

REAL ESTATE LAW FOR HOMEOWNER AND BROKER

by Parnell J.T. Callahan
& Louis M. Nussbaum

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PREFACE

Home ownership is an unusual and rare investment in one's lifetime. While a knowledge of legal principles is necessary to avoid costly errors, an understanding of economic and social factors is of equal importance to the owner.

Before a single dollar is invested or a single contract is signed, an owner should consider the following factors:

- 1—Proximity of transit facilities
- 2—Location of schools
- 3—Parks and Playgrounds
- 4—Neighborhood and neighbors
- 5—Parking areas
- 6—Shopping convenience
- 7—House of Worship locations
- 8—Adequate local utilities, e.g., gas,
electric, telephone
- 9—Health conditions; sewage disposal, refuse removal
- 10—Construction of a home: drainage;
type of land, e. g., refilled land

The home owner should avail himself of professional advice. In advance of buying or building, consultation with an architect, real estate broker, an appraiser and an attorney, will be of incalculable value.

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Chapter 1

REAL ESTATE AND PROPERTY RIGHTS — SOME BASIC PRINCIPLES

The object of this book is to state in plain words the law governing the buying of a home; the subsequent peaceful enjoyment of its possession, and then its sale, either through the direct efforts of the owner or employment of a real estate broker as a medium.

Its further purpose is to set forth the rights, privileges and duties of the home owner as they are recognized by law and enforced in our courts.

It is a natural assumption of ownership, that when an individual receives a deed to real property, that he owns it absolutely. However, such ownership is subject to various curbs and restrictions created by law, in order to control the property use for the promotion of the health and welfare of adjoining community home owners.

The following are examples of governmental restrictions:

Governmental Limitations

- 1—Exercise of Police Power
- 2—Eminent Domain
- 3—Taxation Powers

EXERCISE OF POLICE POWER: The State as a sovereign power, on its own initiative or by delegation to local governing units can curtail the full use of real estate by the adoption of zoning regulations, building, fire and health regulations.

ZONING: The fundamental purpose of the zoning power is to prevent overcrowding of land; avoid undue population concentration; provide adequate light, air and sunshine to building occupants; facilitate traffic and lessen street congestion; and the conservation of property values.

Laws accomplishing these ends are a valid police power.

EMINENT DOMAIN: The government has the right to condemn or take your property, if needed for a public use, on payment of a fair price. Examples of public uses:

- 1—Public buildings; a court house
- 2—Creation of parkways, streets, roads
- 3—Increased transit facilities
- 4—Public health structures; Hospitals
- 5—Parking fields, Public markets
- 6—Slum Clearance and elimination of substandard areas.

The right to fair and just compensation to the property owner is guaranteed and protected by the United States Constitution under the clause that "no person shall be deprived of his life, liberty or "property", except by due process and payment of just compensation.

The value of the property taken is fixed by appraisers, appointed by the courts, and it must be the fair market value of the property, as of the date of the government taking.

A definition of "Fair Market Value" as stated in a leading case, sets forth the following rule in determining the damage award:

"Fair Market Value" means neither panic value; auction value; speculative value; nor a value fixed by depressed or inflated prices. The mere absence of competitive buyers does not establish a lack of a real market. However, a true market may be established only where there are willing buyers and sellers in substantial numbers. When there is no real market, as of the time of condemnation, proof of such loss occasioned because of the public use appropriation by the government, may be shown by evidence of the "fair market value, at the nearest earlier date when there was a fair market, provided the property is substantially in the same condition as at that prior time.

TAXATION POWERS: Taxes are charges imposed on property to raise money for public needs, and every owner

of property holds title subject to the government power to tax, and is charged with notice, that periodically a tax will be levied upon his land. Ownership of property, particularly in large cities, should be promptly recorded and filed also with the local unit charged with the collection of taxes. At the present time, a failure to pay a tax due, no matter how small, without further billing, and at the expiration of the local statutory grace period, will cause the public sale of the land.

As distinguished from taxes, assessments do not occur regularly. An assessment may cover the entire cost of a local improvement, or only a portion of this cost, in which latter case, the remainder is paid from general taxes. Until paid, an assessment is a lien against the owner's property. In the purchase of real estate, affected by an assessment, payable in annual installments, as each of these installments fall due, they become liens on the property. The unpaid assessments, which become due thereafter, subsequent to the transfer of title, would have to be discharged by the purchaser, without liability on the part of the seller. For example, in New York City, certain assessments may, at the option of the owner, be divided into ten installments. In the absence of a clause in the contract, requiring the seller to pay and discharge the entire assessment imposed, a buyer would, in effect, be paying twice for the improvements to the property.

Private Limitations of Ownership

Although ownership of property gives the right to its use absolutely, except for the creation of nuisance, there are, in addition to the limitations imposed by law, for example, right of condemnation, zoning regulations, and taxing powers, certain other limitations may be created by restrictions in the deed of ownership from the seller. An owner of a plot of land, may subdivide this property, sell each of these lots individually, and by means of restrictive clauses placed in these deeds, for the purpose of benefiting the owners of the adjoining lots provide, that buildings

may be constructed only of a specific type; below a certain height, or set back a definite distance from the front boundary. Such limitations bind future owners of the property, and for a violation of such restriction, any owner or subsequent owner may sue to restrain such acts.

A. REAL ESTATE

When you buy "REAL ESTATE" or "REAL PROPERTY", just what do you expect to acquire? What is the extent of your ownership? How much of what is on the land belongs to you, and how much may the seller keep for himself? When you sell "REAL ESTATE," just how much do you want to sell, and what do you want to keep?

Suppose there are some sturdy old oak trees, and a neat pile of oak logs, freshly cut down just a week before the delivery of the deed made you the owner of the land. And suppose that in that old colonial house, of which you are now the owner, there are some beautiful old wall fixtures and some hand carved wall panels which slide out very nicely for cleaning. Who owns them after the property is sold

The growing trees are REAL PROPERTY to the same extent as the land on which they are growing. The logs, having been severed from the REAL PROPERTY, are personal property, and do not pass with the land. Inside the house, an almost identical situation prevails. The wall fixtures, being affixed permanently to the house are REAL PROPERTY, but the hand carved panels which can be removed without damage to the house, and without changing their nature or structure, are personal property, and do not pass with the building unless the contract of sale specifically provides for their inclusion.

Of course, there is little difficulty when we deal with land itself, which we can easily recognize as REAL PROPERTY. When we come to the growing crops, however, the law varies somewhat from state to state, and from crop to crop. Trees or timber, whose growth extends over more than one year are about universally regarded as REAL PROPERTY as long as they are affixed to the land, but as personal property, not necessarily passing with the land, once they have been severed. On the other hand, crops which mature or are harvested within a year are usually regarded as personal property.

If you are in doubt, ask your lawyer BEFORE you sign the contract for the purchase or sale of the land.

Fixtures which are built in or permanently attached to the land or house become part of it, and are considered as REAL PROPERTY; but if they can be moved without damage to themselves and the real estate, they are personal property rather than REAL PROPERTY.

While the Real Property Law of the State of New York, and of many other states defines "REAL PROPERTY" as "lands, tenements and hereditaments and chattels real, except a lease for a term not exceeding three years," the situation may be summarized by reference to the old civil law, which designated REAL PROPERTY as "immovables" and personal property as "movables."

B. WHO MAY OWN REAL PROPERTY

Any citizen of the United States may become an owner of land or real estate. No state or community has the right to infringe upon a citizen's right to inherit or purchase either real or personal property. In most states, aliens and even alien enemies are entitled to hold property although their power to transfer, sell or mortgage their property is usually subject to restriction. In other states there are some limitations placed on the class of aliens who may hold real property, and a transfer to such an alien may be absolutely void. If you are in any doubt as to whether you may hold real property in a particular state, be sure to consult your lawyer before you sign a contract of sale. By the same token, if you are about to sell your property, make proper inquiries to insure against having your property tied up under a contract of sale to a person or persons who may not legally acquire title.

While a state may not limit the right of a citizen to own property, the question of restrictive covenants is altogether different, and the United States Supreme Court has held that a restrictive covenant, or a clause in his deed prohibiting sale to, or occupancy by members of a certain race, religion, or sect, is not a violation of constitutional rights, because it is the action of an individual, and not of the state itself. However, the Supreme Court has ruled these covenants unenforceable, since their enforcement by a court—an arm of government—would be unconstitutional. Thus a seller may freely violate a racial restrictive covenant since no legal action to

prevent it can be successfully brought. If, however, the seller is content to be bound by the covenant, the prospective purchaser is powerless to force action. If you feel that there is any doubt as to the validity of a transfer, before you attempt to make a purchase or sale, check with your lawyer.

The fact that you are an infant (and any person under legal age is an infant even if he is six foot tall, weighs two hundred pounds and is a Lieutenant Colonel in the Air Forces) will not bar you from holding **REAL PROPERTY**, but may cause considerable difficulty when you try to sell or transfer the property. In most states, a married woman has the same right as her husband to buy, hold, sell or mortgage real estate.

C. WAYS IN WHICH TITLE OR OWNERSHIP MAY BE ACQUIRED

(1) *Deed or Purchase*: Most people who own **REAL PROPERTY** today acquired their land by buying and paying for it. They agreed with the former owner upon a price and in return for the purchaser's money, the seller gave a written acknowledgment to the effect that he surrendered to the purchaser all rights to the property. This transaction is called a sale or conveyance, and the written acknowledgment is what we know as the "deed" to the **REAL PROPERTY**. The deed is written evidence of ownership, and as soon as it is recorded in the office of the County Clerk or the Register, it serves notice on the world of the ownership of the property. The deed will be signed by the "Grantor" or person who is relinquishing ownership, and will name the new owner, or "Grantee."

(2) *Inheritance*: After your father's funeral, his will is filed and probated, and you learn that he has willed or "left" to you the old family homestead, consisting of the farmhouse, fifty-six acres of land and two barns. The procedure is the same regardless of whether the **REAL PROPERTY** consists of a homestead, a farm, business property, or vacant land. You acquire the property, and become the owner, not through purchase, but by inheritance. You will not receive a deed to the property, and your title will arise

from the will. You may, if you wish, record the will in the office of the County Clerk, where it will be additional evidence of your ownership of the property and your right to transfer title, but such a recording is not necessary to give you a "clear title."

Let us suppose, on the other hand, that your father leaves no will, and that he is survived by your mother, and by your three sisters and brothers. You all become part owners on your father's death, and proceedings in the Surrogate's, Orphans' or Probate Court usually will be necessary to give you a "clear" or "marketable" title, since a prospective purchaser, in addition to wanting to know just who was entitled to a share of the property, will want to be sure that all the owners or heirs are surrendering their rights in the property. If your brother Tom returned to Australia after getting out of the Army, he must join in any deed or conveyance which the rest of the heirs may desire to make. If he fails or refuses to join, you cannot give a "clear" or "marketable" title,

(3) *Public Grants*: The first settlers in the United States came ashore and helped themselves to vacant land. In some places, they really pushed the Indians out, while in other places, like Manhattan Island, they acquired the land from the Indians by purchase. As the settlements spread out, however, there were large areas of land owned by the Government. A large part of this land was distributed or given away by the Government. Occasionally, the new owner made a payment to the Government, which may have been the local, state or Federal Government. On other occasions he promised to make some improvements or to perform some services, such as building a dam, road or railroad, while at still other times the land was merely opened for settlement and colonization, and the first person to make his claim and record it became the owner. Under various Homestead Acts, settlers were given a conditional title, which did not become absolute until after three or five years of continuous occupancy and operation. Even today it is possible for a citizen to acquire title under the Homestead Acts. The details of the areas which are still open for settlement under these Acts, and the requirements for settlement, may be obtained from the Department of Interior, Washington, D. C.

(4) *Adverse Possession*: Suppose that you buy a parcel of property, and build a house and garage. Six months after you have finished the house, the owner of the adjoining lot calls on you one day

and tells you that you made a mistake and that the east side of your house is seven feet over the line on his property. You bring out a survey which shows that you own the seven feet and one more foot. Your neighbor says it is wrong, and you say it is right.

After telling you to get your house off his land, the adjoining land-owner writes you a severe letter, ordering you to remove your house. You file the letter away with your deed and still do nothing about it except to answer his letter and tell him that you are right. Much to your surprise, the owner of the land does nothing, and before you realize it, twenty years have rolled by. Then, one day more than twenty years after you have received the letter telling you to move your house, a lawyer calls on you and tells you that his client has just bought the land next to yours and wants you to remove your house. He shows you a survey and for the first time you realize that for more than twenty years a part of your house has been on your neighbor's property. By this time, your son John is in his second year of law school, and as the lawyer tells you what his client will do, if you don't remove your house, John interrupts to ask when the house was built. When you bring out the letter written over twenty years ago, John, who has received an "A+" in his course in real estate law, smiles happily, while the visiting lawyer, looking very unhappy, reaches for his hat, and leaves without a word. As the door slams, John tells you that by remaining in possession for twenty years, under a claim adverse to that of the actual owner, you have acquired "title by adverse possession."

While the length of time required for an occupancy by adverse possession to ripen into ownership varies from state to state, the elements of (1) *possession* (your house was there and you were in it), (2) *a claim of title* (your claim that your survey was right), (3) *hostile to the other party* (he claimed that you had no right at all to be there) are all that are required. Where your neighbor made his mistake was in not acting promptly. You sometimes wondered why the neighbor on the other side, part of whose property you used as a driveway, asked you to sign a paper acknowledging that you used the driveway with his permission. He merely filed your signature with his deed, and kept his title clear.

On the other hand, if your neighbor on whose land your building encroached, had acted within a year or two after you had

exchanged letters, you would have had no defense and he could have compelled you to remove your house, or to pay him a proportionate part of the value of his land. His difficulty was that he waited too long before taking action, and he actually let you become an owner by *adverse possession*. As a rule, adverse possession from ten to twenty years is required before the occupant of the land actually becomes the owner, but there is some variance from State to State.

(5) *Foreclosure*: Suppose your neighbor, Farmer Jones, finds that he needs three thousand dollars. He owns his small farm, so he hitches up the buggy, drives to the village, and calls on Mr. Gotrocks, the banker. Mr. Gotrocks lends him the money and takes a mortgage on the farm. What actually happens is that Farmer Jones agrees to pay back the three thousand dollars and pledges his farm as security. The transaction is almost the same as if he were to pawn his watch or his automobile, but here, he actually retains possession of the pawned or pledged property, in this case, his farm. After the mortgage is drawn up and signed, it is "filed" or recorded at the office of the County Clerk, and anyone attempting to buy the farm will be required to purchase it subject to the outstanding mortgage. Farmer Jones owns the "fee" or legal title, but the "equitable" title belongs to Mr. Gotrocks, the mortgagee. Farmer Jones, having given the mortgage, is the mortgagor. He has the right to clear his title by "redeeming" the land and paying the mortgage. Suppose, however, that after a few years, instead of finding himself in a position where he can pay back the money, he is absolutely penniless. He has been offered a job in the City and has decided to abandon his farm. One fine morning, he disappears, and Mr. Gotrocks owns the mortgage but not the farm. If Mr. Gotrocks merely walks in and takes possession of the farm, he does so subject to Farmer Jones' right of redemption. In other words, Farmer Jones may return, say to Mr. Gotrocks "Here is your three thousand land interest. Give me back my farm," and Mr. Gotrocks would be required by law to comply. In order to "foreclose" the right of redemption and to acquire legal title to the farm, Mr. Gotrocks must go through a foreclosure proceeding. He first calls on his lawyer, who prepares a complaint and a "lis pendens." The *lis pendens* is filed with the Clerk of the Court and in the Office of the County

Clerk, and is notice to all the world that a foreclosure suit has been begun. If Farmer Jones, far away in the City, attempts to sell his farm, he will sell it subject not only to the mortgage, but also to the pending foreclosure action. If Farmer Jones can be found within the State, he must be served personally with the summons and complaint in the foreclosure action. If he cannot be found, it will be necessary for Mr. Gotrocks to publish the summons and notice of foreclosure. After the publication has been completed, or after the summons and complaint have been served personally on Farmer Jones, he will have twenty or thirty days within which to file an answer. He may claim that he actually paid the mortgage, that it was usurious, or that it was obtained under duress, or he may not even bother to answer. After his failure to answer or after a trial, a judgment of foreclosure will be entered and the Sheriff or a Referee appointed by the Court will sell the property at auction. As a rule, the mortgagee "buys in" the property for the amount of the mortgage and no money changes hands. However, if the property is worth considerably more than the mortgage, there may be competition among various buyers and enough money may be realized to satisfy the mortgage and to leave something for the mortgagor, in our case, Farmer Jones. It will take Mr. Gotrocks anywhere from one week to two years to complete his foreclosure, and it will cost him anywhere from ten dollars to three hundred and fifty dollars, exclusive of what he will have to pay his lawyer. You may be in a position to acquire property by taking over a mortgage and foreclosing. You may also be in a position where the mortgagor, rather than put you to the expense of a foreclosure, will give you a deed. By following this procedure, you will be on somewhat shaky ground, since other creditors may claim that the transfer to you was an unlawful preference, giving you a priority over them in collecting the debts owed by the mortgagor.

On the other hand, suppose that you, yourself, are unable to pay your mortgage. If the mortgage is a small one, it may be better for you to sell your property subject to the mortgage and to realize enough from the sale to pay the mortgagee. If the mortgagee is anxious to obtain your property, you may be able to work out a more satisfactory bargain by saving him from the delay, bother and expense of foreclosure. Every person who has an interest in the property must be served with papers or notified, actually or by publication, of the existence of the foreclosure action. Even tenants must

be notified, or the new owner will not be able to evict them under the judgment of foreclosure. Foreclosures are technical legal proceedings. You should no more attempt a foreclosure without a lawyer than you should attempt an appendectomy without a doctor.

(6) *Accretion*: Suppose you own a lovely house right on the beach. You have been somewhat worried about possibility of the bay washing away your land, so before going back home for the winter, you erect a small bulkhead. To your great surprise, when you arrive the following summer, you find that the bay has built up, around your bulkhead, an additional one hundred feet of land. Although this land was not acquired by purchase, inheritance, foreclosure, public grant, or adverse possession, it nevertheless belongs to you. Accretion is the increase of REAL ESTATE by the addition of portions of soil by gradual deposit through the operation of natural causes. If you own land on the bank of a river and the unfortunate land owner up stream suffers the loss of part of his land, the fact that his land is deposited on your land, thus doubling the size of your property, does not give him any rights against you. You must own land in order to acquire land by accretion, but any deposits on your own land adding to its dimensions belong to you.

D. ESTATES OR DEGREES OF POSSESSION OF REAL PROPERTY

(1) *Fee Simple*: Your deed will usually include the words "To John Purchaser, his heirs and assigns forever." This conveys to you a "Fee Simple" the highest type of ownership of REAL PROPERTY. A Fee Simple gives you absolute ownership and permits you to sell, mortgage, convey and devise your land by Will. It excludes all qualifications or restrictions as to the persons to whom you may transfer it, and it is yours as long as you live, if you do not sell it, give it away, or mortgage it and then fail to pay the mortgage. In some states, the word "heirs" must be included, while in other states the words "and assigns" by itself is sufficient. To safeguard against all changes or idiosyncracies, it is always well to have the deed include the words "To John Purchaser, his heirs and assigns forever." In this way there never can

be any question that John Purchaser is the absolute owner and that there are no limitations, restrictions or qualifications placed on his ownership of the property.

(2) *Life Estate*: An estate for life is an ownership of property, absolute but held by the tenant for his own life or for the life or lives of one more person. When the measure of the duration of the estate is the tenant's own life, it is simply called an "estate for life." On the other hand, when the measure of the duration is the life of some other person, it is called an "estate per autre vie" or "estate for a life of another."

A life estate may be created either by an act of the parties, or by operation of law. In states where the wife's right of dower or the husband's right of curtesy still exists, a life estate may be created by operation of law. On the death of the husband, the wife may have a life estate in all or in part of the REAL PROPERTY owned by the husband, not only at the time of his death, but also on property owned by him at any time during the marriage. Once a life estate is created by operation of law, only the life tenant may do something to terminate or defeat the estate.

If you are buying REAL PROPERTY from a married man or a married woman, if you want to be sure that you do not find yourself holding title subject to a life estate, insist that the wife or husband join in the deed. Do this even in states where there is no right to dower or curtesy, since your purpose is not to win a law suit involving your title, but to avoid a law suit. On the other hand, you yourself may desire to create a life estate. You may want your wife to live in your house after your death, but not wishing to offend any one of your four children, you may not want to give the house to anyone individually. You, therefore, provide in your will that your wife is to have a life estate in your house, and that upon her death, the life estate is to terminate and the title to your house is to pass to your four children equally. As long as your wife owns the life estate, she may harvest the crops and exercise all incidents of ownership which do not affect the permanent character of the property. She may repair the property, but unless the persons who will be the owners after the termination of her life estate, give their permission, she may not tear it down and may not make alterations which will change its nature to any substantial degree, such as changing it from a residence to a store.