Cases and Materials on Land Financing

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Recommended Citation
Available at: http://scholarship.law.cornell.edu/clr/vol57/iss1/5
BOOK REVIEW


Although student mastery of the intellectual challenge in courses on mortgages, land security, or land finance is satisfying for both student and instructor, the learning process itself can be difficult and frustrating. There are at least two possible reasons. First, the substantive content of the courses is highly conceptual and demands rigorous mental discipline. Instructors are only too aware of the slow and steady process required, for example, to impart the distinction between statutory redemption and the equity of tardy redemption, or to explore the complex nature of the rights of the numerous parties when a third or fourth mortgage is being foreclosed. Second, the student must be exposed to transactional applications of the substantive law in order to acquire an ultimate understanding of the subject. He should, for example, analyze substantive principles in the contemporary context of shopping center and subdivision development, urban housing problems, condominiums, growing government programs, and the modern credit markets. It can be argued, of course, that the law school practice of offering specialized property courses, such as those dealing exclusively with land security, is itself antithetical to a transactional overview, and that broader, more sweeping real estate transactions courses should be encouraged.¹ Whatever the shortcomings of traditional courses and the merits of curricular reorganization, however, the fact is that such specialized courses, in varying forms, remain firmly and probably properly embedded in many law school curricula. A modern casebook designed to meet the needs of such courses, therefore, should encompass and integrate both solid substance and modern developments and techniques.

Traditional casebooks such as those by Hanna,² Durfee,³ and Osborne,⁴ have treated purely substantive land security law in a comprehensive and superior manner. Such casebooks normally cover the mortgage transaction sequentially, from the formation of the mortgage contract through several intermediate problem areas to foreclosure and

⁴ G. Osborne, Cases and Materials on Secured Transactions (1967).
redemption. In my first teaching experience in this area, I used what is clearly the classic treatment of the law of mortgages, Durfee's *Cases on Security*. Although the Durfee casebook is twenty years old, it is still the best available substantive coverage of mortgage law. Who has matched, for example, Durfee's detailed and laborious development of the distinction between the lien and title theories of land security? Moreover, his selection of cases and general treatment of foreclosure by suit in equity and the omitted lienor problem is unsurpassed.

Nonetheless, what one scholar has said in a slightly different context accurately characterizes these traditional casebooks, including Durfee: they describe "a doctrinal system which was developed under a credit structure which bears little resemblance to the modern real estate market."5 Financing transactions are no longer usually short term nor are lenders typically private parties.6 Institutionalized lenders and government intervention in the finance market receive little attention in these casebooks and relatively minor coverage is given to the application of substantive law in the context of modern developments. The addition of substantial supplementary materials by the instructor becomes a necessity.

At the other extreme are those casebooks that are more functional and transactional in nature and give extensive coverage to modern developments and concepts which affect land financing. For example, George Lefcoe's *Land Finance Law*7 contains not only the more traditional substantive material on the law of mortgages, but in addition includes substantial treatment of such topics as housing for moderate income families and the poor, tax aspects of leasing and mortgaging, and shopping centers. Materials on the effect of governmental regulation and programs are also included. Another recent casebook, Axelrod, Berger, and Johnstone, *Land Transfer and Finance*, although it contains considerable mortgage law substance, is essentially transactionally oriented in that it deals consecutively with the purchase, sale, and development of real estate in a manner somewhat similar to Allison Dunham's classic, *Modern Real Estate Transactions*.8

Neither book, however, is readily adaptable to a traditional mort-
gages course. *Land Transfer and Finance* is more suitable for a broader real estate transaction course in the second year. *Land Finance Law* slight substance and gives too much supplemental material to be useful for a basic land security course. Although traditional casebooks tend to overemphasize doctrine and substance, in *Land Finance Law* too many important substantive topics are cursorily treated. These include, for example, such basic matters as the difference between “assuming” and taking “subject to” a mortgage, problems arising when there is a break in the chain of assumptions, the validity of releases of the equity of redemption, foreclosure of mortgages by suits in equity, purchase money mortgages, and redemption from the mortgage.\(^\text{11}\)

In *Cases and Materials on Land Financing*, Professors Penney and Broude have attempted to “bridge the ‘generation gap’” by providing “a basic grounding in mortgage law” while devoting substantial attention to “modern devices and techniques.”\(^\text{12}\) Having used the casebook during the past semester, I am happy to report that their efforts were successful. Fully the first 342 pages, with the exception of a short chapter on cooperatives and condominiums,\(^\text{13}\) and the last 180 pages set forth a solid and basically traditional exposition of the substantive law of mortgages. The casebook also includes, however, over 300 pages concerning such subjects as federal aid to housing,\(^\text{14}\) the secondary mortgage market,\(^\text{15}\) interest rates and government aids,\(^\text{16}\) subdivisions,\(^\text{17}\) and shopping centers.\(^\text{18}\) Moreover, these latter chapters are structured in such a way as often to perform the additional role of introducing or developing some of the traditional substantive areas.

One commentator has observed that land security casebook editors are confronted by the fact that because mortgage devices and the mechanics of their operation vary considerably from state to state, it is difficult to assemble a truly “national” casebook which will concurrently meet the need, especially in state law schools, to provide the student with a solid basis in local law.\(^\text{19}\) With one exception mentioned later, Penney and Broude, however, do an excellent job of meeting both needs. This is especially true in their treatment of the varying

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\(^\text{11}\) For a more complete list of substantive deficiencies, see Cunningham, Book Review, 19 BUFFALO L. REV. 303, 307-09 (1970).

\(^\text{12}\) P. xiii.

\(^\text{13}\) Ch. 2.

\(^\text{14}\) Ch. 5.

\(^\text{15}\) Ch. 6.

\(^\text{16}\) Ch. 7.

\(^\text{17}\) Ch. 10.

\(^\text{18}\) Ch. 11.

forms of financing devices. Ample coverage is given to the numerous alternatives to the straight mortgage, such as the absolute deed intended as a mortgage, the deed of trust, and the installment land contract. I found, for example, that Bank of Italy National Trust & Savings Association v. Bentley, since it provides a desirable general introduction to the deed of trust, can be utilized as a stepping-stone to more detailed consideration of the Missouri deed of trust.

Coverage of the absolute deed intended as a mortgage is especially good. The recent Michigan case of Taines v. Munson is an excellent vehicle for a general exploration of the folly for both lenders and borrowers in using the absolute deed as a financing device. Since courts traditionally treat the deed absolute as a mortgage where there is sufficient evidence of mortgage intent, the lender is often stymied in his attempt to avoid the time and expense of a normal foreclosure proceeding. Moreover, since the absolute deed will never contain a power of sale, the grantee-mortgagee will often have to rely on time-consuming judicial foreclosure rather than on the foreclosure by nonjudicial sale available in many states. From the borrower's point of view, the transaction is risky because there is always the possibility that he will be unable to show that his actions as grantor of a deed had a security intent only.

The casebook also includes a most valuable short excerpt from an excellent article by Professor Chapin Clark on installment land contracts. The excerpt consists of a table showing the extent to which installment land contracts have been used in farm real estate transactions in several midwestern states in the last few decades. The table shows, for example, that in Minnesota and Michigan in 1960, fifty-five percent and fifty-three percent respectively of all farm sales reported utilized the installment land contract as a financing device; during the same year in Missouri only fifteen percent of such transactions utilized the land contract. This table provides a useful introduction to the reality behind the figures, namely, that because the law in Minnesota and Michigan governing traditional mortgage transactions is relatively pro-debtor, creditors utilize alternative devices to a greater extent than in a state such as Missouri where deed of trust statutes and case law

20 Ch. 1.
24 P. 96.
substantially favor the creditor. Similar observations may be made with respect to the data shown for other states on the chart.

One topic unfortunately considered too lightly by Penney and Broude is the power of sale method of foreclosure. Under a power of sale provision in the mortgage the foreclosure sale is conducted out of court, often with a short period of publication the only notice required by statute. Although this device is not utilized in a majority of jurisdictions, in at least eighteen states it appears to be the prevailing method of foreclosure and, indeed, in jurisdictions such as Minnesota, Texas, and Missouri it is practically the only device utilized. Thus it is unfortunate that formal casebook treatment is apparently limited to one case and a page of notes. Moreover, these notes fail to consider the potentially serious constitutional problems posed by some limited statutory notice requirements. Does the fourteenth amendment requirement of Mullane v. Central Hanover Bank & Trust Co.—that the type of notice used in any proceeding to be accorded finality must be reasonably calculated to reach interested parties—extend to the power of sale foreclosure? To be sure, the power of sale device is extrajudicial and in most instances involves express mortgagor consent in the mortgage instrument to the type of notice to be given. On the other hand, junior lienors and judgment creditors of the mortgagor who are not formal parties to the mortgage can hardly be said to have given meaningful "consent" to the method of notice, even though their interests may be eliminated by foreclosure. In any event, there is a growing judicial suspicion concerning notice by publication and a substantial consideration of the problem by Penney and Broude would have been helpful.

Although the selection of cases and materials dealing with foreclosure by judicial action is generally first-rate, I do have one ob-

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26 See, e.g., Mo. Ann. Stat. §§ 443.320, 410, 420 (1949); Horman v. Connett, 348 Mo. 244, 152 S.W.2d 1053 (1941).
29 National Tailoring Co. v. Scott, 65 Wyo. 64, 196 P.2d 387 (1948).
30 P. 248.
jection. One of the most difficult areas for student and instructor alike is the analysis of the rights and obligations of the purchaser at a judicial foreclosure sale vis-à-vis the omitted junior lienor. Two cases included in Durfee, Rodman v. Quick and Murphy v. Farwell are excellent vehicles for illustrating the divergent views that the purchaser is merely as assignee of the foreclosed mortgage or, on the other hand, that he acquires the interest of the mortgagor as well as an assignment of the foreclosed mortgage. The omission of these cases by Penney and Broude is regrettable.

Because I taught only a two hour course, I was unable to cover much of the material dealing with the modern transactional setting. For example, I did not find the time to cover the material on federal aid to housing or shopping centers, although both sections appear to be valuable and practical. I did, however, give substantial coverage to the material on subdivisions, and found it to be thorough and teachable. There was especially favorable student comment about this chapter, particularly on the introductory excerpt describing generally the mechanics of subdivision development. What is most attractive about the subdivision material is that it allows the teacher to introduce traditional substantive material within a broader transactional setting. For example, subdivision development is an excellent vehicle for exploring the intricacies of mortgages used to secure future advances and the problems of marshalling. Moreover, this material is so situated in the casebook that by the time the student reaches it, he is equipped to handle new issues in a much broader context.

With few exceptions, the authors give little consideration to the federal tax consequences of the myriad of real estate transactions covered in the casebook. Tax problems are, of course, part and parcel of almost every real estate financing, especially in the commercial setting. However, the authors correctly justify their hesitancy to delve deeply into this area "because of the Pandora’s box which such an excursion would open." Given the rapid development and revision of the federal tax laws, it is always dangerous to commit tax material heavily to casebooks where the instructors utilizing them are not primarily tax experts. Perhaps a more advanced seminar on real estate transactions taught by both real estate and tax instructors would be a partial solu-

34 211 Ill. 546, 71 N.E. 1087 (1904).
35 9 Wis. 102 (1859).
37 E.g., pp. 402-12, 524.
38 P. xiv.
tion to the problem of integrating tax considerations into the real estate financing picture.

Penney and Broude have constructed an excellent casebook, notwithstanding minor faults. It is highly successful in utilizing the solid substantive law base common to its more traditional precursors as a foundation for extensive and valuable exploration of the land security device in modern settings and transactions. Reviewers always will find it more difficult to praise than to find fault, perhaps because the synonyms of praise seem repetitious, whereas criticism gives a greater impression of originality. I look forward, however, to using the Penney and Broude casebook again. It is a highly useful and successful teaching tool.

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