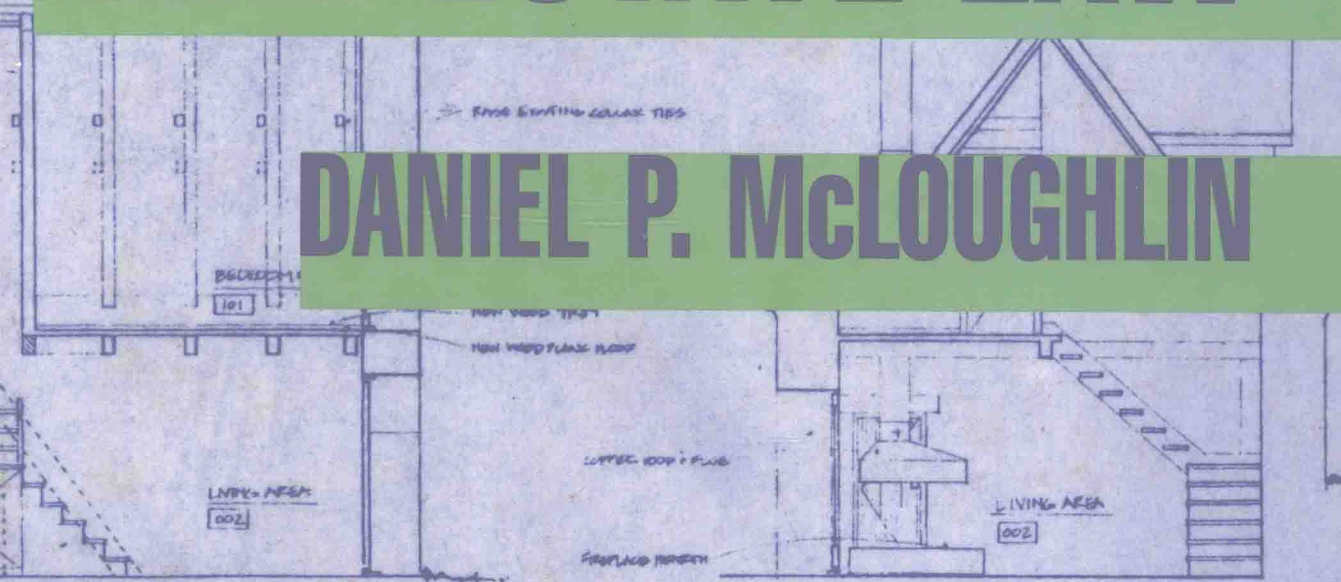




# PRINCIPLES OF REAL ESTATE LAW

DANIEL P. McLOUGHLIN



② TRANSVERSE SECTION

at the request of the undersigned  
and, its successors and assigns, in  
conditions provided in said lease  
in the manner of payment

# PRINCIPLES OF REAL ESTATE LAW

**Daniel P. McLoughlin**

San Francisco State University  
Member of the California Bar

**McGRAW-HILL, INC.**

New York St. Louis San Francisco Auckland Bogotá  
Caracas Lisbon London Madrid Mexico Milan Montreal New Delhi  
Paris San Juan Singapore Sydney Tokyo Toronto

This book was set in Times Roman by Arcata Graphics/Kingsport.  
The editor was Kenneth A. MacLeod;  
the production supervisor was Leroy A. Young.  
The cover was designed by Joan Greenfield.  
Project supervision was done by Tague Publishing Service, Inc.  
Arcata Graphics/Halliday was printer and binder.

## PRINCIPLES OF REAL ESTATE LAW

Copyright © 1992 by McGraw-Hill, Inc. All rights reserved. Printed in the United States of America. Except as permitted under the United States Copyright Act of 1976, no part of this publication may be reproduced or distributed in any form or by any means, or stored in a data base or retrieval system, without the prior written permission of the publisher.

1 2 3 4 5 6 7 8 9 0 HAL HAL 9 0 9 8 7 6 5 4 3 2

ISBN 0-07-045434-5

Library of Congress Cataloging-in-Publication Data

McLoughlin, Daniel P.

Principles of real estate law / Daniel P. McLoughlin.

p. cm.

Includes index.

ISBN 0-07-045434-5

1. Real property—United States. 2. Real estate business—Law and  
legislation—United States. I. Title.

KF570.M4 1992

346.7304'3—dc20

[347.30643]

91-37467

# **PRINCIPLES OF REAL ESTATE LAW**

---

# ABOUT THE AUTHOR

---

DANIEL P. McLOUGHLIN has been a real estate and business attorney since 1978. During that time, he has represented buyers, sellers, lenders, title insurance companies, developers and agents respecting a wide variety of real estate transactions. He is a member of the Real Property and Business Law Sections of the State Bar of California and is a licensed real estate broker. He is a member of the faculty at San Francisco State University and is certified by the California Department of Real Estate to teach Continuing Education courses.

**To My Mother and Father**

---

# PREFACE

---

This book is an introduction to real estate law for undergraduate and graduate students. Business schools usually offer a course in real estate law and departments of architectural and urban planning often include the course in their curricula. A course on the principles of real estate is advised as a prerequisite and a course in business law that covers contracts and agency would be helpful, although not a necessary prerequisite.

In preparing this text, certain goals were kept in mind to distinguish this book from the others in the field. The text is intended to be comprehensive in both the classical and modern sense and to serve as a tool for the effective presentation of the material. It is national in its scope and presents both the general law and significant minority positions. The approach adopted by a particular state or states is identified only for purposes of illustration or if it suggests a significant emerging trend.

Throughout the text, an effort has been made to include material that will enable the student to appreciate the historical context of property law. The other fields of law with which students are most likely to become acquainted are contracts, agency, and business organizations. Unlike these, property law is often more steeped in history than in logic, and material has been included to provide a historical context to help the student better understand the law in its present state.

The sheer mass of necessary material dictates that the case book approach is nearly indispensable to an effective presentation. The cases in this text were selected on the basis of their tendency to serve a useful pedagogic function. The cases have been heavily edited to delete procedural and secondary issues and, for the most part, the facts have been rewritten and reorganized in the interest of clarity. An effort was made to obtain the leading cases and those that contain a particularly careful discussion of the issues. Most cases in the text are followed by additional material to clarify the issues presented, suggest alternative approaches, and pose discussion questions.

At the end of the chapters are a series of questions. These have been developed to promote discussion, emphasize certain material, or clarify items that may warrant additional examination.

The text is divided into nine major sections that can best be presented consecutively. However, some might choose to introduce the materials on noncontractual transfers (Chapter 10) and deeds (Chapter 14) at an earlier stage in the text. The

material on landlord and tenant (Chapter 19) and public regulation (Chapters 20 through 22) can probably be presented at any time during the course.

Section I consists of one chapter and provides a broad overview of the nature of legal thinking and the nature of property. Section II introduces the student to the permissible present and future interests in land and, to a large extent, is essential to a comprehensive understanding of the remainder of the text.

Section III consists of Chapter 4 which examines direct restraints on alienation, an issue which recurs, particularly in the material on mortgages and landlord tenant. Chapter 4 also considers the rule against perpetuities. This esoteric subject was included with the idea that it probably will be deleted by all but the most ambitious of professors.

Section IV is concerned with co-ownership of land. Chapter 5 introduces the various forms of co-ownership and Chapter 6 extends the discussion into the area of condominiums and related forms.

Section V examines private land use limitations. Chapter 7 considers so-called inherent limitations, primarily the doctrine of nuisance. Chapter 8 covers the creation, scope, and termination of easements and Chapter 9 addresses covenants and equitable servitudes.

Section VI consists of seven chapters which, for the most part, examine the modern real estate conveyance. Chapter 10 is a survey of noncontractual transfers, particularly *inter vivos* and testamentary gifts and adverse possession. Two chapters are devoted to the role of real estate agents. Chapter 11 considers the nature of the agency relation, particularly the scope of an agent's authority and the fiduciary obligation. Chapter 12 introduces the licensing and regulatory requirements of the brokerage industry and examines the expanding area of civil liability.

Chapter 13 contains a detailed discussion of real estate contracts, including sections on marketable title, performance of conditions, disclosure requirements, and the liability of housing suppliers. Chapters 14 and 15 are respectively devoted to the use of deeds and the operation of recording statutes. Finally, Chapter 16 examines the responsibilities of the escrow holder and the role of title insurance.

Section VII considers security interests in real estate and is composed of two chapters. Chapter 17 examines real estate finance, particularly the creation, operation, foreclosure, and discharge of a mortgage and its equivalents. Chapter 18 considers involuntary liens, with emphasis upon the judgment lien and the mechanic's lien.

Section VIII is comprised of one chapter which discusses, at some length, the commercial and residential landlord-tenant relationship.

The text concludes with Section IX, which examines public regulation of real property. Chapter 20 addresses the scope and operation of the condemnation power and includes sections on inverse condemnation and valuation. Chapter 21 contains an extensive discussion of the subject of zoning. Included in the chapter are sections on the regulatory taking and the administration of the zoning plan through the techniques of the nonconforming use, conditional use, and variance. Exclusionary zoning and examples of the regional approach to zoning are also discussed.

Chapter 22 examines subdivision regulations including dedications and impact fees. Chapter 23 concludes the text with a discussion of environmental protection statutes.



The National Environmental Quality Act (NEPA) and the preparation of the Environmental Impact Statement receive particular attention.

This text is intended to be comprehensive and to afford the professor the opportunity to delete material because of time and other constraints. Case material has been selected and edited to facilitate the students' interest and learning. The text has been class-tested during two semesters at San Francisco State University and modifications have been made on the basis of that experience. We have found that all the material can be covered in a fifteen week semester and that student interest and participation remains high throughout the course. It has been our experience and continues to be our hope that at the end of the semester, the student will emerge with a thorough and enjoyably obtained understanding of this relatively difficult subject.

McGraw-Hill and I would like to thank the following reviewers for their many helpful comments and suggestions: Jerry Belloit, University of North Florida; Richard L. Coffinberger, George Mason University; Judith A. Craven, Attorney-at-Law; Deborah A. Ford, University of Baltimore; Veronica Free, University of North Alabama; Forrest E. Huffman, Temple University; Arthur F. Stelley, Baylor University; Bill W. West, Attorney-at-Law; and Lois J. Yoder, Kent State University.

*Daniel P. McLoughlin*

---

# CONTENTS

---

	PREFACE	xix
<b>SECTION I</b>	<b>INTRODUCTION TO THE STUDY OF REAL ESTATE LAW</b>	<b>1</b>
<b>1</b>	<b>The Nature of Law and Property</b>	<b>3</b>
	INTRODUCTION	4
	JURISPRUDENCE: "THE NATURE OF LAW"	4
	SOURCES OF LAW IN THE UNITED STATES	5
	THE AMERICAN COURT SYSTEM	8
	JURISDICTION	8
	INTRODUCTION TO THE NATURE OF PROPERTY	9
	HISTORICAL BACKGROUND	10
	THE ROLE OF EQUITY	12
	THE POWER TO EXCLUDE	13
	PROPERTY AND SOCIAL POLICY	16
	SUMMARY	17
<b>SECTION II</b>	<b>THE PRIVATE ESTATES IN LAND</b>	<b>19</b>
<b>2</b>	<b>Present Estates in Land</b>	<b>21</b>
	INTRODUCTION	21
	FREEHOLD ESTATES	22
	A The Fee Simple Absolute	22
	B The Fee Simple Defeasible	23
	THE LIFE ESTATE	29
	RIGHTS AND DUTIES OF THE LIFE TENANT	30
		ix

THE NONFREEHOLD ESTATES	30
A The Estate for Years	31
B The Estate from Period to Period: The Periodic Tenancy	31
C The Estate at Will	31
D Tenancy at Sufferance	32
SUMMARY	32
QUESTIONS	32
 <b>3 Future Estates in land</b>	 <b>34</b>
INTRODUCTION	34
CLASSIFICATION OF FUTURE INTERESTS	35
THE REVERSION	35
THE POSSIBILITY OF REVERTER	35
THE POWER OF TERMINATION OR RIGHT OF ENTRY FOR BREACH OF CONDITION	36
STATUTORY LIMITATIONS UPON THE POSSIBILITY OF REVERTER AND THE RIGHT OF ENTRY	38
THE REMAINDER	41
THE EXECUTORY INTEREST	43
SUMMARY	46
QUESTIONS	46
 <b>SECTION III LIMITATIONS ON THE RIGHT TO CREATE INTERESTS IN LAND</b>	 <b>49</b>
 <b>4 Restraints upon Alienation</b>	 <b>51</b>
INTRODUCTION	52
DIRECT RESTRAINTS: DEFINITIONS AND CONSEQUENCES	52
CLASSIFICATION OF DIRECT RESTRAINTS	55
A Disabling Restraint on Alienation	55
B Forfeiture Restraint	55
C Promissory Restraint	55
LIMITED OR QUALIFIED RESTRAINTS	56
USE RESTRAINTS	56
VALIDITY OF RESTRAINTS ON ALIENATION	59
THE RULE AGAINST PERPETUITIES	60
STATEMENT OF THE RULE AGAINST PERPETUITIES	61
RATIONALE FOR THE RULE AGAINST PERPETUITIES	61

OPERATION OF THE RULE	62
A Interests Subject to the Rule	62
B The Period of Perpetuities	62
C “Lives in Being”: The Measuring Lives	63
D The Requirement of Vesting	63
MODIFICATIONS TO THE RULE AGAINST PERPETUITIES	64
A The “Wait and See” Doctrine	64
B Equitable Reformation	65
CONSEQUENCES OF VIOLATING THE RULE	65
SUMMARY	66
QUESTIONS	66
<b>SECTION IV CO-OWNERSHIP OF INTERESTS IN REAL ESTATE</b>	<b>69</b>
<b>5 Concurrent Ownership</b>	<b>71</b>
INTRODUCTION	71
OVERVIEW OF MAJOR FORMS OF CONCURRENT OWNERSHIP	73
THE JOINT TENANCY	74
A The Four Unities	74
B Statutory Modifications of the Joint Tenancy	76
C Severance of the Joint Tenancy	76
TENANCY IN COMMON	78
TENANCY BY THE ENTIRETY	79
RIGHTS AND DUTIES OF CO-OWNERS	81
A The Power of a Co-Tenant to Convey	81
B The Duty to Account for Rents, Profits, and Use	81
PARTITION OF CO-OWNED INTERESTS	82
MARITAL INTERESTS: THE COMMUNITY PROPERTY SYSTEM	83
SUMMARY	84
QUESTIONS	85
<b>6 The Condominium and Related Forms of Ownership</b>	<b>86</b>
INTRODUCTION	86
BASIC DEFINITIONS	87
BRIEF HISTORY OF THE CONDOMINIUM	87
FORMATION OF THE CONDOMINIUM: THE ESSENTIAL DOCUMENTS	88
A The Declaration or Master Deed	88
B Management Documents	91
C Deeds to Individual Units	94

	LIABILITY OF THE ASSOCIATION AND INDIVIDUAL UNIT	94
	TIME-SHARE PROJECTS	97
	SUMMARY	97
	QUESTIONS	97
<b>SECTION V</b>	<b>PRIVATE RIGHTS IN THE LAND OF ANOTHER</b>	<b>99</b>
<b>7</b>	<b>Inherent Rights and Limitations in the Use of Land of Another</b>	<b>101</b>
	INTRODUCTION	101
	THE DOCTRINE OF NUISANCE	102
	MODERN APPLICATIONS OF THE DOCTRINE OF NUISANCE	105
	REMEDIES FOR NUISANCE	107
	NUISANCE AND THE EFFECT OF A STATUTE	111
	LATERAL AND SUBJACENT SUPPORT	111
	SUMMARY	114
	QUESTION	114
<b>8</b>	<b>Easements and Related Interests</b>	<b>115</b>
	INTRODUCTION	115
	BASIC TERMINOLOGY	116
	CREATION OF EASEMENTS	117
	A Creation by Express Grant	118
	B Easement by Express Reservation	118
	C Easement by Implication	120
	D Easement by Prescription	123
	SCOPE OF THE EASEMENT	124
	BURDEN OF REPAIR AND MAINTENANCE	129
	TRANSFER OF EASEMENTS	129
	A Appurtenant Easements	130
	B Easements in Gross	130
	TERMINATION OF EASEMENTS	131
	THE LICENSE	132
	SUMMARY	134
	QUESTIONS	135
<b>9</b>	<b>Promises Affecting the Use of land</b>	<b>137</b>
	INTRODUCTION	137
	BASIC TERMINOLOGY	138

	ELEMENTS REQUIRED FOR A COVENANT TO RUN WITH THE LAND	139
	A Enforceable Promise	141
	B Intent to Bind Successors	142
	C Touch and Concern	142
	D Privity of Estate	144
	E A Brief Review	147
	EQUITABLE SERVITUDES	148
	ELEMENTS OF EQUITABLE SERVITUDE	150
	TERMINATION OF COVENANTS	153
	SUMMARY	155
	QUESTIONS	155
<b>SECTION VI</b>	<b>TRANSFER OF INTERESTS IN LAND</b>	<b>157</b>
<b>10</b>	<b>Transfer of Interests in Land without a Land Contract</b>	<b>159</b>
	INTRODUCTION	159
	TRANSFER BY GIFT	160
	TRANSFER BY WILL	161
	TRANSFER AT DEATH WITHOUT A WILL (INTESTATE SUCCESSION)	163
	ESCHEAT	164
	DEDICATION	164
	EMINENT DOMAIN	164
	ADVERSE POSSESSION	164
	A Elements of Adverse Possession	165
	B Color of Title	169
	C Tacking	169
	SUMMARY	169
	QUESTIONS	170
<b>11</b>	<b>Real Estate Agents and Brokers: Authority and Responsibilities</b>	<b>171</b>
	INTRODUCTION	171
	CREATION OF THE AGENCY RELATIONSHIP: LISTING AGREEMENTS	172
	AUTHORITY OF AN AGENT TO BIND THE PRINCIPAL	175
	DUTIES OF THE AGENT TO THE PRINCIPAL, PARTICULARLY THE FIDUCIARY DUTY	179
	AGENT'S RIGHT TO A COMMISSION	184
	SUMMARY	186
	QUESTIONS	186

<b>12</b>	<b>Real Estate Agents and Brokers: Licensing Requirements and Special Considerations</b>	<b>188</b>
	INTRODUCTION	188
	PENALTIES FOR FAILURE TO OBTAIN A LICENSE	189
	CLASSIFICATION OF LICENSEES	189
	EXEMPTIONS FROM LICENSING REQUIREMENTS:	
	THE ROLE OF “FINDERS”	190
	PROCEDURE FOR OBTAINING A LICENSE	190
	ADMINISTRATIVE AUTHORITY TO SUSPEND OR REVOKE A LICENSE	191
	UNAUTHORIZED PRACTICE OF LAW	194
	CIVIL LIABILITY	195
	SUMMARY	198
	QUESTIONS	198
<b>13</b>	<b>Transfer of Interests by Contract of Sale</b>	<b>200</b>
	INTRODUCTION	200
	TRANSFERS AT COMMON LAW	201
	THE MODERN REAL ESTATE TRANSACTION	201
	THE REQUIREMENT OF A WRITING	202
	EXCEPTIONS TO THE STATUTE OF FRAUDS	204
	MARKETABLE TITLE	207
	PERFORMANCE OF CONDITIONS	209
	TIME OF PERFORMANCE	210
	EQUITABLE CONVERSION AND RISK OF LOSS	212
	DISCLOSURES ON TRANSFER OF REAL ESTATE	215
	REMEDIES	217
	LIABILITY OF HOUSING SUPPLIERS	222
	SUMMARY	225
	QUESTIONS	226
<b>14</b>	<b>The Deed and Its Operation</b>	<b>228</b>
	INTRODUCTION	228
	HISTORICAL BACKGROUND	229
	TYPES OF MODERN DEEDS	229
	FORMAL REQUIREMENTS PERTAINING TO THE VALIDITY OF A DEED	230
	A Capacity and Identity of the Parties	230
	B Description of the Property	231
	C The Requirements of a Writing	234
	D Delivery of the Deed	235

COVENANTS OF TITLE	238
A Covenants of Seisin and Rights to Convey	238
B Covenant Against Encumbrances	240
C Covenants of Quiet Enjoyment and Warranty	240
REMEDY FOR BREACH OF COVENANTS	241
STATUTES AFFECTING DEED COVENANTS	241
SUMMARY	242
QUESTIONS	243
 <b>15 Recording Statutes and Priorities</b>	 <b>244</b>
INTRODUCTION	244
HISTORY OF RECORDING ACTS	245
PERSONS PROTECTED BY RECORDING	245
NOTICE	246
TYPES OF RECORDING STATUTES	249
THE MECHANICS OF RECORDING	252
METHODS OF INDEXING	252
ERRORS BY THE RECORDING OFFICER	255
SUMMARY	256
QUESTIONS	257
 <b>16 Closing the Transaction: Escrow Holders and Insurers of Title</b>	 <b>258</b>
INTRODUCTION	258
NATURE OF AN ESCROW	259
LIABILITY OF THE ESCROW HOLDER	260
THE REAL ESTATE SETTLEMENT PROCEDURES ACT (RESPA)	262
THE ROLE OF TITLE INSURANCE	262
THE EXTENT OF COVERAGE	263
THE LIABILITY OF THE TITLE INSURER	266
SUMMARY	266
QUESTIONS	267
 <b>SECTION VII REAL ESTATE AS SECURITY FOR OBLIGATIONS</b>	 <b>269</b>
 <b>17 Real Estate Financing Devices</b>	 <b>271</b>
INTRODUCTION	271
THE NATURE OF A MORTGAGE	272
A The Mortgage at English Common Law	272
B American Developments Affecting Mortgage Law	272
C The Uniform Land Security Interest Act	273



PROPERTY WHICH MAY BE SUBJECT TO A MORTGAGE	273
THE OBLIGATION	276
A Alternative Mortgage Instruments	277
B The Adjustable Rate Mortgage (ARM)	278
MORTGAGE SUBSTITUTES	278
A The Deed of Trust	278
B The Deed Absolute	280
C The Installment Land Sale Contract	281
FORECLOSURE OF MORTGAGE AND LIMITATIONS ON FORECLOSURE	283
ASSIGNMENT OF MORTGAGE AND OF PROPERTY SECURED BY A MORTGAGE	290
SATISFACTION AND DISCHARGE OF THE MORTGAGE	292
PRIORITY PROBLEMS	295
SUMMARY	297
QUESTIONS	299
 <b>18 Involuntary Liens on Real Property</b>	 <b>300</b>
INTRODUCTION	300
EQUITABLE LIENS	301
STATUTORY LIENS	302
A Judgment Liens	302
B Mechanic's Liens	305
LIENS IN FAVOR OF GOVERNMENTAL ENTITIES	308
SUMMARY	309
QUESTIONS	310
 <b>SECTION VIII LANDLORD AND TENANT</b>	 <b>311</b>
 <b>19 Landlord and Tenant</b>	 <b>313</b>
INTRODUCTION	314
LANDLORD AND TENANT: THE BASICS	314
A Classification of the Common Law Estates	315
TYPICAL PROVISIONS OF A LEASE	316
A Essential Terms	316
B Provisions for the Payment of Rent	316
RIGHTS AND DUTIES OF THE PARTIES	319
A The Duty to Deliver Possession	319
B Interference with Possession During the Tenancy	321
DEVELOPMENTS IN RESIDENTIAL HOUSING	325
A The Implied Warranty of Habitability	325