other security interests, in most states, mechanic's liens are given to contractors and material suppliers who may or may not have a direct contractual agreement with the owner of the land. In fact, this is often the norm because in most cases, the owner of the land contracts only with a general contractor (often called a "prime contractor"). The general contractor, in turn, hires subcontractors ("subs") and material suppliers ("suppliers") to perform the work. These subs and suppliers are entitled to liens on the owner's property to secure their payment from the general contractor.

However, to have an enforceable lien, it usually must be "perfected." This means that the holder of the lien must comply with the statutory requirements for maintaining and enforcing the lien. These requirements, which contain time limits, are generally as follows:

- Providing the required preliminary notice to the property owner disclosing the entitlement to the lien (some states).
- Filing notices of commencement of work (some states).
- Filing notices in the required public records offices of the intention to file a lien if unpaid (some states).
- Filing the notice or claim of lien in the required public records offices within a specified period of time after the materials have been supplied or the work completed (all states).



The law varies from state-to-state on both the triggering event and the timing of this. Some states require the filing within a period measured from the time when the claimant completes its work, while others specify the event as being after all work on the project has been completed. The filing time periods after the triggering event vary, with 4-6 months being common.

- Filing a lawsuit to foreclose the lien within a specified time period.

Priority respecting other interests

The statutes creating mechanic's liens usually give them a higher priority with respect to other interests in the title than the law gives most real property security interests. Among other things, priority is the attribute that determines which of several competing security claims will have the first claim to the funds of a foreclosure sale. In this context, the priority of a mechanic's lien is determined either by the time the lien attaches to the title to the property or by the point in time to which it "relates back." With some exceptions, the lien attaches or relates back to a time prior to the time that any notice of it appears in the public records. In many states, this is specified as the time when the first visible construction commences on the building site. In others, it is when the contract is executed for the work to be done. In still others, each contractor or supplier's lien attaches at the time when it commences its own work. Therefore, persons dealing with the owner of the title to the property risk having their interests unexpectedly subject to mechanic's liens of which they had no knowledge.

Special provisions are made in some states for determining the priority between a mechanic's lien and the lien of a mortgage that is financing the construction on the land. For instance, in the State of New York, the appearance of specified language in the mortgage to the effect that it is a construction loan preserves its priority over mechanic's liens arising out of the construction, as long as subsequently filed lien claims that are legitimate are not ignored. In other states, such as Florida, it is an all or nothing proposition. There, the recording of the construction mortgage before the filing of a statutory notice of commencement of construction provides the mortgage with absolute priority over mechanic's liens arising out of the construction. Still other states, such as California, provide priority for a construction loan mortgage recorded before the visible commencement of construction where the lender is obligated to disburse the funds. In the State of Illinois, there is a statutory funds disbursing scheme that, if followed, provides construction loan mortgage priority. In other states, there are still other arrangements and some states, such as Colorado, provide almost no practical means for a construction loan mortgage to obtain priority at all.

Enforcement

Mechanic's liens are enforced exclusively through judicial foreclosure sales, i.e., through court proceedings similar to mortgage foreclosures. The court must determine whether the requirements of the statute have been met and, if so, the priority of the mechanic's lien being foreclosed relative to the other liens or encumbrances on the title. Once that is determined, the court will order the property sold and the proceeds of the sale applied to the liens in the order of their priority.

Lis pendens

Lis pendens is Latin for "suit pending." This may refer to any pending lawsuit or to a specific situation with a public notice of litigation that has been recorded in the same location where the title of real property has been recorded. This notice secures a plaintiff's claim on the property so that the sale, mortgage, or encumbrance of the property will not diminish plaintiff's rights to the property, should plaintiff prevail in its case. In some jurisdictions, when it is properly recorded, *Lis pendens* is considered constructive notice to the other litigants or other unrecorded or subordinate lienholders.

A foreclosure will wipe out a lis pendens.

Chapter 4 Conveyances and Recording

CORRESPONDENCE EVALUATION QUESTIONS

1. An example of involuntary alienation is by:
a. adverse possession
b. Will.
c. covenant of seisin.
d. quitclaim deed.

2. A quitclaim deed would not be used to:
a. convey an easement.
b. release a nominal interest in land.
c. warrant that a title is good.
d. remove a cloud on a title.

3. Jim refused to sell his land to the local park district. He felt that the price the park district offered for the land was not sufficient consideration. If the park district were to pursue the matter in court, what proceeding would it institute to try to force Jim to sell the land?
a. Escheat
b. Foreclosure
c .Probate
d. Condemnation

4. Title to real property is transferred when a valid deed is:
a. signed by the grantor.
b. delivered and accepted.
c. recorded.
d. executed.

5. The requirements for a valid will include:
a. sound mind and body.
b. legal age.
c. Four witnesses
d. Notary acknowledgment

6. Five covenants are contained in a(n):
a. warranty deed.
b. executor's deed.
c. bargain and sale deed.
d. quitclaim deed.

7. A summarized history of everything of importance affecting a specific parcel of real estate is:
a. an affidavit of title.
b. an abstract of title.
c. a certificate of title.
d. a title insurance policy.

8. If a purchaser can be assured that he or she will not have to defend against any lawsuits filed on the basis of defects in the seller's title, the seller is said to have:
a. marketable title.
b. a certificate of title.
c. an abstract of title.
d. a chain of title.

Chapter 4 Conveyances and Recording

9. The law that covers contracts involving the sale of goods, security agreements, financing statements, negotiable instruments and bulk transfers is called the:
a. Federal Fair Housing Act.
b. Uniform Commercial Code.
c. Recording Act.
d. Torrens Registration Act.

10. Which of the following is accepted as evidence or proof of marketable title in land?
a. Trust deed
b. Warranty deed
c. Title insurance policy
d. Affidavit

11. A title insurance policy that conforms to certain uniform standards that are recognized throughout the insurance industry is called:
a. a UCC policy
b. an extended coverage policy.
c. an ALTA policy.
d. a Chicago Title Insurance policy.

12. In the purchase of real estate the buyer is held responsible for facts and information obtainable through actual notice and also through:
a. caveat emptor.
b. incorporeal interest
c. eminent domain.
d. constructive notice

Chapter 4 Conveyances and Recording

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Answer Sheet

	A	B	C	D
1.	❒	❒	❒	❒
2.	❒	❒	❒	❒
3.	❒	❒	❒	❒
4.	❒	❒	❒	❒
5.	❒	❒	❒	❒
6.	❒	❒	❒	❒
7.	❒	❒	❒	❒
8.	❒	❒	❒	❒
9.	❒	❒	❒	❒
10.	❒	❒	❒	❒
11.	❒	❒	❒	❒
12.	❒	❒	❒	❒

I certify that I, _____
(print name)
personally answered these questions.

Student Signature: _____

Please Print this answer sheet and after finishing, email to denny@akhomes.co or FAX to 866-659-8458 or mail to:

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