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A Treatise on Mortgages

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of cases pro and con, references to texts, law reviews and so on; at intervals there are what are virtually short essays on certain topics. E.g., the case of *Winston v. Westfeldt*⁵ is followed by a five-page "Note of *Lis Pendens*" which in turn is followed by a two-page "Note on Privity in Equity." This, to make the picture complete, is followed by ten "Problem Cases" covering nearly two pages. And then follows another principal case.

The reviewer has already expressed his high opinion of these notes as sources of information; he does not intend to derogate from that. Nor does he wish by the foregoing comments on casebooks in general to make any oblique imputations on the scholarship or integrity of this one; that should be abundantly clear. Still, it does not seem unfair or discourteous to ask: is this a casebook¹ at all? Or, since names don't matter, is it a well planned and adapted teaching tool? In most disciplines, selectivity counts; is it really true that in legal education we must substitute collectivity? No student taking a course in equity ever would or could avail himself of more than a half or a quarter of this material. Why should he (in several senses) be burdened with it all? Even the most callous professor is likely to wince a little when he requires the purchase of these two volumes for a course running (normally) three hours for one semester. Reference has been made to the detailed index and to an innovation in the form of a thirteen-page "Analytical Table of Contents." No doubt these will be greeted with enthusiasm—but do they smack of student use or suggest rather the complete reference work, for the desk of the practitioner and teacher? The only innovation that really seems to be based on the psychology of living students is the inclusion of illustrations, the subject matter ranging from Lord Eldon to the Salton Sea. This deserves hearty commendation.

The old-fashioned casebook may or may not be obsolete. We may or may not have discovered the need for a combined casebook, text and quizzer. Those are questions the prospective editor will have to decide for himself. But if he decides for the combination, let him produce it frankly. Let him write and print what is meant to be studied as though it really were meant to be read and not to be used as ballast. Let him not put in references so extensive as to discourage looking up any. Let him not use extended quotations to impart information he could more effectively and briefly give in his own words. If opinions are in point let him include his own if he have one. In short, let him abandon the behavior patterns of an aborigine trying to bring on rain and take up those of the scientist trying to use or devise materials in the most effective way to bring about some desired result.†

A TREATISE ON MORTGAGES. By William F. Walsh. Chicago: Callaghan. 1934 pp. xlv, 376.

THIS is a handbook on the legal doctrine about some of the more important real estate mortgage problems. The structure of the book is that of the orthodox law school course.¹ There are fifteen chapters which range, after a prologue on the history of mortgage theory, through "equitable mortgages," interests that may be mortgaged, the mortgage debt, rights and duties of the parties, priorities, discharge, redemption and so on to foreclosure, foreclosure sales, and power of sale mortgages. The author states in a foreword that his purpose is to "restate the

5. P. 21.

†Philip Mechem, Professor of Law, Iowa State University.

1. Compare, for example, PARKS, *CASES ON THE LAW OF MORTGAGES* (1926). Contrast STURGES, *CASES AND MATERIALS ON THE LAW OF CREDIT TRANSACTIONS* (1930) and HANNA, *CASES AND OTHER MATERIALS ON SECURITY* (1932).

fundamentals" of mortgage law in the light of the "merger" of law and equity and as revealed by history.² Though he recognizes that "no other branch of the law" can boast so much contrariety of decision and confusion of statement, he promises "finally to reconcile or to explain the many conflicting decisions and opposing theories." The book is to provide practicing lawyers with a "carefully developed and logical analysis of the law of mortgages as it is, in its historical perspective" and to be helpful to students as collateral reading.

How is all this accomplished? The author's method is, as his preface would indicate, in the absolutist tradition.³ What he offers is not an objective description of conflicting decisions with an analysis of their social, psychological, or economic bases but rather an exposition, with much effort at "reconciliation," of technical legal doctrine. His ideal is that of "logical consistency" and he obtains initial premises by the usual formula. From all the forked doctrine that abounds in the cases and older texts, he picks out certain symbols which, for reasons unexplained, he labels "fundamental." Symbols pointing in opposite directions he attacks with invective or relegates to footnotes as perversions.⁴ The basic assumption of the book is of course that "true" doctrine springs from the "nature" of a mortgage. This nature is revealed to the author in the fecund concept of "lien." All decisions that can be fitted into the ramifications of doctrine spun out of this concept are good. Other decisions that can be more easily fitted into doctrine spun out of "title" or "intermediate" theories are bad. Courts are castigated in strong language for having yielded to conflicting economic interests and contradictory social ideals.

This approach appears even in the opening chapter on the history of mortgage theory. A study of the tortuous course of judicial decision could have been used to show that there are mortgages and mortgages and natures and natures. Yet it is here used to show ineluctable revelation by equity of true nature. Not only does the author repeat again and again that the true nature of a mortgage is that it is "security" only, but he even suggests that the common law judges had recognized—though they often ignored—this true nature before the intervention of equity and that the chancellors were working from it when they began to grant relief to mortgagors because of fraud, accident, and mistake.⁵ This reaches an extreme when he chides Mr. Turner for intimating that the Chancellor in extending redemption to all cases was more concerned about expanding his jurisdiction than about the proper conception of mortgage.⁶ The Chancellor, like any normal person of his period, must have known that a mortgage was security only; the true nature of the mortgage relation just did not happen to be discussed in the earlier cases! Finally, by manipulation of well-chosen premises the author attempts to establish that "security" must mean "legal title" and "beneficial ownership" in the mortgagor and "legal lien" only in the mortgagee.

What liege service Professor Walsh can make weighted symbols like these perform is demonstrated throughout the rest of the book. An example typical of his argumentative technique is his discussion of the problem of who is to have the possession and fruits of the mortgaged premises pending foreclosure sale. To begin with, he suggests that the English courts in granting the possession and fruits to the mortgagee failed to recognize "the actualities of the mortgage relation."⁷ Later he finds it "quite evident that the recovery of possession by the mortgagee is in violation

2. p. iii.

3. For aught the book reveals the "realists" might never have written a line. That is the reviewer's apology for comments which to some may appear all too obvious.

4. See Chapter IX, notes 18 and 20, pp. 212, 214.

5. Pp. 6, 11.

6. P. 11, n. 30.

7. P. 17. All italics and comments in parentheses are inserted by the reviewer.

of the *spirit* and *purpose* of the *normal* mortgage relation."⁸ He minimizes the mortgagee's right to apply any rents he may collect to the debt and states that "it is quite absurd to revert to the discarded title theory merely to give the mortgagee a possession of little or no practical use to him in fact."⁹ His strictures on the "intermediate theory" are vehement. This compromise that puts "legal title" in the mortgagor before default and in the mortgagee thereafter is without support in *principle*, ignores the *actual rights* of the mortgagor and mortgagee and the *actual ownership* of the mortgagor, *indefensibly* combines two *utterly inconsistent doctrines*, and is a "survival having no relation to modern conditions"¹⁰ In sum:

"*Good sense* and *expediency* as well as *uniformity* and the recognition of the *actual law* as it is all unite in demanding that this 'legal title' doctrine be eliminated as completely outgrown and without significance today except to cause confusion and *positive injustice* since giving effect to it is *necessarily* in direct violation of the *fundamental character* of the mortgage relation as that of a secured loan."¹¹

To establish his thesis that nature's livery of seisin pending foreclosure sale is to the mortgagor, the author must struggle not only with the ejectment cases that begot the "title" and "intermediate" theories but also with four other varieties of hostile decision. There are the cases that allow the mortgagee (a) to collect rent from tenants of the mortgagor, (b) merely by adding a few words to the mortgage agreement to obtain possession any time he wants it, (c) to come into possession by means of a receiver, and (d) if he has obtained possession peaceably, but without valid foreclosure, to stay in until he is paid. Of these decisions at least the (b), (c), and (d) varieties are indigenous to so-called "lien" jurisdictions. How does the author overcome such obstacles? His efforts are worthy of textual criticism. First, the (a) decisions. These are assailed as "futile" and "stupid."

"It ought to be perfectly clear to anyone having any *real understanding* of what the *mortgage relation* is and has been since the latter part of the seventeenth century that it does not involve the *transfer of any beneficial interest* in the mortgaged property other than the *right of security*. . . . In the case of the prior tenant the collecting of the rent by the mortgagee as grantee of the reversion before enforcement of the mortgage for default is in direct violation of the *essence* of the transaction which is to give the mortgagee *security* and *security only*." . . . (But what is the mortgagee's "right of security"? Is not the question how much "beneficial interest" it should include? Why is collecting rent not "enforcement of the mortgage"? Where did this "essence" come from? Is it not strange to describe a wished-for-holding as of the "essence" when there are so many decisions to the contrary? What social policy, if any, is there behind "essence"?). . . . "In the case of the subsequent tenant it is an outrage to ordinary common sense to treat him as a *trespasser* and to permit the mortgagee to divert from the mortgagor the rents he is *obviously entitled* to by compelling the tenant to hold under a new tenancy from the mortgagee enforced by the threat of actual eviction." . . . (By what standard "obviously entitled to"? An assignee of the mortgagor's interest could enforce the lease. Why is the mortgagee a more undesirable landlord? Suppose the mortgagee is also assignee?). . . . "All these absurdities follow from the attempt to apply even as between the parties the technical form of the mortgage as a conveyance of the legal title. . . . Where third parties are involved the mortgagor is held to be *legal owner* practically everywhere. It is high time that this position of the courts in the title theory states, directly opposed to the title theory, should be carried to its logical conclusion by eliminating the title theory and adopting the lien theory."¹² (Why must a court that has for some purposes in disputes between the mortgagor or mortgagee and third parties said that "legal title" is in the mortgagor say the same in totally different disputes between different parties? Must "legal

8. P. 92.

9. P. 28.

10. P. 93.

11. P. 94.

12. Pp. 95, 96. Contrast TEFFT, RECEIVERS AND LESSEES SUBORDINATE TO THE MORTGAGE, 2 UNIV. CHI. L. REV. 33 (1934).

title" be reified into some sort of an absolute that, despite all the evidence of the cases, dictates decisions? Is not greater particularization of problems and more analysis of social considerations needed? . . . What would the adoption of the "lien theory" accomplish? Does the author mean to suggest that the mortgagee cannot get rents accruing before foreclosure in a "lien theory" state? How would he dispose of the last three varieties of decision listed above and discussed below?)

Now the (b) decisions. Though these provide the mortgagee with an easy device for rendering of no avail all the protection that courts have in the name of "lien" worked out for mortgagors, the author strangely attempts reconciliation.

"Just as in states applying the title theory an agreement between the parties that the mortgagor shall have possession is recognized and enforced, so also a like agreement in lien states that the mortgagee shall have possession is given effect, as in an agreement that the mortgagee shall have the right to have a receiver of the rents appointed in any foreclosure action which may be brought."¹³ . . . (What has the enforcement of agreements in "title" states got to do with "nature" in "lien" states? Why allow "nature"—or whatever social policy the author is hiding behind "nature"—to be thwarted by a few additional words in the mortgage document? Why do the additional words evoke such a different social ideal? If these added words make the agreement something other than a "mortgage," what difference does it make what a mortgage is? If one agreement should not let the mortgagee into the premises and the fruits thereof, why should two agreements? Does not this result make all talk of "title" and "lien" theories academic?)

Next the (c) decisions. These too, though contrary to the author's fundamental premise, are reconciled. This time the miracle is achieved by invocation of the all pervading power of equity.

"It seems clear that the lien theory is simply the establishment at law of the equity theory of mortgages, and therefore equity's power to protect and conserve the income during the period required for the foreclosure proceedings in cases of clearly established inadequacy of security for the mortgage debt is in no way affected by the lien theory and by the mortgagor's right as owner until the sale, equity having always recognized him as beneficial owner prior to the enforcement of the mortgage."¹⁴ . . . (Again if it is of the nature of "lien" security that the mortgagor shall have the possession and rents before foreclosure, why tolerate courts that thwart this nature by the simple expedient of appointing a receiver? Can it be that there is no inconsistency in thwarting this nature which is the product of "the equity theory" by another doctrine merely because the other doctrine is also "equitable"? If the mortgagor must give up the fruits, why not give them to the mortgagee without the cost of a receivership?)

Finally, the (d) decisions. True to his premises at last, the author scores these soundly.

"How can he (the mortgagor) be fairly kept out of his possession by a mortgagee who has entered without legal or equitable right and is therefore a trespasser, even though unintentionally so, is not adequately explained by Pomeroy's doctrine of expediency. . . . These cases give the mortgagee a right to possession in fact though acquired without right, and force the mortgagor to redeem long before he is required to do so under the general principles of equity applying to the action to redeem. They are anomalous, without explanation other than that an undefined equity or feeling of abstract justice is the basis of them."¹⁵ . . . (Without "legal or equitable

13. Pp. 96, 97.

14. Pp. 329, 330.

15. P. 100. Further examples of reasoning that fails to pierce the none too imposing facade of judicial rationalization could be taken from almost any portion of the book. Two more must suffice. . . .

"If the legal ownership of the mortgagor as to third persons is recognized in every other situation between him and any person other than the mortgagee there is surely no valid reason for not applying the same doctrine to these cases of fixtures or other parts of the mortgaged property detached and removed by a third person. The anomalous result of permitting the mortgagee to maintain conversion or replevin, completely out of accord with

right" by what standard? To what does "right acquired without right" appeal? Should not this "undefined equity" be investigated? It might prove more compelling than the logic of lien. Might not a simple and efficacious remedy for the mortgagee be of advantage to all parties? Why deprive the mortgagee of one remedy only to give him another more expensive to both him and the mortgagor?)

These criticisms are not intended to suggest that the premises and symbols manipulated by Professor Walsh are not important. The contents of appellate opinions would indicate that such premises and symbols are still too often the mainsprings of judicial behaviour. Students must be taught all this doctrine—but not from the point of view that some of it is "fundamental" and some of it not. They should be taught how to tear it up and how to run it both ways. The practitioner interested in winning a particular case may find any kind of an incantation useful. Yet, however important the rationalizations by which courts explain their decisions, should not even (or especially) an elementary text cut deeper? From the point of view of a scientist trying to describe social or business fact or of a counsel trying to predict future decision, talk about "title" and "lien" theories—save in one narrowly limited situation where convention may have made the terms useful shorthand—is hardly more intelligible or informative than would be talk about "round" and "flat" theories.¹⁶ Equally without other than emotional content are most of the premises that make up the great bulk of explanatory generalization that does not hinge about the two well-worn theories. What is needed today is a book that will get beneath the technical legal doctrine about mortgage problems to the conflicting economic interests and contradictory social ideals that now shape a doctrine and again make it meaningless. Though such a study might not reveal any "scientific" or other standards whereby to guide a choice between competing ideals, it would at least present a more accurate description of what courts and people are doing. The mortgage problems and decisions undoubtedly partake of what Santayana has called the "profound absurdity of things" and are probably just as little amenable to any "ought" as the bewildering economy that brought them forth. Yet—eternal verities aside—he who sets himself up as a reformer might well be required to offer some ideal more appealing than that of consistency with the fundamental nature of phantom concepts.

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the mortgage relation as it actually exists, needs no further discussion. It is simply another result of the effort to maintain as a reality the fiction of the mortgagee's ownership of the property". (Pp. 114, 115. Why should doctrine derived from different cases be allowed to deprive the mortgagee of these remedies if he needs them for the protection of his interests? Where does the "mortgage relation" actually exist? Must it permit successful looting of the premises? What is the fiction? The mortgagee has a financial stake in the property and is given some of the legal protection loosely described as "ownership"? Why not give him this protection?) . . . "Decisions in some states in which the court states that the mortgage cannot be enforced if the debt is barred because the mortgage is an incident of the debt attached to it merely by way of security, are contrary to the law clearly established even in those states that the bar of the statute does not extinguish the debt, and that the action to foreclose a mortgage is an action in rem involving the disposition of the land and jurisdiction over the land not requiring personal jurisdiction over the mortgage debtor, differing radically from the personal action on the debt". (P. 176. Compare statements on p. 300. Why are the symbols of "surviving debt" and "action in rem" more persuasive than the symbol of "security as incident to debt"? What, if anything, is beneath these symbols? How does their use affect the policy of the statute?) See also examples on pp. 30, 34, 70, 80, 135, 171, 207, 210, 219, 231, 245, 248, 251, 261, 276, 292, 343.

16. See STURGES AND CLARK, *LEGAL THEORY AND REAL PROPERTY MORTGAGES*, (1928) 37 *YALE L. J.* 961. The author refers to this article in a footnote (p. 26, n. 94) for a quotation from Pomeroy's *Equity Jurisprudence*, but he ignores the purpose for which Sturges and Clark were quoting and their careful "exposure" of the theories.