

# REAL ESTATE FINANCE LAW

George E. Osborne  
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*Hornbook Series*



# REAL ESTATE FINANCE LAW

By

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Brigham Young University, 1979–

A Successor to  
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To  
Judy and Marjorie

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## PREFACE

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The task of revising the work of a scholar of George Osborne's stature and reputation is a humbling, even intimidating one. Osborne's Handbook on the Law of Mortgages has been widely regarded as one of the finest works in the hornbook series. First published in 1948 and revised by the author in 1970, it has been relied upon with great frequency by courts and lawyers.

During the period since the book was first printed, the law of real estate finance, once thought staid and dull, has burgeoned. New mortgage forms and techniques have developed, new legal issues have arisen, and a new awareness of the interests of mortgagors as consumers has emerged. Statutes and regulations have multiplied as long-standing lenders' practices have come under question. The work of lawyers who represent borrowers and lenders continues to become increasingly complex; the old issues remain, and new ones are constantly being added. The need for a new edition of the Handbook on the Law of Mortgages was clear.

Our effort has been to retain the best of the previous editions while making the needed additions. To accomplish this within a reasonable span of pages, some editing of Osborne's previous material has been necessary. His meticulous treatment of the historical development of mortgage law, for example, has been drastically shortened. The previous editions are widely available, and those who need the greater depth on such topics can find it in them. We have tried to retain and update the best of Osborne's work which has modern relevance. Still found in this new edition, albeit with some revision and reorganization, is his superb treatment of such topics as the absolute deed as mortgage, the mortgagee in possession, the lien, title, and intermediate theories, receiverships, and transfers by the mortgagor.

At the same time, a large number of traditional topics have been substantially or completely rewritten to provide greater clarity and to take recent developments into account. These include assignments and transfers by the mortgagee, the installment land contract, the effect of defective exercise of a power of sale, antideficiency statutes, and the deed in lieu of foreclosure.

Finally, we have added numerous topics which were barely mentioned or entirely uncovered in previous editions, often because they



## PREFACE

were simply not relevant issues prior to recent years. We have covered the constitutionality of power of sale foreclosure and mechanics' lien statutes. We have examined such current issues in mortgage drafting as due-on clauses, escrow accounts for taxes and insurance, prepayment fees, late charges, and rights to eminent domain and casualty insurance proceeds. We have dealt with the increasing federalization of mortgage law, as it is reflected in government agency regulation of lenders, prohibitions on lending discrimination, the strengthening of federally-sponsored mortgage market support institutions, and the pre-emption of state mortgage law. We have described the problems associated with the financing of condominiums and cooperative apartments, and we have attempted to analyze the special problems of construction lending.

We hope the present edition represents an optimum combination of old and new, with the inevitable compromises and deletions made on the wisest possible basis. For those who might have wished for a more thorough treatment of one topic or another, our apology must be based on the inherent limitations of a one-volume treatise. Since neither of us worked personally with George Osborne, we can only hope, but cannot be certain, that our work would have met with his approval. For us, the project has been a pleasant and productive experience which has greatly strengthened our mutual friendship and respect.

Much of our work has been done at the J. Reuben Clark Law School at Brigham Young University, Provo, Utah. Both of us have served on the BYU faculty, although neither is a permanent member of that faculty as of the publication date of this book. Our working conditions there have been virtually ideal, with excellent library and staff support. Since BYU's name does not appear on the title page, we feel a special obligation to thank the administration and staff there, as well as our faculty colleagues at BYU, for their support and encouragement. We also express our gratitude to the University of Missouri-Columbia and University of Washington Schools of Law for their significant support.

We have been blessed with research assistants of unusual caliber. They include Karen M. Johnson, N. Gregory Smith, Myrna South, and Grant Walker. The mistakes which may be found by readers must, of course, be laid at our feet and not theirs, but their help was invaluable. Many secretaries have made major contributions to the book, but special thanks must go to Marie Jensen of Brigham Young University for her superb efforts.