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CHATTEL MORTGAGES ON AFTER-ACQUIRED PROPERTY

The question of the validity and effect of attempts to mortgage after-acquired property is one which has caused much difficulty and diversity of opinion among the several states. Under the common law, whose rule the Wisconsin Supreme Court has adopted, there could be no valid mortgage of property which was not in existence at the date of the mortgage, or of property which did not at least potentially belong to the mortgagor as an incident of property then in existence and belonging to him.[1] That is, where creditors of or innocent purchasers from the mortgagor were involved, only that property which existed when the mortgage was executed would be burdened with the lien of the mortgage.

The courts in a majority of the states recognized what they considered an injustice in this rule, and have held that the mortgage acted as an executory agreement attaching to the property when acquired, although it was ineffective to pass any title to such property, and enforced the agreement in equity.[2] But neither the courts of Wisconsin or of Massachusetts will enforce the after-acquired clause, even in equity.[3]

In *Chynoweth* v. *Tenney* the court ruled that an estoppel against the mortgagor must fail, since "An estoppel prohibits one from setting up the truth against some act or statement of his own, upon which another has acted in such a manner that he will be injured if the truth is afterwards allowed to be shown," but where we have an after-acquired clause, it appears on the face that the grantor has no title, "and the grantee is bound to know that, in law, the conveyance is inoperative."[4]

But in no case does the mere attempt to include such property in the mortgage render it wholly void. In fact, if the mortgagor, after he acquires the property, by some affirmative act, such as actually delivering the property over to the mortgagee,[5] or by executing and de-

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[1] Comstock v. Scales, 7 Wis 138 (1858) " . . . a chattel mortgage can only operate upon property in actual existence at the time of execution . . . " Case v. Fish, 58 Wis. 56, 15 N.W. 808 (1883); Merchants' & Mechanics' Savings Bank v. Lovejoy, 84 Wis. 601, 55 N.W. 108 (1893); Taylor v. Barton Child Co., 228 Mass. 126, 117 N.E. 43 (1917).

[2] Borden v. Croak, 131 Ill. 68, 22 N.E. 793, 19 Am. St. Rep. 23 (1889). These courts usually apply the doctrine that "Equity considers as done that which ought to be done."

[3] Chynoweth v. Tenney, 10 Wis. 341 (1860); Kohler Imp. Co. v. Preder, 217 Wis. 641, 259 N.W. 833 (1935) "In either a sale or a chattel mortgage of future goods the grantee acquires no title, and if the grantor refuses to deliver when the same come into existence, the grantee cannot enforce the same in equity." Blanchard v. Cooke, 144 Mass. 207, 11 N.E. 83 (1887).

[4] Chynoweth v. Tenney, 10 Wis. 341 (1860).

[5] *Ibid.*

livering a deed of surrender of the property[6] ratifies the mortgage, it will be binding between the parties. To be effective as against creditors and purchasers, there must be an actual transfer of the possession to the mortgagee, either by a voluntary delivery or by an exercise of the right to possession.[7] It is clear, however, that if there has been no such ratification or actual surrender of the property after acquisition, the after-acquired clause will be considered a mere license, uncoupled with an interest, and revocable at the will of the mortgagor.[8]

The problem as to the effect of the after-acquired clause most frequently arises where there is an attempt to mortgage future crops. Crops which must be sown annually are personalty and do not pass with the land, hence they can be the subject of a valid chattel mortgage.[9] Nevertheless, in Wisconsin, only such crops may be mortgaged as are up, out of the ground, and have the appearance of a growing crop.[10] In this respect, the Wisconsin Supreme Court holds *contra* to the general rule, under which crops to be grown in the future may, under certain conditions, be mortgaged.[11] But the law of each state must be closely studied, inasmuch as there are wide divergences of opinion as to when the mortgage takes effect, the rights of purchasers, of creditors, etc.

For purposes of convenience, the cases may be classified into those involving landowner and creditor, landowner and tenant, and landowner and cropper. As a rule, a creditor of a landowner cannot secure a lien on the future crops because of the principle invalidating mortgages on after-acquired property. But *Lanyon* v. *Woodward*[12] demonstrates an interesting exception, under the doctrine of joint adventure. Here the landowner had purchased seed from the creditor, under a contract by which the creditor was to remain the owner of the seed and crop. The landowner agreed to return a certain number of bushels of grain from the crop and to sell the entire crop to the creditor at a determinable price. Although this agreement had the effect of securing a lien on future crops, the court construed it as a "joint adventure,

[6] Farmers' Loan and Trust Co. v. Commercial Bank, 11 Wis. 215 (1860).
[7] Merchants' & Mechanics' Savings Bank v. Lovejoy, *supra* note 1. Lamson v. Moffat, 61 Wis. 153, 21 N.W. 62 (1884); Single v. Phelps, 20 Wis. 419 (1866).
[8] Kohler Imp. Co. v. Preder, 217 Wis. 641, 259 N.W. 833 (1935). In this case the court went on to say that the provisions of the Uniform Sales Act (Wis. Stat. (1937) § 121.05) authorizing contracts to sell goods not in existence or not acquired, have no application to chattel mortgages.
[9] Simanek v. Nemetz, 120 Wis. 42, 97 N.W. 508 (1903).
[10] Comstock v. Scales, 7 Wis. 138 (1858). In Hill v. Merriman, 72 Wis 483, 40 N.W. 399 (1888), it was held that a chattel mortgage upon a crop of grain which was not yet sown, or at least was not in existence when the mortgage was given, is inoperative.
[11] Weyrauch v. Johnson, 203 Iowa 1380, 208 N.W. 706 (1926); In re Miller, 244 Mich. 302, 221 N.W. 146 (1928); Mocassin State Bank v. Waldron, 81 Mont. 579, 264 Pac. 940 (1928).
[12] Lanyon v. Woodward, 55 Wis. 652, 13 N.W. 863 (1882).

the raising of flax-seed," and enforced it against a holder of a subsequent chattel mortgage on the same crop, who had notice of the prior contract.

In arrangements between the landlord and tenant, where the landlord reserves a lien on future crops to secure rents, the court has said it is not to be construed as a chattel mortgage, but rather as a valid and binding contract between the parties.[13] In *Kohler Improvement Co.* v. *Preder,*[14] it was held that "There is a very clear distinction between the so-called landlord and tenant cases in which there is a reservation of the title (to the crops) in the lessor for the purpose of securing the rent to become due under the lease, and the line of cases involving the validity of chattel mortgages upon crops not in actual existence." But even in such case, the landlord may be estopped as against a bona fide purchaser.[15] In no case may a person who is a mere cropper, and who therefore has no interest in or title to the land validly mortgage the crop.[16]

At common law, a mortgagee is vested with a defeasible title to the mortgaged property. Therefore, under the rule that the incident follows the principal, it has been held in the common law states, of which Wisconsin is one, that there may be a valid chattel mortgage covering the increase of livestock.[17] In *Funk* v. *Paul,*[18] the leading Wisconsin case on this point, it was decided that if the mortgage by express terms does cover the increase, as between the parties, it remains a lien upon such increase until the mortgage is discharged. But in respect to subsequent purchasers, the mortgage does not cover after the nurture period

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[13] Hill v. Merriman, 72 Wis. 483, 40 N.W. 399 (1888).

[14] Kohler Imp. Co. v. Preder, 217 Wis. 641, 259 N.W. 833 (1935). In Layng v. Stout, 155 Wis. 553, 145 N.W. 227 (1914) the court undertook to explain the apparent inconsistency between the rule here set forth and the rule that crops are personalty (Cf *supra* note 9) thus: "It is true that, as between landlord and tenant, in the absence of any express agreement to the contrary. the title to the crops ordinarily vests in the tenant. But where a landlord is about to lease his land, why may he not contract that the title to the crops raised thereon shall vest in the owner of the soil that produced them? It would seem to be entirely consonant with reason to so hold, and the authorities pretty uniformly do hold that such stipulations are valid."

[15] Layng v. Stout, 155 Wis. 553, 145 N.W. 227 (1914).

[16] Kelly v. Rummerfield, 117 Wis. 620, 94 N.W. 649 (1903).

[17] Brown v. Schwab, 27 Ariz. 457, 233 Pac. 593 (1925).

[18] Funk v. Paul, 64 Wis. 35, 24 N.W. 419 (1885) "There would seem to be no valid reason for terminating the lien as against the mortgagor, merely because the period of 'suitable nurture' had passed. Such nurture did not give the lien, and its termination could not take it away as against the mortgagor. As to such mortgagor the question of notice or insufficiency of description is not involved, for he had actual notice that such increase was, in fact, covered by the mortgage. But as to subsequent bona fide purchasers and mortgagees without notice the question is different. As to them, the period of nurture being passed, and the young being entirely separated from the mother, and not being mentioned in the mortgage, nor any longer connected with the mother covered by the mortgage, they have neither actual no constructive notice of the mortgagor's rights and interests, nor anything to put them upon inquiry."

has passed, unless the purchaser has actual or constructive notice that the young animals are in fact those referred to in the mortgage. However, if the increase is not mentioned in the mortgage, after the young have been separated from their mother there is nothing to put the purchasers on inquiry as to the existence of any lien covering the young, and so such purchasers would not be bound unless they had actual notice of the mortgage.

The question of the validity of chattel mortgages on stock in trade and future acquisitions is governed by statute in Wisconsin. Such mortgages are given full effect upon compliance with certain filing requirements.[19] Nevertheless, the lien will be lost, as against creditors and purchasers, if the mortgagor is authorized to sell for his own benefit,[20] or to apply the proceeds wholly or in part to his own use.[21] In an early case, *Blakeslee* v. *Rossman*,[22] the court ruled that "A chattel mortgage permitting the mortgagor to remain in possession, to sell and apply the proceeds or any part of them to his own use, is fraudulent and void in law as against creditors." The fraud is conclusive, and even a taking of possession by the mortgagee does not purge the fraud, and gives no valid title as against creditors.

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[19] Wis. Stat. (1937) § 241.14. See also 19 MARQ. L. R. 257 (1935) and 20 MARQ. L. R. 199 (1936).

[20] Knapp v. Milwaukee Trust Co., 216 U.S. 545, 30 Sup. Ct. 412, 54 L.ed. 610 (1910).

[21] Wymelenberg v. Badger Furnace Co., 220 Wis. 473, 265 N.W. 718 (1936); Ross v. State Bank, 198 Wis. 335, 224 N.W. 114 (1929); Morley-Murphy Co. v. Jodar, 220 Wis. 302, 264 N.W. 926 (1936); Franzke v. Hitchon, 105 Wis. 11, 80 N.W. 931 (1900).

[22] Blakeslee v. Rossman, 43 Wis. 116 (1877).