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George Lefcoe, Land Finance Law: A Symposium Review

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BOOKS

GEORGE LEFCOE, Land Finance Law: A SYMPOSIUM REVIEW

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PROFESSOR George Lefcoe has now followed up his monumental coursebook entitled *Land Development Law* with a slightly less monumental but still bulky coursebook entitled *Land Finance Law*. Without having had the opportunity to try out *Land Development Law* in the classroom, I recently reviewed it in generally favorable terms.[1] After using *Land Finance Law* in the classroom last winter (in a pre-publication photocopied edition), I believe that it is the best book of its kind now available, but that it presents substantial problems for the teacher who plans to use it as a coursebook.

It is clear that *Land Finance Law* is simply too long[2] to be "covered" in the time likely to be available for a course in land finance law. Assuming that forty-five classroom hours are allotted to the course, it would be necessary to "cover" *Land Finance Law* at an average rate of twenty-six pages per hour. If only thirty classroom hours are available, it would be necessary to race through forty pages per hour. I think that it will be almost impossible for most teachers to do justice to the material unless the pace is slowed considerably, which will inevitably mean that a substantial part of the book will have to be omitted.

The obvious way to solve the length problem is to limit one's course in land finance law to only one or two of the three parts into which *Land Finance Law* is divided. Integration of these three parts, which are entitled, respectively, Housing for Moderate Income Families and the Poor, Mortgages and Mortgage Markets, and Structuring the Commercial Real Estate Transaction, is not very tight. Indeed, Professor Lefcoe concedes in his preface that the first Part could be placed in a "poverty and law" offering, the second in a secured transactions or conventional mortgage law course, and the third in a business finance package. It is doubtful, however, that part one would provide enough material for even thirty classroom hours of a "law and poverty" course, and it would certainly need to be extensively supplemented to provide sufficient material for a course of forty-five classroom hours. Similarly, part three clearly does not provide enough material for a business finance course of forty-five classroom hours, or even for one of thirty classroom hours. Moreover, part three could hardly stand alone without some reference to the materials in part two, which deals with mortgage lending institutions, mortgage law, and monetary policy. Only part two seems capable of standing on its own feet as the basis for a separate

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1. Cunningham, Book Review, 66 MICH. L. REV. 794 (1968).

2. The book totals 1194 pages exclusive of the preface, table of contents, table of cases, bibliography, and index.

course. Its roughly seven hundred pages could certainly be "covered" in a course of forty-five classroom hours, and possibly even in a course of thirty classroom hours. In addition, either parts one and two together, totalling nine hundred ninety-four pages, or parts two and three together, totalling eight hundred ninety-two pages, could provide a reasonably good basis for a course of forty-five classroom hours. Some rearrangement of the materials would be required, however, if either combination were used.

In his preface, Professor Lefcoe anticipates criticism of *Land Finance Law* on several counts. With regard to part one, he anticipates that critics may say that this part, in focusing on housing finance problems, deals with only "a small part of the relevant social perspective on race and poverty in the United States," and that "the economic development of the ghetto, the negative income tax, participatory democracy, and total community organization are all worthy of more attention than they receive." I agree with this anticipated criticism. Consequently, I think that part one of *Land Finance Law* is not adequate, without extensive supplementation, to provide the materials for a really substantial course offering on "poverty and law." However, as I have previously indicated, I do think that a good course in housing finance could be taught from parts one and two combined. And such a combination is highly desirable if one shares Professor Lefcoe's belief, as I do, that students whose primary interest is in the problems of race and poverty ought to be encouraged to study mortgage law, since "the well-meaning advocate for the poor who urges widespread home ownership or cooperative ownership without anticipating the consequences of mortgage defaults, foreclosures, and deficiency judgments . . . is surely failing to meet the highest professional standard he could set for himself."[3]

Having expressed the view that parts one and two, combined, could provide the basis for a good course in housing finance, let me add a few reservations about this. I happen to share Professor Lefcoe's view that the brute fact of widespread poverty and its economic consequences will preclude any substantial improvement in housing for the poor by means of tenants' unions, rent strikes, and building code enforcement programs against slumlords[4]—at least so long as no way can be found drastically to reduce the costs of housing construction. But I do not find in part one of *Land Finance Law* adequate materials to provide a basis for evaluating the real dimensions of the economic problem involved in improving the housing of the poor, nor do I find and adequate discussion of methods by which the cost of new housing construction might be substantially reduced instead of simply being partially subsidized by the use of public funds.[5] Moreover, I think the discussion of the various federal subsidy programs

3. P. ix.
4. P. viii.
5. I do not regard the excerpt in chapter 2 dealing with industrialization of housing as an adequate treatment of the problem. Among other things, I believe the excerpt vastly underestimates the difficulties which will arise because of local building codes, zoning regulations, union work rules, building inspection practices, and the like.

in chapter 2 of part one would be more meaningful to the student if he were first given some idea of what a mortgage is, what the private and public sources of mortgage funds are, and what policies private mortgage lenders follow in deciding whether to lend on the security of slum and non-slum property, respectively.

If the course in land finance law is based on the first two parts of *Land Finance Law*, the fact that part two is a less than adequate treatment of the law of mortgages is not fatal, so long as students are alerted to the fact that there are important gaps in coverage which they may have to fill in on their own after they graduate from law school.[6] If, however, part two alone is to be used as the course book for an "updated, but conventional" course in mortgage law[7]—or even in an unconventional course in mortgage law—it has some serious deficiencies.

An inspection of the initial chapter of part two of *Land Finance Law* reveals that it contains an excellent collection of materials on The Banking Institutions as Mortgage Lenders, and that it includes some fascinating insights into the inadequacies of federal regulatory agencies such as the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board. But, as Mr. Prather points out in his review, the distinction between "debt" accounts in "stock" savings and loan associations and "share" accounts in "mutual" savings and loan associations (a distinction to which *Land Finance Law* devotes substantial attention in chapter 3) has become largely a matter of historical interest as a result of recent federal and state legislation. And it is difficult to assess the significance of the anti-trust materials in chapter 3, since there is nothing to suggest what effect the merger of commercial banks is likely to have on the flow of mortgage funds into housing. It should also be noted that this initial chapter omits any explanation of what a mortgage is,[8] what other forms of real estate investment are available to financial institutions,[9] why such institutions generally utilize the mortgage either in its ordinary or its trust deed form,[10] the function of junior mortgage financing and the lenders involved in such financing,[11] arrangements for "merging"

6. *Cf.* p. vii, where Professor Lefcoe says: "[I]f I have been glossy or inept at setting forth some of the doctrinal intricacies, I have tried to provide an appropriate place where others, from their deeper expertise and with greater patience, can fill the gaps and correct the improper inferences."

7. "The *aficionados* of mortgage law, as it has been traditionally taught, may deserve a book cut more closely to their needs. The brothers of this venerable fraternity would, I assume, applaud an updated, but conventional mortgage law casebook." P. vii.

8. Surely the student needs some initial understanding of the character and function of property security generally and the mortgage in particular. And a little history would probably be helpful.

9. At least the various forms of debt security should be mentioned—i.e., mortgage, deed of trust, installment land contract, etc. Perhaps equity investment and long-term leasing might also be briefly mentioned in order to provide perspective.

10. Business considerations, as well as restrictions on investment imposed by statutes and governmental regulations, might be briefly mentioned. Governmental restrictions are touched on in piecemeal fashion in chapters 3 and 4.

11. Despite its lesser use today, as compared with the 1920's, the junior mortgage is

first and second mortgages,[12] the "wrap-around mortgage,"[13] and "equity participation"[14] by mortgage lenders. Some of these matters are not dealt with anywhere in part two or part three of *Land Finance Law.*

The rest of the chapters in part two (except chapter 8, on Mortgages and Monetary Policy) deal essentially with some of the traditional doctrines of mortgage law, arranged in a "functional"[15] manner and consisting mainly of appellate opinions supplemented with a substantial amount of text.[16] The trouble is that some important topics are entirely omitted, many important topics are treated in a much too sketchy manner, and the arrangement of the materials is quite illogical in some instances. For example, chapter 4 contains a generally excellent set of cases and materials on construction financing, some of which deal with the issue of priority between mechanics and materialmen and construction lenders.[17] But nowhere in the chapter is there any material from which students could elicit the basic starting point for consideration of that issue: the rule that a construction loan mortgage recorded before the start of construction has priority as to all advances made thereunder over mechanics' and materialmen's liens if the making of such advances was "obligatory" on the mortgage lender,[18] but priority only as to advances made before notice of an "intervening" lien if

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still an important source of funds, and numerous lenders engage only in this form of financing. The banking institutions dealt with in chapter 2 of *Land Finance Law* generally are prohibited by law from investing in junior mortgages. Consequently most junior mortgages are originated and held by individuals or by mortgage companies. The bulk of junior mortgage financing is in connection with income producing properties, particularly apartment houses. It is also rather common for a vendor of land to accept a second mortgage as security for payment of a portion of the purchase price.

12. Arrangements are sometimes worked out whereby the first mortgage holder acts as a collection agent for the second mortgage holder. The mortgagor makes a single periodic payment, and various plans may be used for crediting the payment. For example, all payments of principal may be credited to the first mortgage, and when it has been amortized by the amount of the second mortgage, the first mortgage holder may agree to increase the first mortgage to its original amount, thus permitting redemption of the second mortgage.

13. A "wrap-around mortgage" is one which permits a lender to advance funds to a borrower in excess of an existing first mortgage when the first mortgage holder is unwilling to increase the size of the loan or to renegotiate the terms of the mortgage, without requiring the discharge of the first mortgage. Usually, the "wrap-around" mortgagee advances the difference between the amount due on the existing first mortgage and the face amount of the "wrap-around mortgage," and takes over payment of the first mortgage. The borrower makes his payments only to the holder of the "wrap-around" mortgage and no longer deals with the holder of the first mortgage.

14. In the recent period of rapid inflation, institutional mortgage lenders have been desirous of participating in both the "cash flow" and the growth of capital made possible by equity investment, if this is permitted by applicable statutes and regulations.

15. Chapters 4 through 7 deal, respectively, with Construction Financing, The Drafting of the Long-Term Mortgage, Administration After Default and Before Foreclosure, and Foreclosing the Mortgagor's Interest.

16. Chapters 4 through 7 contain a total of 419 pages, of which approximately 286 are devoted to appellate court opinions. Of the remaining 133 pages, approximately 100 are devoted to text material reprinted from various sources, approximately 24 pages consist of text specially written for *Land Finance Law*, approximately 8 are devoted to documents, and approximately 1 is devoted to statutes.

17. Ch. 4, section B, pp. 489-527.

18. G. OSBORNE, HANDBOOK OF THE LAW OF MORTGAGES § 120 (1951) (hereinafter cited as OSBORNE).

the making of additional advances was not "obligatory."[19] Strangely enough, however, in a later chapter entitled The Drafting of the Long-Term Mortgage, in a section entitled "The Mortgagee's Priority to Improvements Made After the Mortgage is Entered,"[20] we find a case[21] holding that a recorded construction loan mortgage is prior to "intervening" liens as to all advances thereunder, by virtue of a Florida statute which expressly makes any mortgage given to secure future advances "whether obligatory or otherwise" valid as against third persons without actual notice thereof "as to all such indebtedness and future advances from the time the mortgage . . . is filed for record."[22] This opinion reveals to the student, for the first time, "the common law distinction long drawn between mortgages of this kind which are 'obligatory' and those in which they are merely 'optional'."[23] But nothing in the opinion or in the notes that follow it suggests the differing judicial views as to the effect of "constructive" (as distinguished from "actual") notice of an "intervening" lien upon the priority of a mortgage with respect to further advances.[24] Nor is there any clue to the well-settled rule that a mortgage securing "optional" future advances has priority with respect to all advances, without regard to notice of "intervening" liens, if the mortgage is security for a publicly held bond issue.[25]

Other important topics which are either omitted or treated in an inadequate manner in part two of *Land Finance Law* include the following: protection of the equitable right to redeem in cases where a land security transaction is disguised as an absolute conveyance or a so-called "conditional sale;"[26] conflicting priorities of land security claimants and chattel security claimants in fixtures under article 9 of the Uniform Commercial Code;[27] the measure of damages when a mortgage holder recovers in an action for waste,[28] and the judicial standards applied when the mortgage holder seeks to enjoin waste;[29] the

19. *Id.* § 118.
20. Ch. 5, section B, pp. 618-29.
21. Silver Waters Corp. v. Murphy, 177 So. 2d 897 (Fla. App. 1965).
22. *Id.*, in LAND FINANCE LAW at 620.
23. FLA. STAT. § 697.04.
24. *Compare* Ladue v. Detroit & Milwaukee Railroad Co., 13 Mich. 380, 87 Am. Dec. 759 (1865), with Ackerman v. Hunsicker, 85 N.Y. 43, 39 Am. Rep. 21 (1881). The weight of authority is in accord with the *Ackerman* case, requiring actual notice. OSBORNE, § 119.
25. *See, e.g.*, Landers-Morrison-Christenson Co. v. Ambassador Holding Co., 171 Minn. 445, 214 N.W. 503 (1927). *See generally* OSBORNE § 123.
26. The only cases in *Land Finance Law* involving a disguised security transaction are Smith v. Shattls, 66 N.J. Super. 430, 169 A.2d 503 (App. Div. 1961), *reprinted at* p. 770, and Herrmann v. Churchill, 235 Ore. 327, 385 P.2d 190 (1963), *reprinted at* p. 781. In neither case did the court discuss judicial standards for determining whether the transaction should be treated as a mortgage.
27. Holland Furnace Co. v. Trumbull Savings & Loan Co., 135 Ohio St. 48, 19 N.E.2d 273 (1939), *reprinted in Land Finance Law* at p. 624, is obviously not an adequate treatment of the problem under article 9 of the U.C.C. Perhaps the lack of material on this point is to be explained by the pending revision of the fixture sections of the U.C.C.
28. *Compare* Byrom v. Chapin, 113 Mass. 308 (1873), *with* Kircher v. Schalk, 39 N.J.L. 335 (Sup. Ct. 1877) and Schalk v. Kingsley, 42 N.J.L. 32 (Sup. Ct. 1880). *See generally* OSBORNE, §§ 128-130.
29. *Compare* Williams v. Chicago Exhibition Co., 188 Ill. 19, 58 N.E. 611 (1900), *with* Fidelity Trust Co. v. Hoboken & Manhattan R. Co., 71 N.J. Eq. 14, 63 A. 273 (Ch. 1906). *See generally* OSBORNE, § 134.

effect of various kinds of reference in a negotiable note to the mortgage securing it;[30] the effect of charging "points" or "discounts" under usury statutes;[31] the different legal effects of a transfer of mortgaged land to a grantee who "assumes" the mortgage and to a grantee who merely takes the land "subject to" the mortgage;[32] the different legal results, with respect to cases where there is a break in the "chain of assumptions," of treating the mortgage holder as a third party beneficiary as opposed to giving him only a "derivative right" to enforce the grantor's contract rights against the "assuming grantee;"[33] the distinction, still extant in many states, between an "executed" and an "executory" release of the equity of redemption to the mortgagee[34] and related problems with respect to the validity of such releases;[35] foreclosure of mortgages by judicial sale after equitable suit;[36] the constitutionality of out-of-court sales

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30. *See* OSBORNE, §§ 231-32.

31. Treatment of usury and related problems is quite widely scattered in *Land Finance Law*. *See, e.g.* Equitable Life Assurance Society v. Scali, 38 Ill. 2d 544, 232 N.E.2d 712 (1967), *reprinted at* p. 654; Noakes v. Rice, [1902] A.C. 24 (House of Lords); *reprinted at* p. 668; materials at pp. 672-78; Thomassen v. Carr, 250 Cal. App. 2d 341, 58 Cal. Rptr. 297 (1967), *reprinted at* p. 922; and Gelber v. Kugel's Tavern, Inc., 10 N.J. 191, 89 A.2d 654 (1952), *reprinted at* p. 927.

32. The treatment of this problem in Seventeenth and Locust Street Corp. v. Montcalm Corp., 54 F.2d 42 (3d Cir. 1931), *reprinted in Land Finance Law* at p. 678 is quite inadequate. The decision purports to be based on a Pennsylvania statute of 1878 "which provides in substance that a grantee of real estate bound by mortgage or other incumbrance, shall not be personally liable for the payment of the same, unless he shall, by an agreement in writing, have expressly assumed a personal liability therefor, or there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability." This statute, even assuming it had been consistently and literally applied in Pennsylvania, would give students a misleading idea of the state of the law on this point in the United States, since the Pennsylvania statute "further provides that the right to enforce such [personal] liability does not enure to any person other than the person with whom such agreement is made, nor shall such liability continue after the said grantee has bona fide parted with the incumbered property, unless he shall have expressly assumed such continuing liability." But the Third Circuit Court of Appeals misconstrued the Pennsylvania law in the *Montcalm Corp.* case, *supra.* By 1894 the Pennsylvania Supreme Court had decided that the 1878 statute was intended to protect the grantee from suit by the mortgagee, but not by his grantor, where the conveyance was expressly made "under and subject to the mortgage" but without an express assumption of personal liability. Even the grantee's protection from suit by the mortgagee was destroyed by an assignment to the mortgagee of the grantor's right of action against the grantee. Having thus practically decided that the 1878 statute represented a mere codification of the pre-existing Pennsylvania law in this respect, the court subsequently proceeded to destroy the effect of the statute still further by allowing the mortgagee to sue in the name of the grantor ("to the use of" the mortgagee) when the grantee had expressly assumed the mortgage debt. The only force finally given to the statute by the Pennsylvania courts, therefore, was to prevent the mortgagee from suing in his own name as plaintiff. *See* Note, 84 U. PA. L. REV. 909 (1936).

33. *Compare, e.g.*, Schneider v. Ferrigno, 110 Conn. 86, 147 A. 303 (1929) (effect of break in the chain of "assumptions" where mortgagee is regarded as a third party beneficiary), *with* Ward v. De Oca, 120 Cal. 102, 52 P. 130 (1898) (same where mortgagee's rights are regarded as derivative only). *See generally* OSBORNE, § 265.

34. *See, e.g.*, Holden Land & Live Stock Co. v. Interstate Trading Co., 87 Kan. 221, 123 P. 733 (1912). *See generally* OSBORNE § 100. The distinction is not mentioned in Smith v. Shattls, 66 N.J. Super. 430, 169 A.2d 503 (App. Div. 1961), *reprinted in Land Finance Law* at p. 770.

35. *See, e.g.*, Peugh v. Davis, 96 U.S. 332 (1877); De Martin v. Phelan, 115 Cal. 538, 47 P. 356 (1897). *See generally* OSBORNE § 100.

36. Practically all the cases in chapter 7, section C (Foreclosure by Sale: Trust Deeds

under a power of sale without personal notice to the mortgagor and the holders of junior interests;[37] the doctrine of sale in the inverse order of alienation in cases where a tract subject to a blanket mortgage has been subdivided and conveyed to different grantees;[38] the special rules as to priority of purchase money mortgages;[39] the vulnerability of "equitable mortgages" to attack by a trustee in bankruptcy of the mortgagor;[40] and equitable redemption from the mortgage.[41]

Chapter 8, entitled Mortgages and Monetary Policy, includes an interesting set of materials dealing with the condition of the mortgage markets during the latter half of the present decade and certain proposals for "bolstering the mortgage instrument during periods of monetary restraint,"[42] including variable interest rate plans. I think, however, that chapter 8 might better have been placed after chapter 3 (The Banking Institutions as Mortgage Lenders), since it bears no very close relation to the more technical treatment of mortgage law to be found in chapters 4 through 7.

Part three of *Land Finance Law*, entitled Structuring the Real Estate Transaction, includes chapters dealing with "Some Tax Aspects of Leasing and Mortgaging," "The Lease as a Finance Device," "Landlord and Tenant: The Shopping Center," and "Public Sale of Real Estate Securities." At first glance, these topics would appear to be only loosely related, but the relationship is reasonably clear in light of the "Astromart Problem" set out at pages 995-96 of the book. However, I do not think that part three, standing alone, provides sufficient material for a course on business finance. If it were to be used in such a course, it would have to be extensively supplemented, especially with tax materials. On the other hand, it could well be used in a course which also covered the mortgage materials in part two. This would permit an interesting comparison of the mortgage and the lease as financing devices.

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and Mortgages) and section D (Conduct of Sale) deal with foreclosure by out-of-court sale under a power of sale in the mortgage or trust deed. There is no consideration of the difficult problems that may arise in determining who should be joined as plaintiffs and who should be joined as defendants, the effect of recording statutes and the doctrine of lis pendens, joinder of senior lienholders and adverse claimants, or the effect of failing to join a junior lienholder. *See generally* OSBORNE §§ 319-24.

37. *Cf.* Schroeder v. New York, 371 U.S. 208 (1962); Mullane v. Hanover Bank, 339 U.S. 306 (1950).

38. This is mentioned but not discussed in Bryson v. Newtown Real Estate & Development Corp., 153 Conn. 267, 216 A.2d 176 (1965), *reprinted in Land Finance Law* at p. 836. For a good discussion, *see* OSBORNE §§ 287-90.

39. *See* OSBORNE § 213.

40. Pagenhardt v. Walsh, 250 Md. 333, 243 A.2d 494 (1968), *reprinted in Land Finance Law* at p. 845, is not adequate for the purpose, since it ignores the applicability of section 60 of the Bankruptcy Act, 11 U.S.C. § 96 (1965), to equitable mortgages.

41. First National Bank & Trust Co. v. MacGarvie, 22 N.J. 539, 126 A.2d 880 (1956), *reprinted in Land Finance Law* at p. 882, discusses the major differences between equitable redemption from the mortgage and statutory redemption from foreclosure sale. But a number of important problems in connection with equitable redemption—*e.g.*, the effect of redemption by junior lienholders—are completely ignored. *See generally* OSBORNE §§ 302-06.

42. Ch. 8, section B, pp. 908-21.

Even if part three were to be used in combination with part two, however, I think it has some deficiencies. For example, the discussion of the tax treatment of depreciation in chapter 10 does not really give the student a clear picture of the way in which mortgage financing enables the real estate investor to achieve the advantages of "leverage"—i.e., to put up only a small percentage of the cost of the real estate and obtain the dual benefits of (1) annual depreciation figured on the full value of the real estate when purchased and (2) the appreciation in value of the real estate.[43] In recent years, of course, appreciation in value—which accrues entirely to the equity investor—has generally been the rule because of the rising value of land and the fact that well-maintained buildings have a virtually indefinite life. Putting these elements together means that for a relatively small cash investment the investor not only stands to benefit from future appreciation but also obtains a large cash flow because operating income is tax-sheltered by depreciation deductions. To the extent that this cash flow goes to amortize the mortgage, the investor's equity increases, so that his cash gain on an ultimate sale will be larger. The result of all this can be an extraordinary return on the investment.

Moreover, in dealing with the tax advantages of leasing in chapter 10, Professor Lefcoe refers only to deductions for depreciation. There is no discussion of the fact that rent is a deductible business expense if the lessee uses the real estate for business purposes.[44] Nor is there any real discussion of the possibility that a lease with option to purchase may be treated for tax purposes as an installment purchase,[45] with the rent non-deductible because it is considered to be installments of the purchase price.[46] This significant point is barely mentioned in passing, in a discussion of the basic features of lease financing in chapter 11, along with a very brief suggestion on how to avoid treatment of the lease as an installment purchase.[47] There is no mention in either chapter 10 or chapter 11 of the fact that, if the lease is treated as an installment purchase, the lessee in all probability may either capitalize the installment payments and take deductions in the form of depreciation or deduct part of each payment as interest expense.[48] Nor is there any discussion of the lessee's right to depreciate

43. Depreciation deductions are discussed in ch. 1 at pp. 15-18 and 257-260, and ch. 10 at pp. 998-1014, but there is no discussion of the "leverage" effect. The only discussion of land value appreciation is in ch. 1, section A, at pp. 11-12, suggesting that appreciation in slum areas may not be sufficient to overcome the effect of persistent inflation in the general price level.

44. INT. REV. CODE of 1954, § 162(a)(3).

45. *See, e.g.*, Oesterreich v. Commissioner, 226 F.2d 798 (9th Cir. 1955).

46. The law permits rentals to be deducted only if they are paid for the use of property to which the taxpayer has not taken or is not taking title, or in which he has no equity. INT. REV. CODE of 1954, § 162.

47. P. 1037.

48. The Revenue Act of 1964, § 224, amended INT. REV. CODE of 1954 by adding a new § 483, which requires that a portion of the purchase price in an installment or deferred sale be treated as unstated interest where (1) the sale is of a capital asset or depreciable property, (2) the sales price exceeds $3,000, and (3) the contract does not state a minimum interest rate set by the IRS. It would seem that this provision will apply to a lease agreement which the IRS or a court determines to be an installment purchase. In one case

the value of improvements he has placed on the leased land over the useful life of such improvements or the lease period, whichever is shorter;[49] nor any discussion of the effect of renewal options[50] or purchase options on this right.[51]

The discussion of leasehold mortgages in chapter 11 is excellent. However, some insight into the sources of leasehold mortgage financing would have been welcome.[52] Chapter 12, dealing with shopping center problems, is well-done and interesting. However, if part three of *Land Finance Law* is used in a course designed to cover both part two and part three, I suspect that something may have to be left out in order to fit the course into the time allotted to it in the curriculum. If so, I would be inclined to omit chapter 12. The material in chapter 12 is related only indirectly to the main theme of land finance, and might better be dealt with in a comprehensive course on landlord-tenant problems. This is particularly true of the shopping center lease which occupies thirty-seven pages in a chapter totalling fifty-two pages. On the other hand, if a full-scale comparison of mortgage financing and lease financing is intended, chapter 12 should include adequate materials on the lessor's remedies in the event of default by the lessee, like those in Professor Dunham's casebook, *Modern Real Estate Transactions*.[53]

Chapter 13, Public Sale of Real Estate Securities, is excellent as far as it goes. It deals with syndication of equity investments in real estate and state regulation of real estate syndications, public sales of junior mortgages to investors, "cash flow" real estate corporations, federal securities regulations as they apply to real estate securities, investors' private remedies for fraud and mismanagement, and a proposed federally chartered syndication to promote low and moderate income housing (National Housing Partnerships). Strangely, however, there is no discussion of real estate investment trusts as public investment vehicles.[54]

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decided before the 1964 Revenue Act went into effect, it was held that where a lease is treated as a sale, part of the price may be treated as deductible interest. Commissioner v. Wilshire Holding Corp., 244 F.2d 904 (9th Cir. 1956).

49. Treas. Reg. § 1.167(a)-4 (1961).

50. INT. REV. CODE of 1954, § 178.

51. There is no statutory provision similar to INT. REV. CODE of 1954, § 178, which applies to renewal options, but the "renewal principle" of § 178 has been used by the Tax Court in a situation involving a purchase option. The court held that if there is a reasonable probability that the lessee will exercise his option to buy, then the improvements must be amortized over their useful lives rather than over the lease term. Moss, 38 T.C. 605 (1962).

52. It would appear that life insurance companies are the prime source of leasehold mortgage financing. Other lenders on leasehold mortgage security include national commercial banks and federal savings and loan associations, and in some states, state-chartered commercial banks and savings and loan associations, as well as mutual savings banks.

53. I do not regard as adequate for the purposes of a full-scale comparison the shopping center lease clause on defaults and remedies and the accompanying footnotes, set out at pp. 1106-09 of *Land Finance Law*.

54. Real estate investment trusts are unincorporated associations that operate in the business trust form. Most of them are "equity" trusts which invest directly in real estate and derive their income from rents. Others are "mortgage" trusts specifically organized to deal in mortgages and debt paper generally. "Mortgage" trusts make loans for construction, development, and long-term real estate financing. Their income is derived primarily from in-

To summarize: *Land Finance Law* is an excellent course book, although it is too long to be covered in the time likely to be allotted to a course in land finance law. Neither part one nor part three, standing alone, will provide enough material for a separate course without extensive supplementation. The book can provide the basis for a good course in land finance law within the confines of the usual time allocation if either part one or part three is omitted. And it would also provide the nucleus for a more traditional course on mortgage law if the teacher were to use part two alone and supplement it with additional materials. I intend to use the book again next semester in a land finance law course of forty-five classroom hours, in which I will omit almost all of part one.

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terest earned and discounts received. Some real estate investment trusts engage in both "equity" and "mortgage" transactions. Under the Real Estate Investment Trust Act of 1960, INT. REV. CODE §§ 856-58, qualified real estate investment trusts can bet special tax treatment whereby they pay no federal income or capital gains tax on income or gains which they distribute to their shareholders, provided they distribute annually at least 90% of their ordinary taxable income.