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Principles of the American Real Property Law

The real property transactions in the United States have been in the spotlight of public interest since the adverse development of the housing market has truly evolved and has become the most vulnerable segment of the American economy. The transactions attached to a real property governed by law at federal and state levels. There are several variations in the application of the federal concepts as state law varies in each state; however there are basic principles that govern the real estate transactions, and their applications differ even between counties and cities within states.¹

Real property is defined as the land and things permanently attached to it, and whatever is beneath the surface and above the surface.² The fixture, for example becomes part of the real property, because it cannot be removed without damaging the property.³ Real property, which generally refers to land, and real estate are not synonyms, however real estate includes land and properties permanently affixed to it, and interest in land.

The owner's major legal rights of real property are possession, use and power of disposition. The possession is an occupation of the land, and gives the right to the owner to exclude others from the territory of the real property. The right to use means the right of utilization.⁴ The disposition in the real estate can occur by contract, deed, and lease or at the owner's death by inheritance or will. The sale of real property is governed by contract law, therefore the majority of contracts are controlled by the state's common law, however the real property conveyance is somewhat different than other transactions, and in most states the *Statute of Frauds*⁵ applies, requiring that the real estate transactions be evidenced in writing.

The requirements of valid contract are offer, acceptance and consideration, but generally the contract of real property must be in writing to be enforceable. It comes from the English law enacted in 1677, known as *An Act for the Prevention of Frauds and*

¹ For example: Alabama (see Title 35), Alaska- Title 34, Arizona- Title 33, Arkansas (see Title 18), Colorado (Title 38), Connecticut (see Volume 12), Delaware - Title 25 , District of Columbia: Real - Title 45, Florida (see Title XL), Georgia (Title 44), Idaho - Title 55, Illinois- Chapter 765, Indiana- Title 32, Iowa- Title XIV, Kansas (see Chapters 58 and 67), Kentucky (see Title XXXII), Louisiana (searchable index), Maine- Title 33, Maryland (Article: Real Property), Massachusetts (see Chapters 183-189), Michigan (see Chapters 554-570), Minnesota (see Chapters 500 thru 515B), Mississippi (see Title 89), Missouri- Title 29, Montana- Title 70, Nebraska (see Chapters 69 and 76), Nevada (see Title 10), New Hampshire (see Titles 46 thru 48), New Jersey (see Title 46), New Mexico (see Chapter 42), New York (see Chapters 1, 41, 50, 81, and 50-A), North Carolina (see Chapters 47B thru 47F and 116A thru 116B), North Dakota- Title 47, Ohio- Title 53, Oklahoma (searchable index - Title 60), Oregon (see Chapters 90-105), Pennsylvania- Title 68, Rhode Island- Title 34, South Carolina- Title 27, South Dakota - Title 43, Tennessee (see Title 66), Texas, Utah- Title 57, Vermont- Title 27, Virginia- Title 55, Washington (see Titles 63 and 64), West Virginia (see Chapters 32A, 34, 35, and 36), Wisconsin (see Chapters 700-710), Wyoming- Title 34.

² Steven H. Gifis, *Law Dictionary*, 4th Ed. P. 424-425.

³ Steven H. Gifis, *Law Dictionary*, 4th Ed. P. 204.

⁴ Daniel F. Hinkel, *Essentials of Practical Real Estate Law*, 4th Ed. P. 4.

⁵ Uniform Commercial Code § 2-201

Perjuries to prevent fraudulent practices.⁶ The seller must show that the offered title of real property is “marketable”, meaning the seller has the legal right to control and dispose the property; and there is no third party who has an undisclosed interest in the property, and the purchaser has knowledge of all facts and would accept them. The best is if the owner has *fee simple* or *fee simple absolute*⁷ estate with infinite duration and no restrictions on use. The *fee simple determinable* estate has potential infinite duration and is subject to condition that can result in termination of the estate automatically. The *fee simple on condition subsequent* estate is subject to a circumstance that can result in termination when an action is started to recover the property. The duration of the *life estate* is one or more person’s life. The duration of the *estate for years* is a definite period, and the duration of the estate at will depends on the will of the parties. Therefore the most common title of ownership is the fee simple/fee simple absolute estate.

It is unusual that a real property is free of restrictions or debts. There are public encumbrances, such as zoning regulations by the government restricting private land use, and building codes that regulates the construction of improvements. The eminent domain is another example for the public encumbrances, which is the power of government to take the property for public use. The government must pay the owner a fair market value of the property before it exercises its right. The government at city and county levels as well has the right to tax real property within their jurisdiction on the basis of the estimated annual value of the property. If somebody missed the payment by the first day of the tax year, the tax becomes registered lien or debt on the real property.

Private encumbrances are judgment liens, when the debt recorded in the Judgment Book or General Execution Docket in the county where the real property is located. Generally the state statutory law regulates⁸ that mechanics’ or material men’s payment can be secured as a lien on the property and it is recorded at the County Recorder's office, but Mechanics lien laws differ from state to state. A mechanic’s lien is a claim created by statute for the purpose of securing priority of payment of the price or value of work performed or materials furnished in erecting or repairing a building or structure.⁹ The restrictive covenants are restrictions of use of the property by future owners to create or protect the rights of the other owners in the neighborhood, and to protect property values and provide neighborhood stability, like the restriction of the height of the homes or restriction for detached houses for single-family use.¹⁰ Restrictive covenants are enforced by injunction or suit for damages. There are easements (right to a non-owner use the real property for a determined purpose, for example utility easement and access easements). Finally a license can be a private encumbrance, which is a permission or privilege to do

⁶ G.N. Stepeniak, The Statue of Frauds as a Bar to an Action in Tort for Fraud, 53 Fordham L. Rev. 1231 (1985)

⁷ Fee: in real property an estate of complete ownership which can be sold by the owner or devised to his heirs. Fee Simple estate is a freehold estate of virtually infinite duration and of absolute inheritance free of any condition, limitation, or restriction to particular heirs. -Steven H. Gifis, Barron’s Law Dictionary, Fifth Ed. P. 201

⁸ For example: California Civil Code sections 3110-3154, Ohio Revised Code (O.R.C.) §§ 1311.01 through 1311.22. O.R.C. §§ 1311.25 through 1311.32

⁹ Black’s Law Dictionary 885 (5th Ed. 1979).

¹⁰ Encyclopedia Britannica

or act(s) on land possessed by another. If the license is granted by contract in writing it is usually irrevocable.¹¹

It is necessary that the purchaser make a Title Search¹² to examine the public records for any defects or encumbrances that may exist in the chain of title¹³ of the property. Having a title to something means having the right to possess it.¹⁴ The quality of title of the real property should be “insurable title” meaning that the title is insurable from title defect by an insurance company. The contract between the seller and the purchaser should provide reasonable time for the buyer to search the title and examine it and for the seller to cure defects. Usually the purchaser obtains a title examination and title insurance through a title company.

There are also a number of environmental land use laws that should be investigated. The quality of water and air are regulated by the federal legislations the Clean Water Act¹⁵, and the Clean Air Act¹⁶ providing right for the landowner to ensure the quality of water and air. The hazardous waste is regulated by the federal Comprehensive Environmental Response, Compensation and Liability Act (CERLA)¹⁷ and handled by the Environmental Protection Agency (EPA).¹⁸ The real property owner or developer can be liable for the hazardous substances found on the property. Liability is imposed by state laws¹⁹ as well. CERLA protects the innocent purchaser or lender, but generally the property must be correctly investigated before the transaction. The subsurface examination for environmental contamination in general called Phase I. The next level is the Phase II which is more intensive examination, including soil and water testing. These examinations commonly used in commercial real estate transactions and there are several insurance products to lower the financial consequences of environmental risks.

The risk of loss is when the property is destroyed between the time the contract is signed and the time of transfer of the deed is another important question, if such destruction is not the fault of either party. According to the common law rule the doctrine of equitable conversion, the equitable title was passed to the buyer upon signing the contract. Therefore, the risk of loss is the buyer’s responsibility. The parties can agree about the risk of loss, however, in those states²⁰ which have adopted the US Uniform Vendor and Purchasers Risk Act the risk of loss relies on the seller until the buyer takes the title or possession.

¹¹ Daniel F. Hinkel, *Essentials of Practical Real Estate Law*, 4th Ed. P. 40.

¹² Title Search: search through the records maintained in the public record office to determine the state of title, including all liens, encumbrances, mortgages, future interests, etc, affecting the property; the means by which the chain of title is ascertained. - Steven H. Gifis, *Barron’s Law Dictionary*, Fifth Ed. P. 523

¹³ Chain of Title: the successive conveyances of a certain property. The recorded chain of title consists only of the documents affecting title. - Steven H. Gifis, *Barron’s Law Dictionary*, Fifth Ed. P. 73

¹⁴ Steven H. Gifis, *Barron’s Law Dictionary*, Fifth Ed. P. 522.

¹⁵ 33 U.S.C. §1251-1387

¹⁶ 42 U.S.C. §7401-7671

¹⁷ 42. U.S.C. §9601et seq.

¹⁸ <http://www.epa.gov/>

¹⁹ For example: New York State Waste Disposal Sites, Environmental Conservation Law (ECL) (ECL 1301 et seq)

²⁰ For example: Uniform Vendor And Purchaser Risk Act; Provisions Governing Same Deemed Part Of Contract - Michigan. Comp. Laws Section 565.701, Texas Property Code - Section 5.007. Vendor and Purchaser Risk Act, New York Code § 5-1311. Uniform Vendor and Purchaser Risk Act

The closing of a real estate contract is the date of the final act on which the parties agree to perform all their promises under the contract; the purchaser pays the seller the purchase price and the ownership of the real property will be transferred by deed, which is a written document that transfers ownership of real property.²¹ Generally the transfer of title to real property occurs by a deed. The procedures of a contract of sale of real property, and the formalities of the closing process when the actual transfer of the deed occurs differ between states as well as between counties and cities within states.

The “caveat emptor”²² applies to the law of real property transfers, so the buyer must beware. The commonly used deeds in the United States are *general warranty deed*, the *limited warranty deed* and the *quitclaim deed*. The first one provides full warranty of title, containing warranties or covenants of seisin²³, covenant to right to convey²⁴, covenant against encumbrances²⁵, and covenant further assurance²⁶, covenant for quiet enjoyment and warranty²⁷. By the limited or special warranty deed the grantor covenants or warrants only against the lawful claims by, through or under the grantor. The quitclaim deed contains no warranties of title; it transfers only the interest of the grantor and not the property itself.

Generally the recording of contracts, deeds and mortgages occurs at the county level, and it is important to record the appropriate documents by filing at a public recording office. The required formalities for recordation differs every jurisdiction. It is significant rule that the buyer can not acquire greater rights than the transferor has to convey. The common law generally says that “the first in right the first in time”.²⁸ There are recording statutes that may protect subsequent bona fide purchasers of real property. The three main types of recording statues that most states²⁹ in the United States have

²¹ Daniel F. Hinkel, *Essentials of Practical Real Estate Law*, 4th Ed. P. 113.

²² Latin for "Let the buyer beware," the idea that the buyer should examine the thing before the purchase and it is the buyer's responsibility.

²³ Warranty for the right to possess

²⁴ Promise that the grantor has the right to transfer the ownership

²⁵ The land is free and clear from restrictions of use or debts

²⁶ The grantor assures the title intended to be conveyed by deed, and obligates the grantor to perform the reasonably act to perfect or assure the tithe was conveyed. - Steven H. Gifis, *Barron's Law Dictionary*, Fifth Ed. P. 119.

²⁷ Enjoyment without fear of eviction or any third party assertions of adverse claims - Daniel F. Hinkel, *Essentials of Practical Real Estate Law*, 4th Ed. P. 114.

²⁸ Gilmore, Grant. *Security Interests in Personal Property*. Boston: Little, Brown & Company, 1965, Published by The Lawbook Exchange, Ltd., 1999, P. 670

²⁹ Alabama: Ala. Code Sections 35-4-51 (Michie 1975 & Supp. 1994), Alaska: Alaska Stat. Section 40.17.080 (1988), Arizona: Ariz. Rev. Stat. Sections 33-411 &-411.01 (supp. 1995), Arkansas: Ark. Stat. Ann. Sections 18-40-107 (1987), California: Cal. Civ. Code Section 1107 (West 1982), Colorado: Colo. Rev. Stat. Section 38-35-109 (1990), Connecticut: Conn. Gen. Stat. Ann. Sections 47-10 (West 1986), Delaware: Del. Code Ann. Tit. 25, Section 151 (Michie 1989), District of Columbia: D.C. Code Ann. Sections 45-801 & -802 (Michie 1989), Florida: Fla. Stat. Ann. Section 695.01 (West 1994), Georgia: Ga. Code Ann. Section 44-2-1 (West 1991), Hawaii: Hawaii Rev. Stat. Section 502-83 (1992), Idaho: Idaho Code Section 55-611 (1988), Illinois: 765ILCS 5/30 (Smith-Hurd 1992), Indiana: Ind. Code Ann. Sections 32-1-2-11 & -16 (Burns 1994), Iowa: Iowa Code Ann. Sections 558.41 (West 1992 & Supp. 1995), Kansas: Kan. Stat. Ann. Sections 58-2221 to -2223 (1994), Kentucky: Ky. Rev. Stat. Ann. Section 382-110 (Michie 1974 & Supp. 1991), Louisiana: La. Rev. Stat. Ann. Section 9:2721 (West 1991 & Supp. 1995), Maine: Me. Rev. Stat. Tit. 33, Section 201 (West 1988), Maryland: Md. Real Prop. Code Section 3-203 (1998), Massachusetts: Mass. Ann Laws Ch. 183, Section 4 (Law. Co-op Supp. 1987), Michigan: Mich. Stat. Ann. Section 565.29 (West 1988), Minnesota: Minn. Stat. Ann. Section 507.34 (West 1990), Mississippi: Miss.

adopted are Race Statues, Notice Statues, Race Notice Statues; and the fourth category would be the Period of Grace statues. Under Race Statues the first recorder gets the right regardless of notice is deemed to be the legitimate owner of the property – it is in effect in North Carolina.³⁰ The Notice Statues invalidate the purchase of a subsequent bona fide purchaser with actual or constructive notice of another grantee. Most of the states have adopted this type of statutes, like Virginia.³¹ The Notice and Race-Notice protect only the later bona fide purchasers for value and without notice of earlier transfer from the grantor. According to the Race Notice Statutes³² that is adopted by most states in the US a subsequent bona fide purchaser is only protected if the buyer records before the other person and without notice of that interest.³³ The Period of Grace Statues give priority over each other within the given grace period of time for the interest is recorded.³⁴

The “notice”³⁵ the statues refer to can be *actual notice*, when the purchaser knows about the prior interest, or can be *constructive* when the purchaser should have known about the interest from the public records, or *inquiry*, when the buyer with excited apprehension would have known about it making appropriate inquiries. The Alaska's recording statute for example is a race-notice statute³⁶; however courts have interpreted notice theory as well. In the principal Sabo v Horvath³⁷ case the Supreme Court of Alaska held in 1976 that the deed Lowery (seller) conveyed a land to Horvath (buyer 1) before receiving the patent for it from the government was valid, but the interest was only transferred that the seller had at the time of the transfer. The seller afterward received the patent and he conveyed the property with another deed to Sabo (buyer 2) who recorded it and finally got the land. Sabo did not have constructive notice from the recording system, because Horvath recorded the deed prior to the seller received the patent for the land, and

Code Ann. Section 89-5-5 (1991), Missouri: Mo. Ann Stat. Sections 442.380 & .390 (Vernon 1986), Montana: Mont. Code Ann. Sections 70-21-201 & -302 (1994), Nebraska: Neb. Rev. Stat. Sections 76-237 & -238 (1990), Nevada: Nev. Rev. Stat. Ann. Sections 111.320 & .325 (Michie 1993), New Hampshire: N.H. Rev. Stat. Ann. Section 477:3-a (1991), New Jersey: N.J. Stat. Ann. Sections 46:2-1 & 46:22-1 (West 1998), New Mexico: N.M. Stat. Ann. Sections 14-9-1 to -3 (1978), New York: N.Y. Real Prop. Law Section 291 (McKinney Supp. 1989), North Carolina: N.C. Gen. Stat. Section 47:18(a) (1984), North Dakota: N.D. Cent. Code Section 47-19-41 (1978), Ohio: Ohio Rev. Code Ann. Section 5301.25 (Baldwin 1994), Oklahoma: Okla. Stat. Ann. Tit. 16 Sections 15 & 16 (West 1986), Oregon: Or. Rev. Stat. Section 93.640 (Butterworths 1989), Pennsylvania: Pa. Stat. Ann. Tit 21 Section 351 (Purdon 1955), Rhode Island: R.I. Gen. Laws Section 34-1-1 (West 1984), South Carolina: S.C. Code Ann. Section 30-7-10 (Law Co-op 1990), South Dakota: S.D. Codified Laws Section 43-28-17 (1988), Tennessee: Tenn. Code Ann. Section 66-5-106 (Michie 1993), Texas: Tex. Prop. Code Ann. Section 13.001 (Vernon 1984 & Supp. 1995), Utah: Utah Code Ann. Section 57-3-3 (1994), Vermont: Vt. Stat. Ann. Tit. 27, Section 342 (1990), Virginia: Va. Code Ann. Section 55-96 (1995), Washington: Wash. Rev. Code Ann. Section 65.08.070 (West 1994)

³⁰ North Carolina. General Assembly - General Statues §47-18

³¹ Virginia Code Ann. §55-96 (A) (1)

³² Race-notice: of, relating to, or being a recording act which stipulates that an unrecorded deed, mortgage, or lien shall not be valid against a recorded one unless the recording party (as a subsequent purchaser from the same seller) had notice of the interest or claim of the other party when recording. - Merriam-Webster's Dictionary of Law, © 1996 Merriam-Webster, Inc.

³³ Wisconsin Statue §706.08 (1995-1996)

³⁴ Pennsylvania, 42 P.A. C.S.A. §8141(1)

³⁵ Notice: information concerning a fact, actually communicated to a person by an authorized person, or actually derived by him from a proper source. - Steven H. Gifis, Barron's Law Dictionary, Fifth Ed. P. 347.

³⁶ AS 40.17.010-.900

³⁷ Sabo v. Horvath, 559 P.2d 1038 (Alaska. 1976) 478, 482

it was outside the chain of title. Horvath could win if he would have rerecorded the deed before Sabo did when Lowery got the patent.

The Supreme Court of Alaska ruled under the provisions of Title 22-3-25 Alaska Compiled Laws Annotated, 1949,³⁸ that conveyance of real property is void as against a subsequent innocent purchaser for a valuable consideration of the property whose conveyance is first duly recorded. An unrecorded instrument is valid as against one who has actual notice of it. A purchaser has notice only of recorded instruments that are within his chain of title. Therefore every conveyance of real property which is not filed for record as provided by the laws of the Territory of Alaska is deemed to be void as against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property whose conveyance shall be first duly recorded.³⁹

The National Conference of Commissioners on Uniform State Laws (NCCUSL) also known as the Uniform Law Commission announced a new uniform act in 2004, the Uniform Real Property Electronic Recording Act (URPERA)⁴⁰ authorizing local land record offices to accept and store electronic records, and converts the existing records into electronic form for electronic search. The act based on the electronic transactions laws such as the Uniform Electronic Transactions Act (UETA) and the federal Electronic Signatures in Global and National Commerce Act (ESIGN). The legislation have enacted by twenty states⁴¹ in the USA by the end of 2008. In many states⁴² the introductions and enactments are in process.

³⁸ 'Invalidity of unrecorded conveyance against subsequent innocent purchaser. Every conveyance of real property within the Territory hereafter made which shall not be filed for record as provided in this chapter shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded.' 22-3-25, A.C.L.A. (1949).

³⁹ Similar case: Antone NORDLING, Appellant, v. Peter CARLSON and Clement G. MacRae, Appellees. No. 15802., United States Court of Appeals Ninth Circuit., Oct. 17, 1958. 265 F.2d 507,

⁴⁰ UNIFORM REAL PROPERTY ELECTRONIC RECORDING ACT (Last Revised or Amended in 2005) drafted by the National Conference of Commissioners on Uniform State Laws, by it approved and recommended for enactment in all the states as its annual conference meeting in its 113. year, Portland, Oregon, July 30-August 6, 2004.

⁴¹ Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Kansas, Minnesota, Nevada, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin

⁴² Alabama, Georgia, Hawaii, Rhode Island introduced URPERA for legislation in 2009