The Law of Securities, 5th edition, by Edward I. Sykes and Sally Walker (Law Book Company Limited, Sydney, 1993) pages i-cxxii, 1-1030, Index 1031-1070. Price $160 (hardback) $110 (soft cover). ISBN 0 455 21178 7 (hardback). ISBN 0 455 21179 5 (soft cover).

This 5th edition of *The Law of Securities*[1] might well have been entitled 'The Law of Security'. Previous editions have done much to clarify Australian lawyers' grasp of the fundamentals of proprietary security interests, to the extent that the authors could now claim a certain coherence for the subject.

The tripartite division between mortgages, hypothecations and possessory securities, outlined in the opening chapter,[2] gives readers the necessary conceptual framework with which to tackle the variety of security interests discussed later. Although that division is stated to be 'orthodox', it is used rigorously by the authors to categorise those interests and to determine their scope.[3]

It does not matter that few security interests fall neatly within any one orthodox division. The reader can learn much about a security interest by discovering what it is not. For example, the relationship between the general law land legal mortgage and its Torrens system namesake is described as follows: neither is strictly a mortgage (*fiducia*), since they are both, to differing degrees, hypothecations; to the extent that they are not hypothecations, they are of opposite natures.[4] Ironically, then, both those 'mortgages' are only similar to the extent that they are hypothecations.

The classification is not merely of theoretical interest. As noted, it affects the scope of a security interest and, in particular, the rights and remedies available to the parties. For instance, the dissimilarity between general law and Torrens mortgages is used to identify a principle which is the inverse of the doctrine preventing 'clogs' on the equity of redemption. That, in turn, is used to restrict a Torrens mortgagor's power to lease the burdened land.[5] The theoretical distinction between mortgages and possessory securities is used to circumscribe a chattel mortgagee's powers of sale.[6] The distinction between mortgages and hypothecations is used to determine whether the right of foreclosure exists.[7]

Professors Sykes and Walker confine their treatment to proprietary security interests by stating that a security interest 'is essentially of a "real" or "proprietary" character'.[8] That is not argued at any length. The assumption may be that a proprietary interest clearly gives a better feeling of 'security'.[9] In any case,

1 Sykes, E.I. and Walker, S., *The Law of Securities* (5th ed. 1993) ('Sykes and Walker').

2 In the final chapter, this is expanded into a four-fold classification by the subdivision of 'mortgages' to take account of mortgages of leasehold interests (see *ibid.* 1027).

3 See for example *ibid.* 322-323, 749 (bottomry and respondentia bonds). An apparent slip is the reference to an 'assignment . . . by way of . . . charge' at 770 (*cf. ibid.* 197, 772). This is perhaps the loose sense in which 'assignment' is often used in respect of choses in action (*ibid.* 772).

4 See *ibid.* 323.

5 *Ibid.* 265. More generally, the principle seems to be that the holder of a 'legal' interest in an asset may not act in a way inconsistent with a security interest over that asset created by, or in favour of, that person.

6 *Ibid.* 608-609; *cf. ibid.* 789.

7 See *ibid.* 792. See also the discussion of *Re Charge Card Services Ltd* [1987] Ch. 150 below.

8 *Ibid.* 3.

exclusion of 'personal securities' (such as guarantees) allows the authors to nurture a coherent set of underlying proprietary and equitable principles. That makes *The Law of Securities* a fundamental text in property law and equity.

Although the authors specifically exclude guarantees,[10] there seems to be no mention of the 'quasi-real' securities of contractual set-off or security deposits (or 'flawed assets'). Furthermore, negative pledges and subordination are referred to only briefly in relation to corporate securities.[11] While those 'quasi-real' securities are essentially contractual or personal securities, an indication of their general place in Sykes' and Walker's schema would assist readers wishing to fit that schema into the broader picture of banking or financial transactions as a whole. Incidentally, it would help explain what banks have been doing since Millett J. held, in *Re Charge Card Services Ltd*,[12] that debtors cannot take charges over debts owed by themselves.

Within proprietary securities, the authors include conditional sales reserving title to the vendor until payment.[13] However no mention is made of *'Romalpa* clause' cases. Again, some acknowledgment of the developed literature and developing indigenous case law in that area[14] would be of benefit.

As in previous editions, the text is structured around the common categories of property: real property (general law land then Torrens system), tangible personalty and intangible personalty. (Insolvency, corporate law, credit law, limitation of actions and private international law issues are dealt with in a separate, final Part.) The three-fold classification of proprietary security interests is used within each category of property and as a means of linking like interests across categories. As a consequence, the text is best when worked through from cover to cover. Law School gives an opportunity to do that. Yet the depth of treatment makes it far from being merely a student text. The most appreciative readers will perhaps be practitioners or academics who have previously used it in their studies. Unfamiliarity makes the text difficult to dip into, due, for example, to the isolation of corporate law issues and the fragmentation of discussion of any one security interest.[15] Since charges are frequently drafted to cover all categories of property, a reader may be seeking an over-all understanding of a single security interest in all of its manifestations.

The present edition goes some way to counteracting that difficulty. The 'signposting' has been improved somewhat, through the use of better headings,[16] additional short paragraphs of text and altered layout. Readers who are new to the

[9] The authors adopt a functionalist approach in determining the scope of proprietary securities (see *ibid.* 12, 357-358, 1028), thus they would probably do so in determining the scope of 'securities' *per se*.

[10] *Ibid.* 11.

[11] *Ibid.* 963-964, 984, respectively. Neither are referred to by name.

[12] [1987] Ch. 150.

[13] Sykes and Walker, *op. cit.* n. 1, ch. 10, 538, 1028.

[14] See *Chattis Nominees Pty Ltd v. Norman Ross Homeworks Pty Ltd (receiver appointed) (in liq.)* (1992) 28 N.S.W.L.R. 338, where Cohen J. briefly canvasses some of the case law and academic comment.

[15] See for example Sykes and Walker, *op. cit.* n. 1, 216-217, 746-748, 751-752 (in relation to solicitors' security interests) or 728-731, 740-741, 749, 755-758 (in relation to maritime liens).

[16] Although note that a brief discussion of the Victorian situation appears under the heading of N.S.W. and Tasmania (*ibid.* 778).

text would benefit from that approach being extended, if it did not break the flow of the argument. Moreover, some form of diagrammatic summary of security interests, which indicated how each interest operated in respect of each category of property (and where in the text to find detailed discussion), could be a useful addition to the Index.

Legislative and judicial development of security law certainly warranted a 5th edition. The text has been rewritten to take account of the Credit Acts (in Chapter 21) and the Chattel Securities legislation in the various States. The latter resulted in a re-ordering of much of the material in Part III (Securities over Personal Property other than Leaseholds). The first chapter of that Part, Chapter 12, now introduces the Bills of Sale Acts, then deals with the Chattel Securities legislation (although the pure priority issues are deferred until Chapter 17). The following chapter now deals with the remainder of the 4th edition's Chapter 12 (mortgages and charges) and the 4th edition's Chapter 15 (hire-purchase and conditional sale), along with the details of the Bills of Sale Acts.

There is an expanded and re-positioned discussion of equity's attitude to penalties,[17] which takes account of the recent High Court decisions in the area. Likewise, *Hewett v. Court*[18] and *Corin v. Patton*[19] are discussed, although the latter could also have been cited in support of the authors' rejection of the Dixonian indefeasible right to be registered under the Torrens system.[20]

As alluded to above, *Re Charge Card Services Ltd*[21] has been included,[22] and the authors have taken a position hostile to the decision. Their argument, in effect, is that the reliance placed by Millett J. on the principle that a debtor cannot sue himself amounts to letting the tail wag the dog. There is a fundamental distinction between charges and assignments (the charge/mortgage distinction). Such a charge can therefore be created and the question of how it is to be enforced must be worked out on that premise. In any case, it has been pointed out elsewhere that enforcement would not necessarily require a chargee to sue herself, merely to pay herself.[23] However, Millett J.'s decision seems to have caused more consternation in the U.K. than in Australia, and so judicial rejection of it here may not be as forthcoming as it seems to be there.[24]

The preface to this edition includes reference to a number of cases which are not present in the body of the text, and therefore it should not be ignored. Judicial development has not, of course, ceased on the text's publication, and there have been subsequent decisions which reaffirm the principle of immediate

17 *Ibid.* 56; *cf.* Sykes, E.I., *The Law of Securities* (4th ed. 1986) 68.

18 (1983) 149 C.L.R. 639.

19 (1990) 169 C.L.R. 540.

20 Sykes and Walker, *op. cit.* n. 1, 313; see (1990) 169 C.L.R. 540 *per* Mason C.J., McHugh J. at 540, 556 and *per* Deane J. at 582. However the Dixonian position still has life left in it, see (1990) 169 C.L.R. 540, 570 *per* Brennan J.

21 [1987] Ch. 150.

22 Sykes and Walker, *op. cit.* n. 1, 772.

23 Allan, D.E., 'Security: Some Mysteries, Myths & Monstrosities' (1989) 15 *Monash University Law Review* 337, 356; Oditah, F., 'Financing Trade Credit: Welsh Development Agency v. Exfinco' [1992] *Journal of Business Law* 541, 556-557.

24 *Per* Browne-Wilkinson V.-C. (as he then was) in *Welsh Development Agency v. Export Finance Co. Ltd* [1990] B.C.C. 393, 408, and *per* Dillon L.J. in the Court of Appeal at [1992] B.C.L.C. 148, 166-167.

indefeasibility of title under the Torrens statutes of both Victoria and (it seems) South Australia.[25]

This edition obviously came out before the authors could take account of the new Chapter 5 of the Corporations Law.[26] That will undoubtedly be incorporated in the next edition. Until then it should also be noted that the Admiralty Act 1988 (Cth) has supplanted the nineteenth century U.K. admiralty legislation which previously applied in Australia; and that the market overt exception to the *nemo dat* rule in the Victorian Goods Act has been repealed.[27]

It may be noted that some of the original author's distinctive written style has been modified under joint authorship where, it seems, brevity was the paramount concern.[28] However, in some places the text may have required closer revision to take account of developments since previous editions.[29]

Finally, to return to the text's undoubted and (in Australia) unchallenged strength, namely its theoretical analysis, one may note the possibility of further divergence between the U.K. and Australia. The authors advance the accepted view that an equitable mortgage by deposit of title deeds to land depends upon it amounting to part performance of an implied contract which is specifically enforceable.[30] The Westminster Parliament has, however, attempted to exclude the doctrine of part performance and so, if equitable mortgages by deposit of title deeds are to survive, they may have to be re-classified as, perhaps, a *sui generis* form of security.[31] That may not be necessary in Australia, but it would be an interesting development in security law theory.

That Australian lawyers feel confident about their understanding of the theory of security law must be due, in a large part, to *The Law of Securities*. Professor Ford's review of the text as first published in 1962[32] concluded as follows: 'All told, the book is the product of sustained scholarly labour. In its field it will not be lightly superseded.' It only remains to add: It hasn't.

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25 In respect of Victoria, see *Vassos v. State Bank of South Australia* (1992) V ConvR 54-443 (Hayne J.) and *Eade v. Vogiazopoulos* (1993) V ConvR 54-458 (Smith J.). In respect of S.A., see *Whittem v. Acardi* (1992) 5 S.A. & W.A. Judgements Bulletin 98 and *Tsirikolias v. Oakes* (unreported 15/3/93).

26 Introduced by the Corporate Law Reform Act 1992 (Cth).

27 Section 28 of the Goods Act 1958 (Vic.) was repealed by the Second-Hand Dealers and Pawnbrokers Act 1989 (Vic.).

28 For examples, Sykes and Walker, *op. cit.* n.1, 764 & 770 (*cf.* Sykes, *op. cit.* n.17, 696, 703, respectively). At other places, that style remains — for example, Sykes and Walker, *op. cit.* n.1, 323, 755, 1026.

29 For example, it is said that the law is 'not clear' in respect of the interpretation of the *Milroy v. Lord* test (*ibid.* 765), yet later *Corin v. Patton* is said 'clearly' to support one view (*ibid.* 766).

30 *Ibid.* 150-152.

31 See Hill, G., 'Law of Property (Miscellaneous Provisions) Act 1989, Section 2' (1990) 106 *Law Quarterly Review* 396, 400.

32 (1963) 4 M.U.L.R. 149.

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