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George Lefcoe, Land Finance Law: A Symposium Review

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THEORISTS and students of the financial community will find Professor Lefcoe's book a spellbinding kaleidoscopic adventure in a new and exciting dimension. Certainly, as the author suggests in his preface, the 1200 page volume is far from being a conventional casebook of mortgage law. Indeed, the volume is not so much a lawbook as a work of artistic creation, a collage of materials assembled, like Renais' *Last Year at Marienbad*, with the feel of an impressionistic artist rather than a pedestrian effort at selecting and arranging materials according to substance, sequence and form. The book obviously has been put together for the advanced student, not the aficionado, and assumes an existing knowledge in depth of the subjects discussed. Thus the book is designed not so much to instruct or inform as to stimulate idea development, at the same time forcing the mind to formulate the necessary connective tissues of relevance. This is achieved by frequent contrapuntal entries setting forth and dissecting a problem followed in most cases by a variety of tentative solutions which provide take-off points for further creative effort.

On the other hand, the nuts and bolts lawyer, faced typically with a highly practical problem of an immediate controversy or of drawing or interpreting a specific instrument, may find his mind stretched but the practical gleanings somewhat thin. This lawyer also may find that his pleasant consciousness of the kaleidoscopic ambience of part one has, at least in the first chapters of part two, been displaced by a feeling of spottiness and disarray. The presence of more lead-in materials and clues to transition, for example along the more traditional lines of the chapter 7 opening in contrast to the opening gambit of chapter 6, would be welcomed. While the organization and selection of materials here scarcely could be faulted, certain tip-offs to the organizational relevancies and expected extrapolations generally are appreciated even by the sophisticated before biting into the next, seemingly unrelated chunk.

Part one, a challenging collage of materials on slum conditions and ghetto financing certainly is relevant to the problems of the day. This part has more the overtones of a socio-economic study than of a law review, the format contrasting in this respect with later parts of the book. The social and economic evidence amassed to lay the foundation for new approaches to structural change has been unerringly selected and while emphasis is placed on the role of legislation, it points up the still powerful influence of the courts in shaping conduct and the law. Part one hits hard at the difference in the housing field between legal and legislative action, and real action.

Tokenism is uncovered and challenged, often with a nice sense of irony. Juxtaposed to slices-of-life-in-the-slums vignettes, for example, are found recondite statements of congressional intent taken from preambles to several of the major federal housing bills. Certainly, as the author appears to intend, the

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collation suggests the dilemmas inherent in legislative remedies to this somber problem. However, while it is true that attempted solutions to housing the poor so far no doubt have constituted a choice among evils, with some evils being more evil than others, the positivist is bound to believe, or at least hope, that the solution with the fewest disadvantages might in the long run be a good or at least a partial solution. While the case for interest and rent supplements, for example, may have its shortcomings, the device overcomes many of the practical and ideological problems of the past, and, therefore, while it is not by any means a complete or final solution, properly implemented it can be assessed as a good one for at least a part of the problem.

Passing to the part two discussion of institutional mortgage lenders, one still is conscious and appreciative of the kaleidoscopic approach, but begins to feel the need for more focus and for more of the traditional adhesives. Also, one cannot help but wish that publication of the book had been delayed for a few months to have allowed the author to include reference to several recent developments of high significance in this area and to pare away some of the references which have lost their relevancy.

A wealth of material, for example, is included on the share account nature of savings in the nation's savings and loan institutions. In perhaps the most significant single amendment to the federal savings and loan statutes in more than a decade, the Housing and Urban Development Act of 1968¹ provided means for converting federal associations into modern savings institutions offering deposits tailored to savers' needs and promising at the time the account is opened to pay interest at not less than a stated rate. Within three months of the effective date, over two-thirds of all federal associations had made the change with the remaining one-third expected to do so shortly. Under the new statute, savings depositors, in the event of liquidation of the savings institution, are given first priority along with outside creditors as to payment of their claims. Thus, much of the relevance of the share account discussion has disappeared. Similar structural changes also have occurred with respect to state-chartered savings associations. Since the date of the federal enactment, the legislatures of at least two-thirds of the states have followed suit. Thus, many of the materials which contrast the savings and loan business in this respect with other businesses, and the contrasts made between the mutual and capital stock segments of the savings and loan business now have become largely historical.

This section of the book was written before the issuance of two recent major studies, both of which underscore and suggest answers to the need for practical meaningful solutions to the problems of providing adequate housing and the means of financing this need. Both the report of the Commission on

1. Housing and Urban Development Act of 1968, Pub. L. No. 90-448.

Mortgage Interest Rates of August 1969² and the Study of the Savings and Loan Industry prepared under the direction of Irwin Friend, September 1969,³ represent major studies which are bound to shape action in this area for some time to come. Another significant study "The Future of Thrift Institutions," a study of diversification versus specialization, by Leo Grebler, June 1969,⁴ would have provided valuable additional source material for the text, but again the study came along too late.

While the report of the Commission contains somewhat general recommendations to increase the amount of available mortgage credit and reduce its cost, its emphasis on action is bound to produce significant results. Among the recommendations are the controlling of inflation, the need to achieve a better balance of fiscal and monetary policies, the planning and coordination of programs assisting low and moderate income families into decent housing and the freeing of the needed resources for use in homebuilding. The conclusion is that the priority given to development of homesites and housing in the nation's objectives, long promised, but never established in fact, must now be tackled directly and in earnest. Quoting from the Commission's report: "Words, studies, goals are all in ample supply. The need now is for action." Much the same spirit is noted in the Friend Report, which follows with specific recommendations for the development of a specialized and adequate money supply: The encouragement of mortgage capital by better rewarding thrift, the establishment of geographic priorities to correct the imbalance of available mortgage funds, greater diversification of thrift institution investment powers, the expedition of state-wide lending, encouragement of economies of scale, and the creation of saleable mortgage pools, are among the recommendations.

The author occasionally poses problems and questions to which the nature of the expected answers appears to be somewhat obscure. Two cases involving demands by a member to inspect the books and records of a savings institution, one successful and one not, are set forth with a preliminary question as to which decision would tend more to promote a higher rate of growth and how the lending practices of the association might be affected. Arguments, of course, may be arrayed on both sides, but the minor and variable results in either case would not appear to be of great significance in the context of the question.

The material under the heading, The Drafting of the Long Term Mortgage, is excellent, if highly selective. The thorough consideration of mortgage acceleration clauses is extremely helpful in an area in which there has been

2. Report of the Commission on Mortgage Interest Rates to the President of the United States and to the Congress, August, 1969.

3. Friend, Summary and Recommendations, Excerpted from Study of the Savings and Loan Industry, September, 1969. The complete Study, consisting of 20 separate monographs in 4 volumes, currently is in the process of publication.

4. Grebler, The Future of Thrift Institutions, a Study of Diversification Versus Specialization, June, 1969, Joint Savings and Loan and Mutual Savings Bank Exchange Groups.

widespread misunderstanding even among experienced mortgage attorneys. However, one would like to ask the author his reasons for posing the question set forth on page 682, *i.e.*, which of the major institutional lenders, life insurance companies, mutual banks, savings associations or commercial banks, would find the acceleration clause most important? While asset mix, loan maturities, cyclical or continuous obligations and the state of the economy at the moment might suggest more significant short-run advantages to one or another, it would appear that use of such clauses would be an equally important tool in the long run to all of the named types of lenders.

While the author's omission of discussion and materials relative to article 9 of the Uniform Commercial Code in this section may have been deliberate in view of the forthcoming revision of that article by the Commissioners on Uniform State Laws, one does note and remark upon its absence because of its relevancy in a number of priority matters.

In the discussion of the secondary mortgage market, the absence of consideration of the Housing and Urban Development Act of 1968, due to the timing of the publication, as well as the absence of some of the suggestions of the Commission and Friend reports, seem notable omissions. The nuts and bolts lawyer, however, will be particularly appreciative of the chapters in part two relating to loan default and foreclosure. These chapters read more like a conventional casebook with comment and illustrative cases following in meaningful progression. Here the material varies from general to very specific, with liberal hornbook quotations in chapter 7 as to how to foreclose. Again, reform enthusiasts will welcome the final materials which suggest tentative approaches to the problem as a base for further refinement.

The materials on interest escalation clauses presented in this chapter constitute one of the most helpful parts of the book. Again, one finds in juxtaposition both praise and polemic, with news slices of mass borrower revolts. The material suggests an answer along the lines indicated in the Grebler report, namely that while such clauses have an important place in commercial real estate transactions, they provide no real answer to the earnings squeeze problem of financial institutions in the case of residential lending. In this chapter, the author brings out some extremely interesting discussions of the monetary correction idea used in Brazil and other inflation-ridden countries of Latin America. While it may appear that such a solution in the United States currently is more theoretical than practical, a study of the inflation chart and its viciousness demonstrates that some current thinking about this concept is not untimely or wasted.

Part three covering commercial real estate transactions also will be viewed with considerable comfort by the practicing lawyer. Here we encounter a progressive analysis plus illustrative forms in the relatively new field of leasing as a financial device. The discussion here is meaty on both the "whys" and "hows" of doing it. The material on shopping center financing is of particular value as

is the discussion of aspects of taxation, with depreciation being treated importantly and in some detail.

The final section on state and federal regulation of securities is one that this reviewer had anticipated throughout earlier sections of the book, and it is suggested it could have been more strongly introduced, perhaps in piecemeal form, as an adjunct to several of the earlier chapters, particularly the chapter on institutional mortgage lenders. While it is true that the text of the *Tcherepnin v. Knight*⁵ securities case was set out in chapter 3, a more complete blueprint of its significance might have served the immediate purpose as well as laid a foundation for consideration in a more general context later. Since the final material on the securities laws is somewhat narrow and confined to loans, such earlier introduction in different contexts would not have rendered the latter redundant. Also, there perhaps could have been more expansion in the final section to include cases and other materials relating to capital-raising instruments in accumulating the institutional pools of capital necessary to make the loans.

The 1200 pages add up to an exercise in intellectual agility—and stamina—and time—probably possessed in greater degree by the law student of today than the practicing lawyer. The latter, however, once exposed to the kaleidoscope treatment, is lured into a full realization of the change and ferment affecting every segment of the financial world. Unquestionably, he will gain new perspective and what amounts to a mandate to reexamine and perhaps change his own preconceptions and assumptions. Certainly he will be more enlightened, satisfied—and productive. Thus, it is a book every lawyer in finance or real estate as well as students and theoreticians should find time to study. Having done so, he then should arrange through Professor Lefcoe to secure credit for the course.

5. *Tcherepnin v. Knight*, 389 U.S. 332 (1967).

