Book Review: A Treatise on Mortgages, By William F. Walsh

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BOOK REVIEWS


Professor Walsh's text on mortgages is a good book that contains some glaring contradictions—but it is a good book nevertheless. It will not be particularly helpful to students, nor to the practitioner who is himself familiar with the field, but it will be invaluable as an aid to the practitioner who has known something about the subject and who wishes to brush up on occasion. The footnotes are especially good.1 The detailed criticism of specific cases, many of them New York cases, are pertinent. The sections on mortgagee in possession, and the chapter on foreclosures by sale set out excellent short statements of the problems concerned. Nevertheless, it is evident that Professor Walsh has not made up his mind whether he wants to be realistic or whether he wishes to remain safely on the orthodox side when he is presenting his many analyses and suggestions. And that, it is obvious, is a very serious defect.

Anyone who pretends to be realistic in his criticisms must compromise to the extent that he is willing to recognize the use of traditional expressions and phrases by the courts, and in no other field of the law are there so many traditional expressions in common usage as in the field of mortgage law: "equitable" and "legal title," "legal lien," "equity of redemption," "merger," "suits to redeem," "clogging the equity of redemption" and many others. The realist will take them for what they are, figures of speech, that may help the courts in their efforts toward articulation, but figures of speech, after all, which the courts may use in describing any one of any number of concrete situations.

In one chapter of his book Professor Walsh becomes vehement in his contentions that the interest of the mortgagee is a security interest only. He says (page 93), "It is high time that the courts in the so-called common law states should recognize the actual rights of mortgagor and mortgagee under law and equity combined; that the mortgagor is actually the owner with all rights of ownership in equity, and the mortgagee has only a right of security incident to the mortgage debt and going with the debt as personal property; that the continuance of the old theory that the mortgagee has the legal title, before or after default, is a survival having no relation to modern conditions and is entirely unnecessary to the mortgagee's only right of substance, viz. his right of security." And yet, in a previous chapter (chapter four, beginning on page 74) he has set out the traditional statement that a mortgage is an executed transaction, that legal consideration is not requisite, and he takes to task the New York courts that have held a bond and mortgage created by gift void for want of consideration. On several occasions the author re-emphasizes his position with respect to the precise function of a real property mortgage as a security device, and he is constantly pointing out that there is little difference today in the tabulation of results between the decisions in title theory and in lien theory states, but at the same time he forgets his realistic position to become much concerned over the abstract problem as to whether the mortgage lien is a "legal lien" or an "equitable lien," and apparently takes quite seriously his presentation of the traditional explanation of merger.

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1 See for example footnotes 58 and 59, pp. 321 et seq., wherein the author describes the recent state emergency legislation.
It is purely academic to classify the security interest of the mortgagee as a legal lien or an equitable lien. According to the text (page 31), "There is no doubt whatever that a conveyance by the mortgagor to a purchaser for value without notice will not affect the right of the mortgagee. This establishes definitely that the mortgagee's interest in the land, whether it be called a 'lien,' 'security' or otherwise, is a legal and not an equitable interest." To the modern lawyer or student that statement is misleading, it tells him nothing. The author can only have in mind somethings of an introduction to the cases under the recording act raising the question of the amount of protection to be given to mortgagees or grantees against claimants under subsequently executed conveyances. It is submitted here that it is virtually impossible to conceive of the courts' positions in these cases where there are no recording acts, except as illustrated in the English cases, where the execution and delivery of a mortgage or any other conveyance was coupled with the handing over of the "title deeds" leaving it improbable that any third person could be in the position of a purchaser without notice.

To illustrate his contention that under the lien theory the mortgage is a "legal interest" which is not cut off by a subsequent bona fide purchase the author states with approval Professor Durfee's explanation of the well known Wisconsin case, Falass v. Pierce. Because the court decided in that case that the holder of the first executed mortgage was protected against a claimant through a subsequent conveyance, the author is willing to admit with Professor Durfee that the decision proves that the mortgage was a legal lien given its natural priority as against a subsequent legal lien not protected by the recording act. It is submitted that the court in that case was attempting to work out relief among the parties to the litigation as the legislature seemed to have prescribed, that the court was concerned primarily with a problem of construction, and that, had it not felt that the act seemed to have covered this case literally, it would have decided in favor of the second claimant.

What the student or the practitioner wants to know about security transactions where a real property mortgage is given to secure a loan is not whether the security interest is a legal or an equitable interest. What he wants to know are questions like these: What must the creditor do to reach his security in the event of a default? What protection does the creditor get before a default by the borrower? What "mechanical device" does the owner-borrower have to use to effect a transfer of his interest to another? There are dozens of questions having to do with attempted discharges of the obligations for which the security is given, extensions of time, execution of new instruments, the attempts of creditors of the interested parties to reach the various interest in satisfaction of their claims. All of them must be reduced to their concrete terms before the court can give an answer. The study of mortgages is a study of procedure and through procedure to a tabulation of rights and duties. The catch words of tradition have little effect upon actual dispositions in concrete cases.

The title of the book is "A Treatise on Mortgages." Like the usual text on the subject it deals almost exclusively with real property mortgages. Perhaps that is as it should be. Chattel mortgage problems are different from real property mortgage problems, not because the basis of the security in each case is physically different, but because each set of problems grows out of a different set of commercial transactions. But the author makes the usual exception. He devotes quite some time to a discussion of those cases having to do with "after acquired" property clauses, and all the cases are chattel mortgage cases.

2 30 Wis. 473 (1872). Cf. text, footnote 15, p. 133.
Students cannot use this book with a great deal of profit. Most students who resort to the use of texts to help them in their study are led to believe that they are acquiring much more than they actually get. No one can read Professor Walsh's book appreciatively without some understanding of concrete cases which present some specific problems that some courts have answered in the past or will have to answer in the future. The text may help him to find the cases, and it does shed a lot of light upon what courts have done, but to the average student and to the better than average student, who can not know enough about the concrete cases to raise any specific problems, this text or any other text is a useless crutch.

Vernon X. Miller.


Dean Miller has added a useful source of material in criminal law by writing the book under review. As it is, there is too little text material in this field. But it is difficult to find a better way of arranging the legal principles of criminal law in orderly fashion than by use of the Hornbook style as found in this book.

Fortunately, no attempt is made to mingle criminal procedure and substantive criminal law in this work. The idea some teachers advocate that substantive and adjective law should be taught together has always appeared to the writer as being the ideal way of creating extreme confusion in the mind of the student as to the fundamental principles of substantive law. The average student can grasp only a few principles of law at one time. Learning the principles of law is a slow process. If too many principles of law are presented to the student at one time, the result is a lack of knowledge of any of them. The last statement is a fundamental concept of pedagogy.

It is also gratifying to note that Dean Miller's book emphasizes the fundamental principles of criminal law rather than being an exposition of novel and unique situations found in exceptional cases which happen but once in a lifetime of practice. This approach seems proper in view of the fact that it seems to the writer the duty of the law teacher in the undergraduate law school is to expound the solid structure of the law to the student, leaving with him a foundation from which he may make excursions alone into the unusual fields of the subject or indulge in creative thought in those fields—if ever called upon to do so. The practicing lawyer can refresh his memory of these fundamental principles of criminal law by referring to this volume.

A complete text discussion of the material usually presented in a criminal law class will be found in this book. In addition the author has added chapters relating to The Criminal Act and Justification. These will be found of particular interest. The introductory chapter will be useful for the purpose of orientation for the beginning student. A table of law review articles cited in the book would have added to the value of the book by furnishing a source of collateral reading on the subject for the student.

The law student should resort to the text materials. This will aid him in two ways, first, the numerous principles of law found from a study of the cases will become arranged logically and orderly in his mind, and second, various parts of the class-room lecture or discussion might be cleared up by reading a more clarifying statement of the matter under discussion. The writer does not hesitate to recommend to his students a resort to texts as a necessary and helpful supplement to case-study and class-lecture. To criminal law students this new volume will be especially helpful.

J. Walter McKenna.