

Chapter 3

ENCUMBRANCES

I. ENCUMBRANCES: AN OVERVIEW

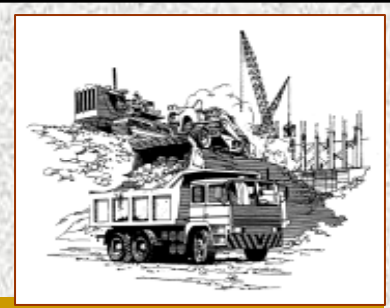
Encumbrance

- A right or interest in real property other than an owner or tenancy interest (**burdens property that limits use and may lessen value**)
- **Blanket Encumbrance** - a lien placed on more than one parcel that has the same owner.
 - Release Clause releases portions of property



II. LIENS (Money Owed)

Liens



- A document using property to secure the payment of the debt or discharge of an obligation

- Liens are either:
 - voluntary or involuntary
 - specific or general

A. Voluntary and Involuntary Liens

- **VOLUNTARY LIENS** – are money debts an owner agrees to pay (e.g., loans)
 - does NOT have to be recorded
- **INVOLUNTARY LIENS** – are money obligations that create a burden on a property by government taxes or legal action because of unpaid bills

Both types must be paid or assumed prior to a sale or refinance of a property

B. Specific and General Liens

- **SPECIFIC LIENS** - charges against a particular parcel of land and the improvements on that property (e.g., property taxes)
- **GENERAL LIENS** – are liens on all the properties of an owner (e.g., Fed or State income taxes or judgment liens)

C. Trust Deed

(Security Device - Voluntary and Specific)

- A **TRUST DEED** is a written instrument which makes real property collateral for a loan (by a pledge or hypothecation)
 - Differs from a promissory note, which is the evidence of the debt itself

D. Mortgage

(Security Device - Voluntary and Specific)

- A **MORTGAGE** is a lien which secures real property for the payment of a promissory note
 - rare in California



E. Mechanic's Lien (Involuntary and Specific)

- A lien which may be filed against a property itself by a person who was not paid after furnishing labor or materials
- It must be recorded to be valid
- They take priority over all other liens

Mechanic's Lien (cont.)

1. **Preliminary Notice** – is a written notice that must be given before filing a mechanic's lien and within **20 days** of supplying labor, materials or services

2. **Determining start time for Mechanic's Liens** – dates back to when work began: *scheme of improvements*

■ suit may be filed (after preliminary notice) up to **30 days after work completion** for suppliers and subcontractors and up to **60 days after completion** for general contractors

Mechanic's Lien (cont.)

3. **Notice of Completion** – should be recorded by owner within 10 days after completion as determined by any of the following:

- Occupation or use by owner after a cessation of labor
- Acceptance of work by the owner
- Cessation of labor for **60 continuous** days
- Cessation of labor for 30 continuous days if owner files a **notice of cessation** with county recorder's office

Mechanic's Lien (cont.)

4. Filing time (limited)

- 30 days subcontractor
- 60 days general contractor
- 90 days (all parties, if no notice of completion)

5. A **Notice of Non-Responsibility** should be recorded **and posted** within 10 days of detecting unauthorized labor to protect the owner against an unfair mechanic's lien

F. Tax Liens

(Specific or General)

- Any unpaid property taxes including special assessments become a lien on real property
 - generally becomes a lien under law, or through court action
 - if not settled, property can be sold by taxing authority to pay back taxes

G. Special Assessments

- Local improvements are paid for by the property owners in a given district
 - streets, sewers, lighting, irrigation
 - developers use “Mello-Roos” Bonds for such improvements
- Special assessments are levied for the cost of specific local improvements, while property tax revenue goes into the general fund



H. Judgments (Involuntary and General Liens)

- A court decision determining the rights of the parties involved and the amount of compensation
 - appealable; good for ten years
- **Abstract of Judgment** - a formal filing or recording of judgment creating a lien on all non-exempt property
 - becomes a lien on all future properties owned by debtor

-- Small Claims Court

- $\$ < \$1,500 = \$30$ filing fee
 $\$1,500 - \$5,000 = \$50$
 $\$5,000 - \$7,500 = \$75$
- b. no legal representation allowed
- c. judgment maximum: \$7,500

I. Termination of Judgment Lien

- Most judgment liens are terminated by the satisfaction of the judgment
- **Satisfaction of Judgment** - compensation by the payment of money or the return of property
 - should be filed with the Clerk of the Court to clear the lien from the record
 - partial releases may be authorized by lien holder

J. Attachment (Court-seized Property)

- A process of the law; it gives custody of real or personal property to the courts to assure payment of a pending lawsuit in that county
 - pre-judgment action; good for 3 years and does not terminate on death of property owner
- **Plaintiff** - party filing a court action
- **Defendant** - the party against whom action is taken (person being sued)

K. Lis Pendens

("Lawsuit is Pending")

- A *lis pendens* is notice of a pending lawsuit that affects title or possession of real property (clouds title) and remains on the public record until judgment is rendered or suit is dismissed

L. Sheriff's Sale (Court Order to Sell)




The forced sale of a debtor's property to satisfy a judgment under a court order called a **writ of execution**

- Order of restitution:
 - mechanic's liens
 - previously recorded judgments
 - expenses of sale
 - trust deeds (1st, 2nd, etc.)

M. Injunction (Court Order to Stop)

- A court order to stop doing something
 - e.g., violating private deed restrictions





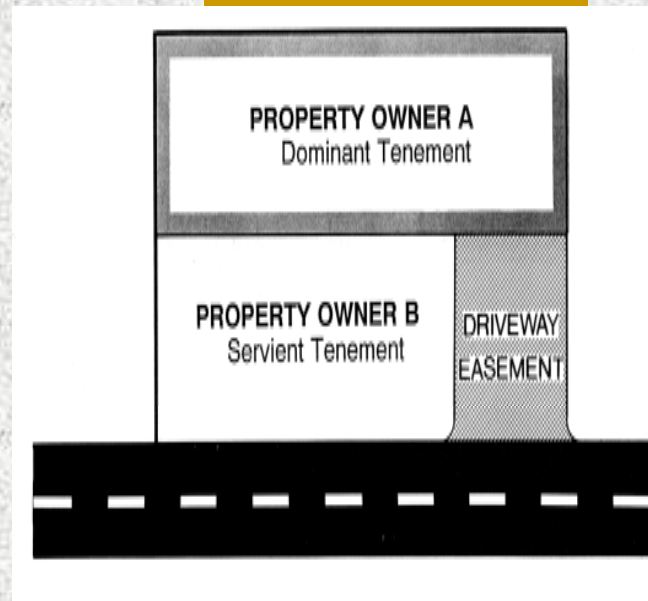
III. ITEMS THAT AFFECT PHYSICAL USE (Non-Money Encumbrances)

A. Items That Affect Physical Use (non-monetary)

- Easement - the right to enter and use another person's land for a specific, limited purpose
- Building restrictions and zoning
- Encroachments
- Lease

a. Easement Appurtenant (Runs with the Land)

- “created for and beneficial to” the owner of adjoining land and transferred with the property (interest in real property, but not an estate); **not a lien**
- Dominant Tenement - the land that obtains the benefits of the easement
- Servient Tenement - the land that gives the easement for the benefit of another



b. Easement in Gross

- Created for the benefit of others who do not own adjoining or attached lands; it does not benefit adjoining landowner(s) and *is a personal property right*
 - may have one or several servient tenements
 - example - a utility company obtains the right to run power lines across your land
 - unlocated easement - when a property owner gives the right to cross his or property and does not limit how or where a person would have to cross

c. Creation of an Easement

- Express Grant (in writing); should be acknowledged and recorded
- Implication of Law (implied easement); e.g., for mineral rights, may use surface entry
 - by necessity – for landlocked parcels; does not have to be most convenient and is terminated if other access is achieved (e.g., by acquisition of parcel needed to do so)
- Long Use (prescription) -- the claimant must:
 1. Use the land openly and notoriously
 2. Uninterrupted use for 5 years
 3. Hostile (without the owner's permission)
 4. Under a claim of right

d. Transfer of an Easement

- **Appurtenant** - automatically transferred as it 'runs with the land'
- **In Gross** - only by an expressed agreement, so long as the easement is not made to a specific individual; should be recorded to give buyer knowledge of its existence

e. Termination of an Easement

- Express Release - usually a quitclaim deed
- Merger of Dominant and Servient Tenements
- Excessive Use – increases burden on servient tenement and injunctive relief can be court ordered
- Abandonment and/or Non-Use – e.g., an easement gained through prescription can be lost by court action if not used for five continuous years
- Destruction of Servient Tenement (Eminent Domain)

2. Building Restrictions (Public and Private)



- PRIVATE DEED RESTRICTIONS limit the use or occupancy of the land:
 - a. Covenants - promises to do or not to do certain things on the property; court action awards money damages
 - b. Conditions - promises made under penalty of title returning to the grantor (with condo CCRs, breach of condition is more serious than breach of covenant)
 - c. Restrictions – public and private; private restrictions by present or previous owners (any racial or other such restrictions are deemed illegal and unenforceable as of legislation passed in 1961)

2. Building Restrictions (Public and Private -- Cont'd)

- d. Public/Governmental Restrictions - limitations to the use or occupancy of land
 - usually enacted by cities and/or counties in the form of zoning

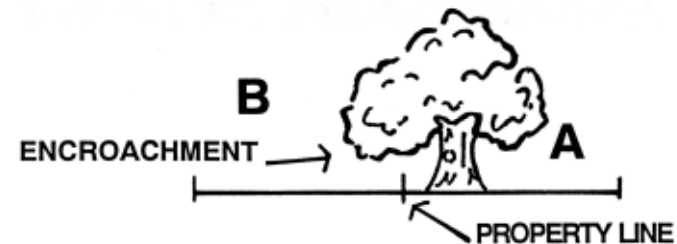
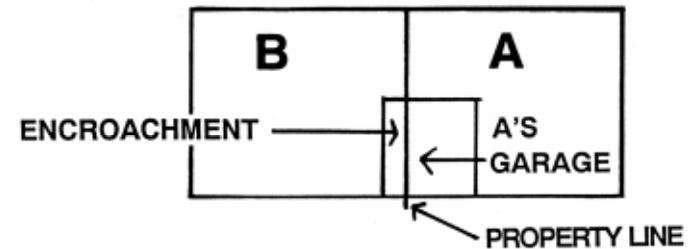
- e. Race Restrictions - deemed illegal by the California State Legislature.

3. Encroachment (3 yrs. to act)

- The wrongful, unauthorized placement of improvements or permanent fixtures on someone else's property
- Encroaching party may gain title through adverse possession or legal use through an easement by prescription

ENCROACHMENT

THE WRONGFUL BUILDING OF A STRUCTURE OR OF ANY IMPROVEMENT ON THE PROPERTY OF ANOTHER

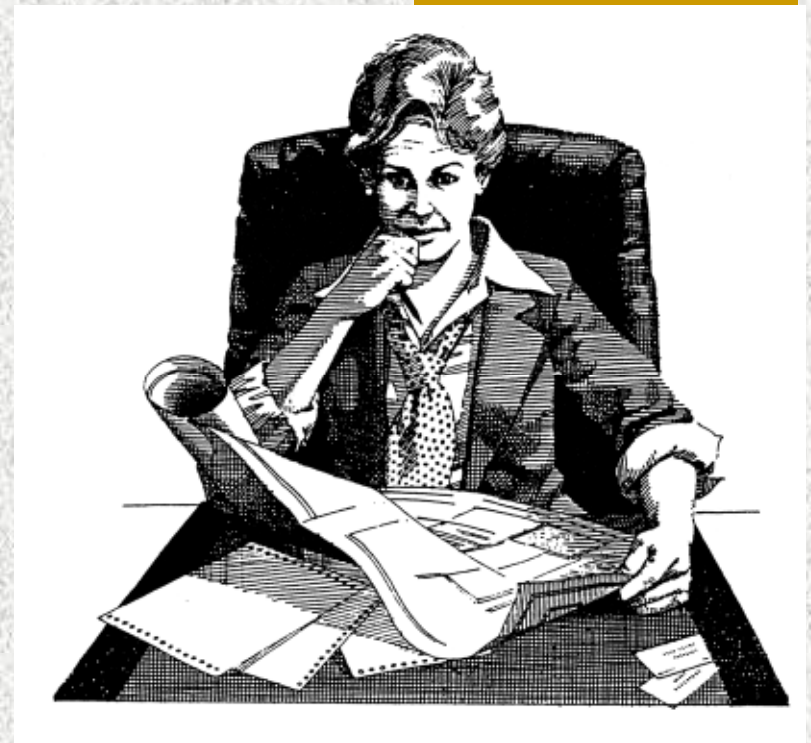




IV. HOMESTEADING YOUR RESIDENCE

Homesteading

- A special provision of the law which allows homeowners to protect their homes from forced sale to satisfy their debts; a **homestead is not an encumbrance**



A. Declaration of Homestead protects improved property

1. \$75,000 for the head of a family
 2. \$150,000 for persons 65 years or older, mentally or physically disabled, or over 55 years with specific low income
 3. \$50,000 for anyone else
 - if equity exceeds these exemptions, property may be sold used to satisfy creditors, with exemption protected for 6 months to be reinvested in replacement home
- Does not protect against:
- Foreclosure on a trust deed
 - Mechanic's liens
 - Liens filed prior to filing

Valid Declaration of Homestead must have:

1. A statement showing the claimant is the “head of family” (lives in home and provides for any other living there) and stating the name of the spouse
2. A statement that the claimant is residing on the premises and claims it as his or her homestead
3. A description of the premises and an estimate of cash value
4. A statement as to the character of the property; that no former declaration has been made and that it is within the limits prescribed by law

B. Termination of a Homestead

- Conveyance of the property ends homestead
- Declaration of Abandonment terminates homestead
 - removal or destruction of the dwelling does not end homestead
 - leasing the property does not end homestead
 - moving out of state does not terminate homestead

HOMework

- Read Chapter 4
- Study for quiz
- Consider your extra credit possibilities
- Continue reading your supplemental text and be prepared to give oral book report

Chapter 3 – Summary

- Encumbrances
 - Blanket Encumbrance
- Liens:
 - Voluntary
 - Involuntary
 - Specific
 - General
- Trust deeds and mortgages
 - Promissory note
- Mechanic's Lien
 - Preliminary Notice
 - Notice of Completion
 - Notice of Cessation
 - Notice of Non-responsibility
- Attachment
 - *Lis pendens*
 - Cloud on title
 - Sheriff's sale
 - Writ of execution

Chapter 3 – Summary

Non-Money Encumbrances

• Easements

- Dominant tenant
- Servient tenement
- Easement appurtenant
- Created by:
 - Deed
 - Implication of law
 - Prescription
- Terminated by:
 - Express release
 - Merger
 - Excessive use
 - Abandonment and non-use
 - Destruction of servient tenement

■ Restrictions

- Covenants
- Conditions
- Restrictions (CC&Rs)
 - Police power
 - Zoning
- Encroachments
- Leases

■ Homestead

- Terminated by:
 - declaration of abandonment
 - the sale of the homesteaded property