4. **ESCHEAT.**

The right of *escheat* exists because property ownership is both a privilege and an obligation so all property must have an identifiable owner. The state government has the right to take over the property when it is abandoned or when an owner dies without a will and without heirs.

B. **PRIVATE ENCUMBRANCES WHICH CREATE A LIEN.**

Private encumbrances are another person’s rights which either grant that person an interest in the property as security for a debt (lien) or affect the use of the property. While a private encumbrance may grant someone else a claim or right in the owner's property, it should be noted that it does not usually prevent the transfer of ownership.

(See FIGURE 2-4.)

A *lien* is a monetary claim a creditor has on the property of a debtor and the debtor’s property is security for payment of the debt. This legal right may allow the creditor to force the sale of the property to satisfy the debt if it is not repaid. For this right to be enforceable, the instrument that creates the lien must be properly recorded in the county records. When a foreclosure occurs, priority of most liens is established by date of recording. Exceptions are property taxes that always have first priority, mechanic's liens that are often prioritized by a date of performance, and the inclusion of a subordination clause.

**EXAMPLE:** Suppose a property has a $30,000 mortgage, recorded February 23rd, and a $10,000 mortgage, recorded July 8th in the same year. Later the property sells at foreclosure for only $39,000. The first mortgage (the one that was recorded first) is paid in full and the second mortgage lender gets the balance of $9,000.

Liens are categorized in several ways:

- They are *voluntary or involuntary*, depending on whether they are recorded with the owner’s consent (as in a mortgage lien) or without it (as in a tax lien).

- They are *statutory or equitable*, depending on whether the right exists because of an act of the legislature (as in a mechanic’s lien) or whether it arises out of justice and fair play (as in a vendee’s lien). Statutory liens are usually involuntary and equitable liens are usually voluntary.

- They are *specific or general*, depending on whether they are attached to just one parcel of property (as in a property tax lien) or to any property the debtor has, real or personal (as in a judgment lien).

1. **SPECIFIC LIENS.**

A specific lien is enforceable against only one parcel of property, regardless of how many other parcels a debtor might own. Examples
include property tax liens, mortgages, vendor’s liens, vendee’s liens, mechanic’s liens and attachment liens.

a. **Property tax liens.**

The services that local governments provide are supported mainly by two types of taxes on real property. The *ad valorem tax* is so-called because it is levied against each property owner according to the value of the property.

Some owners might also find on their tax bill a *special assessment* for a local improvement such as a new sidewalk or street lighting. Since only certain properties will benefit from a neighborhood improvement, those owners are expected to pay the cost.

If tax bills are not paid within the time allowed, liens can be foreclosed and the properties sold to collect the owed taxes. Since recorded tax liens have priority over all other liens, the mortgage lender often requires an owner to establish an escrow account for the monthly payment (called *impounds*) of property taxes. The lender can then pay the bill when it becomes due. Tax liens are involuntary, specific liens.

b. **Mortgage liens.**

The mortgage lien exists when an owner pledges one specific property to the lender as security for a loan. If the loan is not repaid according to the terms set forth in a promissory note the owner signs, the lender can force the sale of the property.

In a purchase money mortgage, the seller is the lender. The loan can be either a first or a second mortgage loan, with the property pledged as security for repayment. In this case the seller has a *vendor's lien*. Mortgage liens are voluntary, specific liens.

c. **Mechanic's liens.**

*Mechanic's liens* are statutory in nature, a right defined by state legislatures and procedures differ somewhat from state to state. The laws allow contractors, subcontractors, workmen and suppliers of building materials to place a lien against a property, if they are not paid in full for improving it. This applies to both new construction and remodeling. The theory is, since the workers enhanced the value of the owner’s property, they are entitled to collect from it what they are owed. Of course, the work or materials must have been provided with the owner’s consent, expressed or implied. Consent can be implied unless the owner objects to the work or refuses to accept the materials, even though ordered by someone else.

In general, the procedure begins with a notice of completion filed with the county clerk (and notice given to the owner) when the
building inspector certifies that the job is done. This triggers a defined time period (usually 60 or 90 days) within which lien rights can be filed by those who are still owed money. In many states this lien, once recorded, has a degree of priority over other liens. It might, for example, “relate back” as if filed when the work began or the supplies were delivered.

Once the lien is filed, the creditor must take action to sue for the money owed or the lien will expire within a stated time, usually one or two years. If a suit is begun to enforce the lien, there may be a long delay before a judgment is rendered. The creditor might then file and record a lis pendens, giving notice a suit is pending. Anyone searching the title on behalf of a prospective buyer would be aware of this legal action. Purchasers considering a property with new construction should be aware of their potential liability for the debt.

Owners should be aware that a lien can be filed against the property by a subcontractor, hired by the general contractor, even though the owner has paid the general contractor in full. One way to avoid this risk is to deal only with contractors who provide a performance bond, insurance that the job will be completed according to contract. Other methods include making payments directly to suppliers and subcontractors; withholding payments to the general contractor until provided with signed releases or waivers of lien rights from the suppliers and subcontractors; or making checks payable to both contractor and subcontractor.

Mechanic’s liens can only be filed for labor and construction materials, never for things like travel, telephone costs, profit or overhead. Mechanic’s liens are involuntary, specific liens.

d. **Vendee’s liens.**

In residential real estate, the sales contract between a buyer and seller is usually not recorded. However, a purchaser, making a large earnest money deposit and incurring additional costs in searching the title, might want protection in the event the seller refuses or is unable to complete the transaction. If the contract is recorded, the buyer has a vendee’s lien for the amount of the deposit and related expenses in the event of a default. This is a voluntary, specific lien.

e. **Attachment liens.**

An attachment lien grants the court custody of a specific property to prevent the owner from transferring ownership while a suit for damages is being decided. This assures the person taking the legal action (the plaintiff) that the property will be available to satisfy a judgment awarded by the court. Before filing for the attachment, however, the plaintiff must post a bond to cover any loss suffered by the property owner in case no judgment is awarded.
This is the only lien that absolutely prevents a sale or any other conveyance of a property. It is an involuntary, specific lien.

2. GENERAL LIENS.

A general lien is one that encumbers all real and personal property owned by a debtor, including properties owned before the lien was recorded or properties acquired after. To be effective the lien must be recorded in all counties where the debtor owns property. General liens result from judgments, federal or state income taxes, and a decedent’s debts. They are all involuntary.


A judgment lien arises out of a lawsuit. When one person (the plaintiff) sues another person (the defendant) for damages and the plaintiff wins the suit, the court awards a judgment in a specific dollar amount to establish the indebtedness. The judgment, when recorded in the county records, becomes a general lien against any real or personal property owned by the defendant in that county.

A lis pendens may have been filed to alert title searchers that a suit is pending. It is also possible that an attachment lien has been granted to prevent the defendant from disposing of a property that might be included in the final decree.

Once the judgment is rendered, if the debtor does not pay the amount due, the creditor may ask the court for a writ of execution authorizing the sheriff to seize and sell enough property to pay the debt and costs of the sale. When the debt is satisfied, the debtor should receive and record a satisfaction piece as evidence. Recording this will then clear the title.

b. Federal and state income taxes.

Any unpaid federal or state income taxes become general liens against the taxpayer’s real or personal property. The lien will be filed against the taxpayer in the county where the taxpayer resides without court intervention.

c. Federal and state inheritance taxes.

Property owned by a decedent is subject to federal estate taxes after certain exemptions are allowed. If this tax is not paid, all property in the estate is encumbered by a general lien. Some states also assess inheritance taxes and the same rule applies.

d. Decedent’s debts.

When someone dies, existing liens on the decedent’s property must be satisfied before the property passes to the heirs. Outstanding debts that cannot be paid out of the decedent’s personal property
create a lien against real property and the real property can be sold to satisfy the remaining debts.

C. PRIVATE ENCUMBRANCES WHICH AFFECT THE USE OF THE PROPERTY

The use of privately owned real estate may be limited or restricted by the rights of other people. Private encumbrances which affect the use of property may be easements, deed restrictions, or encroachments.

1. EASEMENTS.

An easement is a non-possessory, intangible (incorporeal) right one person has to use another person’s land in a specified manner and for a specified purpose. The holder of the easement does not own or possess the land but has only an interest, a right of use. Because an easement is an actual interest in the land, the statute of frauds applies and an easement which is freely given must be in writing. The easement is irrevocable and an encumbrance on the grantor of that right. Easements are either appurtenant or in gross.

a. Easement appurtenant.

To create an appurtenant easement, there must be two separate properties usually, but not necessarily, adjacent to one another. They must have different owners. The owner granting the easement, and therefore burdened by it, is known as the servient estate. The owner that benefits from receiving this right is the dominant estate. The appurtenant easement is said to “run with the land.” In other words it is not just a contract between two owners but a relationship between the two parcels of land. When ownership of either parcel is transferred the easement automatically goes with it, whether or not mentioned in the deed.

Examples of this type of easement include common driveways (See FIGURE 2-5.), a right to use another person’s land for ingress or egress, a right to use water from another landowner’s well, or a party wall. A party wall, often found both in commercial buildings and in townhouses, is a wall that straddles the boundary line between two adjoining properties and is a part of the improvement on both lots. Typically, each owner owns the half of the wall that is on his/her side of the line and has an easement right to the other half. Neither can tear the party wall down.