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AFTER-ACQUIRED PROPERTY UNDER CONFLICTING CORPORATE MORTGAGE INDENTURES

BY HENRY E. FOLEY AND L. WELCH POGUE*

WHEN a company purports or agrees to mortgage not only property owned by it at the time of executing the mortgage but also other property which may be thereafter acquired, a number of important questions arise. What is the effect and scope of the clause in such a mortgage purporting to convey after-acquired property? If such a mortgaging company consolidates with or merges into another company, or if it sells its assets to some company, will the property acquired by the successor¹ feed a mortgage of the predecessor? And where the successor, at the time of a merger or purchase, has a mortgage of its own containing an after-acquired clause, does its mortgage or that of the predecessor obtain a prior lien on property acquired by such a successor after the merger or purchase? These and related problems will be considered in this paper.

I

EFFECT AND SCOPE OF AN AFTER-ACQUIRED CLAUSE

Where a company mortgages its property with an after-acquired clause and later acquires property, questions arise as to (1) the effect of such a clause purporting to subject after-acquired property to the lien of the mortgage and (2) the scope of the

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¹The word "successor" is used in this article in a broad sense to cover a consolidated, reorganized, merging, or purchasing company. The word "predecessor" is used to cover a consolidating, original, merged, or selling company.

after-acquired clause, or in other words, what property is included therein.

1. It is apparent that there can be no actual mortgage of after-acquired property (that is, no transfer of title or creation of an in rem interest) until the property is acquired.² Hence, in so far as an attempt is made in the granting clause of a mortgage to mortgage after-acquired property, it necessarily amounts to no more than a contract that, when the property referred to is acquired, it will feed the mortgage.³ Like other contracts to give security, damages at law being inadequate, this contract is specifically enforceable in equity.⁴ Thus in the frequently cited case of *Trust Co. of America v. City of Rhinelander*⁵ the court said

"Such clauses" [after-acquired property clauses] "are sustainable in equity only as contracts to mortgage the future acquired property. Enforcing the mortgage against it is substantially enforcing specific performance."

There being a specifically enforceable contract to convey property an equitable interest is created in the mortgagee thereunder in the after-acquired property when it is acquired by the mortgagor, and the mortgagee⁶ may be said to have an equitable lien thereon.⁷

²At law a mortgage of property to be acquired in the future is void. *Pierce v. Emery* (1856) 32 N. H. 484, 505. *Bayler v. Commonwealth*, (1861) 40 Pa. 37, 42; *Emerson v. North American Ry. Co.*, (1877) 67 Me. 387, 391. *Jacobson v. Smith*, (1902) 73 App. Div. 412, 415, (appeal dismissed 172 N. Y. 654 in mem. op.) 3 *Fletcher, Cyc. of Corp.*, sec. 1279. 1 *Jones, Mortgages*, 8th ed., sec. 209. See also 5 *Cook, Corporations*, 8th ed., sec. 857.

³See Williston, *Transfers of After-Acquired Personal Property* 19 *Harv. L. Rev.* 557, 558. *Trust Co. of Amer. v. City of Rhinelander* (C.C. Wis. 1910) 182 *Fed.* 64, 69. *Fidelity Trust Co. v. Staten Island Clay Co.*, (1905) 70 N. J. Eq. 550, 553, 67 *Atl.* 1078, *Kribbs v. Alford*, (1890) 120 N. Y. 519, 524, 24 N. E. 811, *Glenn, Creditors' Rights and Remedies*, sec. 260.

⁴See authorities cited in note 3 and see 4 *Thompson, Corporations*, 3d ed., sec. 2622. *Fidelity Trust Co. v. Staten Island Clay Co.*, (1905) 70 N. J. Eq. 550, 67 *Atl.* 1078. *Holroyd v. Marshall*, (1861) 10 H. L. C. 191, 211. *National Bank of Wilmington & Brandywine v. Wilmington, N. C. & S. Ry.*, (1911) 9 *Del. Ch.* 258, 81 *Atl.* 70, noted in 25 *Harv. L. Rev.* 294. cf. *Pennock v. Coe*, (1859) 23 *How.* 117, 16 *L. Ed.* 436. In a few jurisdictions this contract to mortgage after-acquired property may not be specifically enforceable. See Williston, *Transfers of After-Acquired Personal Property* 19 *Harv. L. Rev.* 557, 559.

⁵(C.C. Wis. 1910) 182 *Fed.* 64, 69.

⁶As a matter of practice and convenience large corporate mortgages are usually made by way of a conveyance in trust to a trustee. But the more universally applicable word "mortgagee" has been used in this article to cover the case where the conveyance by way of mortgage is to a trustee.

⁷Williston, *Transfers of After-Acquired Personal Property* 19 *Harv. L. Rev.* 557, *Glenn, Creditors' Rights and Remedies*, sec. 261. *Trust Co. of Amer. v. City of Rhinelander*, (C.C. Wis. 1910) 182 *Fed.*

The conclusion that an after-acquired property clause creates in the mortgagee an equitable lien on such property when acquired has been reached on another theory which it is submitted is unsound. Under this other theory a mortgage of after-acquired property is said to amount to an equitable assignment as soon as the property comes into existence⁸ and it is urged that this "is respected and accorded efficacy because it is executed and because there is no affirmative reason for undoing what has been done."⁹ But as we have seen, there could be no assignment by the mortgagor at the date of the mortgage either at law or in equity and the mortgagor has done no later act of assigning. If, then, there is an assignment it must be because equity has made the assignment on behalf of the mortgagor. Why should equity do this except on principles of specific performance? No other ground for the exercise of equity jurisdiction exists. The New York court of appeals in discussing this problem has said

"A court of equity, in giving effect to such a provision does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does at law. But it construes the instrument as operating by way of present contract, to give a lien, which, as between the parties takes effect and attaches to the subject of it as soon as it comes into the ownership of the party."¹⁰

The view, in whatever form put, that a mortgage of after-acquired property is an executed transaction, rests on the loose conception that an executory transaction is one which requires action—an executed one, no action. It is assumed that after the mortgage is executed the mortgagor need do nothing, hence the transaction

64, 69. *Kribbs v. Alford*, (1890) 120 N. Y. 519, 24 N. E. 811. *Fidelity Trust Co. v. Staten Island Clay Co.*, (1905) 70 N. J. Eq. 550, 67 Atl. 1078, *Diggs v. Fidelity & Deposit Co.*, (1910) 112 Md. 50, 75 Atl. 517 521. *Hamlin v. Jerrard*, (1881) 72 Me. 62, 75; cf. *Pennock v. Coe*, (1859) 23 How. 117 129, 16 L. Ed. 436, where the court said. "We think it very clear, if the company, after having received the money on the bonds and given the mortgage security, had undertaken to divert the fund from the purpose to which it was devoted, namely, the construction of the road and its equipment, and upon which the security mainly depended, a court of equity would have interposed, and enforced a specific performance. And if a court of equity would thus have compelled a specific performance of the contract, we may certainly with confidence conclude that it would sanction the voluntary performance of it by the parties themselves, and give effect to the security as soon as the property is brought into existence." See also 3 *Pomeroy, Equity Jurisprudence*, 4th ed., sec. 1236; 5 *Cook, Corporations*, 8th ed., sec. 857

⁸See an article by Blair, *Allocation of After-Acquired Mortgaged Property*, 40 *Harv. L. Rev.* 222, 225.

⁹*Ibid* at page 226.

¹⁰*Kribbs v. Alford*, (1890) 120 N. Y. 519, 524, 24 N. E. 811.

is thought to be executed. The error is obviously in the lack of an accurate definition of executory and executed transactions. Under this conception a contract to sell land situated in State A would be executed when made, if by the law of State A the vendee could secure the land by a proceeding in that state without personal jurisdiction over the vendor. But clearly such a contract is executory. The truth is that if a promisor must act *to keep his promise* the transaction is executory. The fact that, if the promisor does not act, the same result can be secured by legal proceedings and thus damage to the promisee avoided is immaterial. Thus, where there is a clause purporting to mortgage after-acquired property the mortgagor must act by giving a lien in order to perform its promise, but if it does not act equity will prevent damage to the mortgagee by giving the same result as though the mortgagor had acted. This does not, however, make the transaction an executed one.

The equitable interest in after-acquired property created as a result of the after-acquired clause, should, if it is to be treated as other equitable interests, be held to be enforceable against all but purchasers for value, in good faith, and without notice. But since, in the ordinary case, the mortgagor retains possession of the after-acquired property a situation is created which might deceive creditors and which is possibly objectionable for other reasons.¹¹ Accordingly, there is authority in some jurisdictions to the effect that even though an equitable interest is created¹² it will not be enforceable against creditors of the mortgagor unless the mortgagee takes possession.¹³ The weight of authority however (at least in the case of corporate mortgages where the danger of deception by the retention of possession normally is very slight) recognizes an equitable interest in the property which is acquired by the mortgagor and treats the equitable interest created by an after-acquired clause like other equitable interests, and consequently it is enforceable against all but purchasers for value in good faith and without notice.

¹¹Williston, *Transfers of After-Acquired Personal Property* 19 *Harv. L. Rev.* 557-563 et seq.

¹²In some jurisdictions it is held that an after-acquired clause will not create in the mortgagee an equitable interest in the property when acquired. *Ibid.*, at page 579.

¹³See a collection of jurisdictions following this view, at least as to personal property, in 4 *Thompson, Corporations*, 3d ed., sec. 2625, note 38 where it is pointed out that a distinction is sometimes made between real estate and personal property in this respect. See in this connection *Mass. Gasoline & Oil Co. v. The Go Gas Co.*, (1927) 259 *Mass.* 585, 156 *N. E.* 871. Cf. statute of La. cited in note 15.

This article deals primarily with the law in jurisdictions which give effect to the after-acquired clause¹⁵ even as against creditors of the mortgagor, but the principle here indicated will, however, be helpful in solving the problems arising in connection with after-acquired property in other jurisdictions.

2. The scope of an after-acquired property clause is a matter of construction.¹⁶ The covenant of the mortgagor to cause after-acquired property to feed the mortgage is ordinarily construed to apply only to property subsequently acquired by the mortgagor and not to include property acquired by a successor.¹⁷ Thus, in speaking of the scope of the after-acquired clause in a corporate mortgage, the court said in *New York Security & Trust Co. v. Louisville, E. & St. L. Consol. R. Co.*¹⁸

The after-acquired property clause in each of the mortgages can rightly be construed, I think, to extend only to property subsequently acquired by the mortgagor. The Consolidated Company is a new and different organization."

A mortgagor may, however, expressly provide that the after-acquired clause is to cover after-acquired property of a "successor,"¹⁹ or the context and situation may show that the mort-

¹⁴See 1 Jones, Mortgages, 8th ed., sec. 209; 5 Cook, Corporations, 8th ed., sec. 857. 3 Fletcher, Cyc. of Corporations, sec. 1279. Cf. 2 Machen, Corporations, sec. 1854.

¹⁵Some states by statute have made after-acquired clauses effective in mortgages by certain classes of corporations. See, e. g., Minn. G. S. 1923, (2 Mason's Minn. Sts.,) secs. 7449-7450, (relating to public service corporations) and sec. 7513 (relating to telephone and telegraph companies) Mass. Gen. Laws, 1921, ch. 160, sec. 47 and ch. 161, sec. 25 (relating to railroads and street railways) 2 Idaho Comp. Sts. 1919, sec. 6361 Ga. Code 1926, sec. 3256 Iowa Code 1924, sec. 7933 (relating to railway corporations) 2 Mont. Rev. Code 1921, sec. 8255 1 No. Dak. Compl. Laws 1913, sec. 6731, 1 So. Dak. Rev. Code 1919, sec. 1551 2 Okla. Compl. Sts. 1921, sec. 5257 cf. also Ala. Code 1923, sec. 9008 Ariz. Rev. Sts. 1913, sec. 4099 Cal. Civil Code 1923, sec. 2930 Conn. Gen. Sts. 1913, sec. 5208. But see La., Merrick's Rev. Code 3d ed., art. 3308, prohibiting any conventional mortgage of future property.

¹⁶It is of course clear that apt words must be used in order to make the mortgage cover after-acquired property. See 4 Thompson, Corporations, 3d ed., sec. 2621, 41 C. J. 480, note 98.

¹⁷*Ry. Steel Springs Co. v. Chicago & E. I. R. Co.*, (D.C. Ill. 1917) 246 Fed. 338, 347. *Trust Co. of Amer. v. City of Rhinelander*, (C.C. Wis. 1910) 182 Fed. 64, 69. *Kribbs v. Alford*, (1890) 120 N. Y. 519, 525, 24 N. E. 811, *Diggs v. Fidelity & Deposit Co.*, (1910) 112 Md. 50, 75 Atl. 517 525 *Hinchman v. Pt. Defiance Ry. Co.*, (1896) 14 Wash. 349, 364, 44 Pac. 867 For a slight modification of this see, *Susquehanna Trust & Safe Deposit Co. v. United Tel. & Tel. Co.*, (C.C.A. 3rd Cir. 1925) 6 Fed. (2d) 179, 181 cf. *Ithaca Trust Co. v. Ithaca Traction Co.*, (1928) 248 N. Y. 322, 162 N. E. 93.

¹⁸(C.C. Ind. 1900) 102 Fed. 382, 398.

¹⁹In one case the court held that the word "successor" meant a "corporate successor" and that a purchasing corporation was not such. *Miss. Valley Tr. Co. v. So. Tr. Co.*, (C.C.A. 8th Cir. 1919) 261 Fed. 765. Cf.

gage was not intended to be confined to after-acquired property of the mortgagor. Thus, in *Compton v. Jessup*,²⁰ the court said that the mortgage indenture contemplated consolidation and that it was intended that after-acquired property of the consolidated company should feed the mortgage.²¹

Furthermore, an after-acquired clause, when properly construed, may be confined to certain types of property, for example, where a railroad or a street railway mortgages all its after-acquired property it is generally held to include all the property which forms part of and is to be used as a part of its system as fixed by its charter powers as of the date of the execution of the mortgage,²² or such a clause may be confined to property which the mortgagor is contemplating acquiring.²³

Normally a mortgage will not be construed as applying to property which at the time of executing the mortgage it would have been *ultra vires* for the mortgagor to acquire. If the mortgaging company covenanted to acquire and mortgage property the acquisition of which was not within its charter powers, such an attempted mortgage would itself be *ultra vires*.²⁴ This

Commercial Tr. Co. v. Chattanooga Ry. & Lt. Co., (D.C. Tenn. 1921) 281 Fed. 856, 859.

²⁰(C.C.A. 6th Cir. 1895) 68 Fed. 263, 286.

²¹*Cf. In re Sentenne & Green Co.*, (D.C. N.Y. 1903) 120 Fed. 436.

²²41 C. J. 480, note 99· see *Susquehanna Trust & Safe Dep. Co. v. United Tel. & Tel. Co.*, (C.C.A. 3d Cir. 1925) 6 Fed. (2d) 179· *Amer. Brake Shoe & Foundry Co. v. N. Y. Rys. Co.*, (D.C. N.Y. 1922) 293 Fed. 612, 630· *Ithaca Trust Co. v. Ithaca Traction Co.*, (1928) 248 N. Y. 322, 162 N. E. 93, 95. Thus where a railroad acquires, e. g., lots of land having no relation to the public use, such lots may not be subject to the after-acquired clause of a mortgage. *Trust Co. v. Traction Co.*, (1922) 106 Oh. St. 577 140 N. E. 380. See also, *In re Sentenne & Green Co.*, (D.C. N.Y. 1903) 120 Fed. 436, 439· 5 *Cook, Corporations*, 8th ed., sec. 857 *Cf.*, in this connection, *Smith v. McCullough*, (1881) 104 U. S. 25, 26 L. Ed. 637 where the phrase "all the present and in future to be acquired property of the Burlington and Southwestern Railway that is to say" followed by a detailed description of types of property, was held not to cover property thereafter acquired but not falling within one of the described categories. See also *Westinghouse Elec. & Mfg. Co. v. Brooklyn Rapid Transit Co.*, (C.C.A. 2d Cir. 1920) 263 Fed. 532.

²³*Hinchman v. Pt. Defiance Ry. Co.*, (1896) 14 Wash. 349, 358, 44 Pac. 867 *Commercial Trust Co. v. Chattanooga Ry. & Lt. Co.*, (D.C. Tenn. 1921) 281 Fed. 856, 861 and *cf.* discussion in *Ry. Steel Springs Co. v. Chicago & E. I. R. Co.*, (D.C. Del. 1917) 246 Fed. 338, 348 *et seq.*, and *Metropolitan Trust Co. v. Chicago & E. I. R. Co.*, (C.C.A. 7th Cir. 1918) 253 Fed. 868, and *Trust Co. v. Traction Co.*, (1922) 106 Oh. St. 577 598, 599.

²⁴See *Commercial Trust Co. v. Chattanooga Ry. & Lt. Co.*, (D.C. Tenn. 1921) 281 Fed. 856, 860, where it is stated "On the other hand a railroad company is without authority to mortgage as after-acquired property a line of railroad or other property which it is not authorized within the limitations of its then charter to build or acquire; such attempted mortgage being *ultra vires*."

objection would not exist if the mortgage merely provided that property acquired by virtue of any additional powers which might thereafter be obtained by the mortgagor would feed the mortgage, in which case the covenant should be effective.²⁵ Normally, however, the parties do not have any such unusual situation in mind and hence, in the absence of express words to that effect, the after-acquired clause is construed to apply only to property which could properly be acquired by the mortgagor at the time of executing the mortgage. This, however, is a question of construction and may be controlled by the phraseology actually used.

II

WHERE A COMPANY MORTGAGES ITS PROPERTY WITH AN AFTER-ACQUIRED CLAUSE AND THEN TRANSFERS ITS PROPERTY TO ANOTHER COMPANY WHICH HAS NO MORTGAGE AT THE TIME OF SUCCESSION AND WHICH SUBSEQUENTLY ACQUIRES PROPERTY

In all the main classes of transfers which may fall within the facts assumed under this heading, that is, transfers by way of consolidation, reorganization,²⁶ merger, and ordinary purchase, the predecessor and the successor are different organizations. The question at once arises as to whether property acquired by the successor after the succession will, in any case, be subject to the mortgage of a predecessor—the successor being a distinct and different company

It is axiomatic that A cannot mortgage B's present property. A fortiori A cannot mortgage B's future property.²⁷ Any attempt to do so can have no effect upon B or upon B's property. In speaking of the effect on property acquired by a successor of the after-acquired clause in a mortgage of a predecessor, it was said in *Trust Company of America v. City of Rhinelander*:²⁸

“As the mortgagor could not expressly contract to mortgage the after-acquired property of others, such property can never come within the mortgage by the force of such a contract alone, unaided by the rule of accession, estoppel, or some other equitable consideration.”

²⁵Cf. *Ithaca Trust Co. v. Ithaca Traction Co.*, (1928) 248 N. Y. 322, 162 N. E. 93, 95, and see *Harris v. Youngstown Bridge Co.*, (C.C.A. 6th Cir. 1898) 90 Fed. 322, 325.

²⁶The term “reorganization,” as used in this article, covers the case where a company sells its assets to a new company formed by security holders of the old company.

²⁷See 4 Thompson, *Corporations*, 3d ed., sec. 2620.

²⁸(C.C. Wis. 1910) 182 Fed. 64.

It seems clear, therefore, that property acquired by a successor will not feed the mortgage of a predecessor unless some special ground for that result is found.²⁹

One such ground may be seen in a state statute relating to corporate consolidations, mergers, or reorganizations. Such a statute may contain controlling, as distinguished from merely enabling, provisions, indicating that the new company is to take the place of the old—to step into its shoes.³⁰ As was said by an Ohio court in commenting upon a case involving a statute which was so construed

The Trustee for the bondholders was seeking to reach after-acquired property by virtue of a clause in the mortgage to that effect, which clause did not by its terms apply to the successors of the Southern Ohio Traction Company. It was then decided by this court that notwithstanding the omission to make the after-acquired property clause applicable to successors, the provisions of section 9038, General Code, necessarily produced that effect, because the substantial existence of the constituent companies was thereby perpetuated by being merged in the consolidated company.³¹

Where this is so and the successor acquires property, in connec-

²⁹Kribbs v. Alford, (1890) 120 N. Y. 519, 525, 24 N. E. 811 Hinchman v. Pt. Defiance Ry. Co., (1896) 14 Wash. 349, 364, 44 Pac. 867 Trust Co. of Amer. v. City of Rhinelander, (C.C. Wis. 1910) 182 Fed. 64, 69. But cf. language in Commercial Trust Co. v. Chat. Ry. & Light Co., (D.C. Tenn. 1921) 281 Fed. 856, 860 et seq.

³⁰Cf., in this connection, Minn. G. S. 1923 (2 Mason's Minn. Sts. 1927.) sec. 7509, which provides "Rights and duties of consolidated corporation. Within this state, such [consolidated] corporation shall succeed to all the rights, powers, franchises, contracts, privileges and immunities, and be subject to the same duties, liabilities, and obligations in all respects as were granted to or imposed upon the original corporations but all rights of creditors and all liens upon the property of either of the consolidating corporations shall be preserved unimpaired, and all the debts, liabilities, and duties of either shall thenceforth attach to the new corporation, and be enforceable to the same extent and in the same manner, as if such debts, liabilities, and duties had been originally incurred by it." Cf. 2 N. J. Comp. Sts. of p. 1661 sec. 167. 2 Ill. Callaghan's Sts., ch. 32, sec. 71. Del. Rev. Code 1915, sec. 1974. Ohio Gen. Code, sec. 9038, Fla. Law, 1925, c. 10096, sec. 37 (which provides that on consolidation the liens on property of either of the predecessor corporations "shall be preserved unimpaired, limited in lien to the property affected by such liens at the time of the consolidation,") Va. Gen. Law 1923, sec. 3823. The type of statute considered in this part of the article must be distinguished from what is probably a much more common type of statute and which will be considered later in this article but which merely imposes on the successor the obligations of the predecessor. It is not intended by the citation of the above statutes to indicate that they belong to one class rather than the other. The authorities do not make clear how common is the type of statute here considered.

³¹Marfield v. Traction Co., (1924) 111 Oh. St. 139, 144 N. E. 689.

tion with what has been solely the business of a particular predecessor,³² such property, if it would have fed such predecessor's mortgage had it been acquired by that predecessor should do so now. Such a statute should, in the absence of controlling language the other way be construed as manifesting an intent that property acquired solely in connection with the business of a particular predecessor be treated as though acquired by that predecessor and be subjected to the lien of that predecessor's mortgage.³² In other words, the state allows consolidation, merger or reorganization but seeks to protect the mortgage creditors of the old company, in this respect, to the same extent as if it were continuing.³³ Statutes of this type may be found applying to consolida-

³²See *Hamlin v. Jerrard*, (1859) 72 Me. 62, 80. *Trust Co. v. Traction Co.*, (1922) 106 Oh. St. 577, 597 et seq., 140 N. E. 380. Cf. also *Marfield v. Traction Co.*, (1924) 111 Oh. St. 139, 144 N. E. 589.

Where the property acquired is such that it is within the terms of a predecessor's mortgage but is not used in connection with any business the predecessor had actually conducted, then such property should feed the predecessor's mortgage alone if the successor is a new company, and should probably be allocated between the predecessor's mortgagee and the successor company on principles to be later considered, if the successor was an existing company at the time of succession.

Similarly, where the property acquired is within the terms of the predecessor's mortgage, but is used in connection not only with what had been the predecessor's business, but also with what had been the successor's business, before succession, it would seem that, under such a statute, properly construed property should not be subjected as an entirety to the first lien of the predecessor's mortgage. Such property should be allocated to the predecessor's mortgage in a way similar to that in which property is allocated to the various mortgagees where there is more than one predecessor. The principles applicable are discussed later in this article.

The theory on which these distinctions are based is this: A statute of the type under consideration manifests an intent that the successor shall stand in the position of the predecessor. (1). Where the successor is an existing company it is pretty clearly not intended that all acquisitions made by it should be treated as acquisitions by the predecessor. Acquisitions made in connection with what was formerly its own business should be treated as acquisitions by it alone and the predecessor's mortgagee should have no claim thereto. Acquisitions made in connection with what was formerly the predecessor's business should feed the predecessor's mortgage. While acquisitions made in connection with what was formerly the business of neither should be treated as acquisitions by both (at least when the acquisition would have been *intra vires* of either). (2). On the other hand where the successor is a new company it is fair to assume that the statute intended that all its acts should, for these purposes, be treated as those of the predecessor. The matter, however, is one of statutory intent and is not settled by the authorities.

³³The question arises here incidentally as to what effect such a statute will have on property acquired by the successor company outside of its state of charter. It seems clear that such a statute normally creates an *in rem* obligation in the state of charter as to property in

tions, mergers, and possibly also, though probably less commonly, to reorganizations. But where there is only a purchase of assets it is uncommon to find such a statute. The parties, however, may agree among themselves that the succeeding company will stand in the place of the old so far as the mortgage obligations of the latter are concerned,³⁴ such an agreement is rare.

Where there is a statute of the kind under consideration, making it clear that the successor is to stand in the predecessor's shoes, so that as a result, property acquired by the successor would feed the predecessor's mortgage (because of the after-acquired clause obligation), a question arises, in cases where the successor takes over at the same time the property of two or more predecessors each of which had a mortgage with an after-acquired clause on its property as to which of such mortgages the after-acquired property of the successor will feed.³⁵ Where the property acquired is within the terms of only one predecessor's mortgage it should feed such predecessor's mortgage alone and not that of any other predecessor. Where, however, the property acquired is within the terms of the mortgage of more than one predecessor it seems that a distinction should be taken.³⁶ In those cases where the new property added by the successor is used solely in connection with what had been the business of a particular predecessor, it is submitted that such a statute as we are considering should, in the absence of controlling language, be construed as manifesting an intent that such property feed the mortgage of that predecessor. In those cases where the new property acquired is used in connection with what had been the business of all, or is used in a business not carried on by any predecessor, such property should be held "the common property of all in some proper

that state, thus differing from the other type of statute considered in this article. See n. 30. It also creates an in personam obligation to perform all the duties imposed thereby on the constituent companies, and among such duties would be that of subjecting certain after-acquired property no matter where acquired, to the lien of the predecessor's mortgage. This in personam obligation, being specifically enforceable, would give rise to an equitable lien on property wherever acquired on the same principles as does an after-acquired property clause.

³⁴Cf. the agreement discussed in *Metropolitan Trust Co. v Chicago & E. I. R. Co.*, (C.C.A. 7th Cir. 1918) 253 Fed. 868, 871.

³⁵If property were acquired by the successor which was not within the terms of the after-acquired clause of any predecessor's mortgage, the statute would not affect the situation and, unless governed by principles to be later considered, such property would not feed the mortgage of any predecessor.

³⁶See discussion in Note 32 *supra*, of an analogous situation.

ratio."³⁷ Thus in the case of an interurban railroad it was decided that on foreclosure sale the proceeds should be distributed in proportion to the respective power requirements of the predecessor companies which were to be determined by a special master.³⁸ In that case the successor added a power house which had supplanted a number of power houses formerly maintained by the constituent companies. The new power house was of course an indispensable factor in the operation of the various roads. If a successor under such a statute is the substantial continuation of the predecessors³⁹ the power house added by it and used in connection with the business of the predecessors may be treated as if added by all the constituent companies and hence should feed the mortgages of all such predecessors. The conception of having the mortgaged property become the "common property of all in some proper ratio" is somewhat new. This probably means that while the legal title is in the successor, each of the predecessors' mortgages has an equitable interest, in the nature of a tenancy in common. It is submitted that some proportion of distribution similar to that adopted in the case under discussion, based upon requirements, mileage, or value can be fairly applied in each case and is sound and workable.

A second ground for holding that certain property acquired by a successor feeds the mortgage of a predecessor when no such statute or agreement of the parties exists,⁴⁰ is the assumption by the successor of all the obligations of a predecessor including its mortgage obligations (not merely its debt⁴¹), or the imposi-

³⁷Trust Co. v. Traction Co., (1922) 106 Oh. St. 577 609, 610, 140 N. E. 380. We are assuming here that the successor is a new company and that the only question is of allocation between predecessors. On the question of allocation between predecessors and the successor, see note 32.

³⁸Trust Co. v. Traction Co., (1922) 106 Oh. St. 577 140 N. E. 380.

³⁹Cf. Marfield v. Traction Co., (1924) 111 Oh. St. 139, 144 N. E. 689, where the court said, in speaking of a successor company under such a statute: "The 'substantial existence of the constituent companies was thereby perpetuated.'"

⁴⁰See especially for typical cases where no such statute or agreement exists, Irving Bank-Columbia Trust Co. v. N. Y. Rys. Co., (D.C.N.Y. 1923) 293 Fed. 429, 432 et seq., Metropolitan Trust Co. v. Chicago & E. I. R. Co., (C.C.A. 7th Cir. 1918) 253 Fed. 868, 871, N. Y. Secur. Co. v. L. E. & St. L. Consol. R. Co., (C.C. Ind. 1900) 102 Fed. 382, 398, Diggs v. Fidelity & Dep. Co., (1910) 112 Md. 50, 75 Atl. 517

⁴¹Where the debt only as distinguished from the mortgage obligations is assumed no contract to give a lien on any after-acquired property (even assuming that the clause includes successors) can be made out. In such a case the mere assumption of the debt "creates merely a personal obligation" and "leaves the lien as it finds it. It does not by itself enlarge or spread the lien to the property of the new debtor." Miss. Valley Tr. Co. v. So. Trust Co., (C.C.A. 8th Cir. 1919) 261 Fed.

tion of such obligations where there is a statute in the charter state which, while not of the type above considered requiring the successor to stand in the predecessor's shoes, nevertheless provides that the successor shall be bound by the predecessor's obligations. If there is such an assumption or imposition, and if the after-acquired clause of the mortgage of such predecessor properly construed, is applicable to property acquired by a succeeding company, then after-acquired property of a successor of the kinds described in a predecessor's mortgage will feed that mortgage.⁴² As we have seen, however, ordinarily an after-acquired clause only covers property to be acquired by the mortgagor.⁴³ Hence, the mere assumption or imposition of the obligation of the after-acquired clause does not, in such cases, subject after-acquired property of the successor to the lien of such a mortgage.⁴⁴

Again, if the successor assumes the mortgage obligations of a predecessor, or if there is a statute in the charter state, of the type just considered, and if the mortgage contains covenants to acquire property or to maintain, replace, or the like, throughout the life of the mortgage, the succeeding company will be bound thereby because it has assumed or had imposed upon it such covenant and after-acquired property used for maintenance replacements or the like will feed the original mortgage.⁴⁵

It should be noticed in passing that a view has been expressed⁴⁶ to the effect that a so-called "mandatory" covenant to maintain is binding upon the successor upon the theory that the obligation "runs with the property acquired from the constituent." Two persuasive objections to this suggestion are, first,

765, 767 see also, *Susquehanna Tr. & Safe Deposit Co. v. United Tel. & Tel. Co.*, (C. C. A. 3d Cir. 1925) 6 Fed. (2d) 179, 181 cf. *Commercial Tr. Co. v. Chat. Ry. & Light Co.* (D.C. Tenn. 1921) 281 Fed. 856, 860; *Irving Bank-Columbia Tr. Co. v. N. Y. Rys. Co.*, (D.C. N.Y. 1923) 292 Fed. 429, 433 aff'd without opinion (C.C.A. 2d Cir. 1923) 292 Fed. 440.

⁴²*Compton v. Jesup*, (C.C.A. 6th Cir. 1895) 68 Fed. 263, 287

⁴³See cases cited in note 17

⁴⁴*Metrop. Tr. Co. v. Chu. & E. I. R. Co.*, (C.C.A. 7th Cir. 1918) 253 Fed. 868 *N. Y. Sec. Co. v. L. E. & St. L. Consol. R. Co.*, (C.C. Ind. 1900) 102 Fed. 382, 398. But see, *In re Sentenne & Green Co.*, (D.C. N.Y. 1903) 120 Fed. 436, 440.

⁴⁵*National Bank of W & B. v. N. C. & S. R. Co.*, (1911) 9 Del. Ch. 258, 81 Atl. 70. (Noted in 25 Harv. L. Rev. 294). *Commer. Tr. Co. v. Chat. Ry. & Lt. Co.*, (D.C. Tenn. 1921) 281 Fed. 856, may be in part explicable on this ground. See also, *In re Sentenne & Green Co.* (D.C. N.Y. 1903) 120 Fed. 436. But see, *Metropolitan Co. v. Chicago & E. I. R. Co.* (C.C.A. 7th Cir. 1918) 253 Fed. 868, 878 et seq.

⁴⁶Blair, *Allocation of After-Acquired Property*, 40 Harv. L. Rev. 222, 234.

that there seems to be no authority for the view that such a covenant would run and the doctrine is one not lending itself readily to extension by analogy, and, second, that while it is true that the burden of certain covenants will run with the land where there is "privity,"⁴⁷ the only instance where the burden of a covenant runs with the land where there is no "privity" is that of a fencing covenant and the exception, if that be one, (it may be more correctly classed as an easement), is confined thereto. Furthermore it seems undesirable to invoke so doubtful a doctrine to accomplish a result which the parties can substantially provide for, if it is really contemplated, by requiring in the mortgage that any successor must assume such covenant. Such a requirement is very common and can hardly escape the attention of the parties.

Accession is a third and common ground by virtue of which property of the successor acquired after the succession will be subject to the mortgage of a predecessor company. It seems clear that when such property acquired by the successor becomes an accession (in the commonly accepted sense) to mortgaged property it feeds the mortgage,⁴⁸ unaided by any after-acquired clause. Thus one mile more or less of rails added to many other miles amounts to an accession in the commonly accepted sense.⁴⁹ And the same is true, for example, of repairs on a car⁵⁰ or on any other

⁴⁷"Privity," as used in this sense, involves tenure between the party bound and the party benefited or at least that the one bound or benefited has an easement or profit in the land the one benefited or bound owns. See *Morse v. Aldrich*, (1837) 19 Pick. (Mass.) 449. Consider, however 1 Tiffanv, Real Property, sec. 391.

⁴⁸*Miss. Valley Tr. Co. v. So. Trust Co.* (C.C.A. 8th Cir. 1919) 261 Fed. 765, 781 *Hinchman v. Pt. Defiance Ry. Co.* (1896) 14 Wash. 349, 44 Pac. 867 *Trust Co. of Amer. v. City of Rhinelander*, (C.C. Wis. 1910) 182 Fed. 64, 69 *Trust Co. v. Traction Co.*, (1922) 106 Oh. St. 577 140 N. E. 380 *National Bank of W & B. v. N. C. & S. R. Co.*, (1911) 9 Del. Ch. 358, 81 Atl. 70 *Commer. Trust Co. v. Chat. Ry. & Light Co.*, (D.C. Tenn. 1921) 281 Fed. 856 and see *Dunham v. Ry Co.*, (1863) 1 Wall. 254, 17 L. Ed. 584, and *Porter v. Pittsburg Steel Co.*, (1887) 122 U. S. 267 7 Sup. Ct. 1206, 30 L. Ed. 1210. It is immaterial whether the accession is to realty see, *Miss. Valley Trust Co. v. So. Trust Co.*, (C.C.A. 8th Cir. 1919) 261 Fed. 765, 781 *Hinchman v. Pt. Defiance Ry. Co.*, (1896) 14 Wash. 349, 359, 44 Pac. 867 or to personality. *Miss. Valley Trust Co. v. So. Trust Co.*, (C.C.A. 8th Cir. 1918) 261 Fed. 765, 781.

⁴⁹*Miss. Valley Trust Co. v. So. Trust Co.*, (C.C.A. 8th Cir. 1918) 261 Fed. 765, 781, *Hinchman v. Pt. Defiance Ry. Co.*, (1896) 14 Wash. 349, 44 Pac. 867

⁵⁰*Miss. Valley Trust Co. v. So. Trust Co.*, (C.C.A. 8th Cir. 1918) 261 Fed. 765, 781, *Hamlin v. Jerrard*, (1881) 72 Me. 62, 81, where the court said: "The repairs upon it being mere accessions to the mortgaged chattel."

specific chattel.⁵¹ There is some loose talk, however, in certain cases⁵² as to the principle of accession applying in a much broader sense. But such statements were not necessary for the decision of those cases. Under this broader application of the theory of accession where, for example, railroad properties are mortgaged with an after-acquired clause, and the successor effects improvements, extensions, or additions, or makes replacements or substitutions, they would become subject to the predecessor's mortgage by virtue of accession. But if that is true it would be immaterial whether or not there was an after-acquired clause, for, if such property becomes a part of the principal road by accession, it would be subject to the predecessor's mortgage irrespective of the after-acquired clause. Moreover, the better view is that actual physical unity is an essential element of accession.⁵³ It is submitted that the broader application of the theory of accession is not sound. Thus goods added to a stock of goods or cars to a railroad system are not accessions and should not be so treated.

A fourth ground on which property of a successor acquired after the succession may become subjected to the lien of the predecessor's mortgage is suggested by the important decision of *Wade v. Chicago, Springfield and St. Louis Railway Co.*⁵⁴ In this case the mortgagor at the time of executing the mortgage on its proposed railroad between named points, had surveyed and mapped the entire route and secured certain "rights of way" A construction company contracted with the mortgagor to do all things necessary to complete the railroad in consideration for which the construction company was to receive specified amounts of the mortgagor's bonds and stocks for each mile of railroad actually completed. The construction company secured, presumably with its own funds, most of the necessary right of way and graded considerable portions of the road. It actually completed only two miles of the road, received bonds and stocks therefor, and "conveyed and transferred" all the rest of the

⁵¹Cf. 1 R. C. L. 118, Accession, sec. 5.

⁵²See *Compton v. Jesup*, (C.C.A. 6th Cir. 1895) 68 Fed. 263, 287 and cf. *Commercial Trust Co. v. Chatt. Ry and Light Co.*, (D.C. Tenn. 1921) 281 Fed. 856.

⁵³"The general rule is that the owner of property whether the property be movable or immovable, has the right to that which is united to it by accession or adjunction." *Pierce v. Goddard*, (1839) 22 Pick. (Mass.) 559, 561. See also *First Parish in Sudbury v. Jones* (1851) 8 Cush. (Mass.) 184, 189; *Hunt v. Bay State Iron Co.*, (1867) 97 Mass. 279, 283.

⁵⁴(1893) 149 U. S. 327 13 Sup. Ct. 892, 37 L. Ed. 755.

incompleted road to a second construction company which transferred the same to two new railroad companies. The chief promoter of the mortgagor was the sole owner of the first construction company, the second construction company was a firm consisting of his brother and brother-in-law, and at least one of the new railroad companies was organized by this original promoter. The court held that those portions of the road which were later completed by the two new railroad companies were subject to the mortgage. The opinion states that the original railroad company obtained an equitable interest in the rights of way and other property acquired by the first construction company. Some parts of property added by the two new companies may have become accessions to property in which the original railroad company had the equitable interest just mentioned. But a large amount of property was necessarily added to complete the road which was not accessory. On what grounds could such property have been held subject to the mortgage? The court was very careful, in relating the history of the case, to show that it was a family affair. By the successive transfers it was evidently hoped to avoid the effect of the obligation to complete the road and subject it as completed to the lien of the original mortgage. In such a case "the mortgagor is impliedly bound to buy and complete the thing mortgaged as described, and bring it under the lien of the mortgage, without lien or encumbrance."⁵⁵ In this situation the succeeding companies (having had knowledge or notice of the mortgage and the whole procedure having been so clearly designed to escape the effect of the mortgage obligations) were really aiding in causing a breach of the mortgagor's covenants with knowledge thereof. Such action was tortious. The property so added by the successor and not subjected voluntarily to the mortgage may be subjected to it by law as a matter of specific reparation.⁵⁶

It is sometimes suggested that the successor, being in privity with the predecessor and having notice of the mortgage, is estopped to deny that its after-acquired property becomes subject to the predecessor's mortgage. It is not clear whether the courts have in mind an estoppel in pais, estoppel by estate, estoppel by deed, or some other kind of estoppel. None, however, apply

⁵⁵Harris v. Youngstown Bridge Co., (C.C.A. 6th Cir. (1898) 90 Fed. 322, 330.

⁵⁶It is of course apparent that no actual successor was involved in the Wade Case. But if a successor as defined in note 1 had been formed instead of the two new railroad companies it is clear that the decision would have been the same.

and the term is misused and question begging. There is clearly no estoppel in pais because, where there has been no assumption of mortgage obligations, there is not even a remote ground for finding a representation on which to base such an estoppel. And, where there has been such an assumption, the successor does not represent that *its* after-acquired property will feed the mortgage unless the after-acquired clause on a proper construction, includes after-acquired property of a successor, in which case it is not necessary to invoke estoppel.⁵⁷ Estoppel by estate, so-called, exists between landlord and tenant, and prevents a tenant denying the title of his landlord. The suggested analogy in the situation under consideration is that the successor in taking the mortgaged premises from the predecessor is estopped to deny as applied to it the covenants in the predecessor's mortgage. It is obvious from a mere statement of the case that estoppel by estate has no operation here. And there is even less ground for urging an estoppel by deed. No doctrine of estoppel can help. The term used in this connection is misleading and tends to obscure rather than to assist.

We have thus seen that, while, as a general rule, after-acquired property of a successor company will not feed the mortgage of a predecessor it may, nevertheless, be subject to the predecessor's mortgage in several situations

(1) Where a statute manifests an intent that the successor be treated as the substantial continuation of the predecessor for the protection of creditors, if the predecessor's mortgage has an after-acquired clause, it seems likely that after-acquired property of the successor will feed the mortgage of the predecessor if it is solely employed in connection with what had been that company's business and is within its after-acquired clause, a part of such property will feed the predecessor's mortgage where the after-acquired property is used partly in connection with what had been the predecessor's and partly in connection with what had been the successor's business. The ratio allocable in such

⁵⁷See *Compton v. Jesup*, (C.C.A. 6th Cir. 1897) 68 Fed. 263; *Commercial Trust Co. v. Chatt. Ry. & Light Co.*, (D.C. Tenn. 1921) 281 Fed. 856; *Susquehanna Trust & Safe Dep. Co. v. United Tel. & Tel. Co.*, (C.C.A. 3rd Cir. 1925) 6 F. (2d) 179. Cf. *Dictum* suggestion in *Trust Co. of Amer. v. City of Rhinelander*, (C.C. Wis. 1910) 182 Fed. 64. Even where there has been an assumption of the mortgage obligations there is really no estoppel because the promise to subject after-acquired property to the predecessor's mortgage is not a representation that property will be acquired and because there is no reliance—the bonds having been issued long before the successor's promise is made.

case to the predecessor's mortgage is determined upon the principle considered above,

(2) Where the successor has assumed the mortgage obligations of a predecessor or has had imposed upon it such obligations under a statute other than of the type considered in (1) above, and where the predecessor's mortgage contains an after-acquired clause broad enough to cover property of a successor or covenants to maintain the mortgaged property, or to acquire property and subject it to the mortgage or some similar covenant or covenants, and property is acquired by the successor within the terms of such covenant or covenants, it feeds the predecessor's mortgage,

(3) Where property added by the successor becomes an accession to property subject to the predecessor's mortgage, it feeds that mortgage, and

(4) Where the facts are such that acts done by the successor are tortious such as causing a breach of the predecessor's affirmative obligation to acquire property, the like property added by the successor may become subject to the predecessor's mortgage as a matter of specific reparation.

III

WHERE A COMPANY MORTGAGES ITS PROPERTY WITH AN AFTER-ACQUIRED CLAUSE, AND THEN TRANSFERS ITS PROPERTY TO ANOTHER COMPANY WHICH HAS, AT THE TIME OF THE SUCCESSION, A MORTGAGE ON ITS PROPERTY WITH AN AFTER-ACQUIRED CLAUSE AND SUBSEQUENTLY ACQUIRES PROPERTY

In this unsettled field we must be guided by analogies, for no case has been found which deals with the problems arising under the facts here assumed. We are concerned at this point only with situations where there has been a merger or possibly a sale for only in such a case could the successor have had corporate life prior to the succession. Since consolidated and reorganized companies, being new organizations, had no corporate life prior to the date of the succession, they could have had no mortgage prior to that date. We have seen that the property acquired by a successor will not feed the mortgage of a predecessor unless some special grounds for that result is found. What variations in the rules heretofore discussed, relating to such special grounds, will it make if such a merging or purchasing company has, prior to the succession, a mortgage with an after-acquired clause on its property?

We shall consider, first, instances where a statute might affect this problem⁵⁸ and assume the case where A company merges into B Company, the statute indicating, when properly construed, that, in such a case, B Company is to stand in the shoes of A Company so far as A Company's mortgage obligations are concerned and where both companies have, at the time of the merger, mortgages with after-acquired clauses on their property. As to property thereafter acquired by B Company in connection with what had been solely the business of B Company before the merger, it seems probable that the statute would be construed as permitting the B Company mortgagee to have a lien thereon and as not giving A Company mortgagee any interest therein. On the other hand, as to property acquired by the B Company to be used in connection solely with what had been A Company's business before the merger, it seems equally clear that the statute would require, in so far as it has jurisdiction so to require, i. e., as to property acquired in a charter state,⁵⁹ that the A Company mortgagee obtain a prior lien thereon provided that the new property is the kind included within A Company's after-acquired clause. But as to property that is not thus allocable either entirely to what was formerly A Company's or entirely to what was formerly B Company's business it would seem that such property, if it is used in connection with what was formerly the business of A and B or what was neither the business of A nor B, but is within the after-acquired clauses of both mortgages, should be allocated between the two mortgagees on principles discussed in Part II of this paper. Such part as is allocable to the A Company mortgagee should, so far as the statute can give that result, that is, so far as the property is acquired in the charter state,⁶⁰ feed the A mortgagee first, with a second lien for the B Company mortgagee. The balance should feed the B Company mortgagee only.⁶¹ The matter however, is, as has been stated before, one of statutory construction.

⁵⁸Instances are rare where a statute requires a purchasing company to stand in the shoes of the selling company so far as its mortgage obligations are concerned.

⁵⁹We are assuming that such statutes apply only to domestic corporations.

⁶⁰See note 59, *supra*.

⁶¹As to principles governing the situation where the property added is not used in connection with either what had been the predecessor's or the successor's business, see discussion in footnote 32 *supra* and see also discussion in Part II of this paper.

Where B Company acquires property outside the state of charter a different result is obtained. Outside such state of charter the statute under consideration creates no in rem interest in the A Company mortgage in property acquired by B Company. Such statute does, however, impose an in personam obligation on the promisee to subject property under the circumstances above considered, to the lien of the predecessor's mortgage. When, then, the successor acquires property outside the state of charter the predecessor's claim, if any, is based on this in personam obligation and, as the successor has a prior in personam obligation in the form of a promise to its own mortgagee, the prior in personam obligation should prevail and the lien of the predecessor's mortgage on such property be subordinated to that of the successor.⁶²

If, on such a merger or purchase, all the mortgage obligations of the merged or selling company are assumed by the successor or if there is a statute in the charter state which while not of the type requiring the successor to stand in the predecessor's shoes, nevertheless provides that the successor shall be bound by the predecessor's obligations, we have the same problems as were discussed in Part II of this article as to property acquired by the successor in regard to situations where the merged or selling company's after-acquired clause included successors or where the merged or selling company had covenanted to acquire property or to maintain the mortgaged property, and the like, throughout the life of the mortgage. The principles discussed in Part II of this article would apply here. While it is true that such an assumption of the mortgage obligations involves a contract for the benefit of third parties, if the promise runs to the predecessor company and not to the mortgagee, yet this fact should make no difference in most jurisdictions, (even where *Lawrence v. Fox*⁶³ is not law) since the proceeding is in equity⁶⁴

⁶²See discussion of an analogous situation in the following paragraph.

⁶³(1859) 20 N. Y. 268.

⁶⁴See I Williston, Contracts, sec. 383, where it is stated: "But the only one of the United States where it has definitely been decided that the mortgagee cannot proceed against the grantee is Massachusetts." Professor Williston then shows that in a number of states which do not follow *Lawrence v. Fox*, the mortgagee may sue the assuming grantee either by statute, in equity, or in some cases even at law. If there is a supplemental indenture between the successor and the mortgagee of the predecessor wherein the mortgage obligations are assumed, no third party contract is involved.

There is one additional complication, however, where the merging or purchasing successor has, at the time it assumed or had imposed upon it by such a statute the mortgage obligations of the merged or selling company, a mortgage of its own with an after-acquired clause, due to the fact that such a successor has also promised its own mortgagee that all property acquired by it after the execution of its mortgage will feed its own mortgage. In such a situation, it is submitted that property acquired after the succession which fits the after-acquired clauses of both mortgages should feed the mortgage of B Company first because B Company's promise to its own mortgagee is always prior in point of time (where both companies have mortgages on their property at the time of succession) to its promise, or statutory in personam obligation to the mortgagee of A Company, since this latter obligation is not created until the time of the succession. It is apparent in this case that one of two innocent promisees must suffer. In such a situation it is submitted that the ordinary rule should be applied and that of two specifically enforceable executory obligations to convey the same res the prior should prevail.

A helpful analogy in reaching this result is the case where A contracts to sell Blackacre to B, and then contracts to sell it to C. It seems clear that where B or C seeks specific performance, where both are parties, B will prevail.⁶⁵ In other words, the promise which is prior in point of time prevails.⁶⁶ Each has an equity and C could probably get specific performance if B was not a party.⁶⁷ Thus we find an established rule holding that the prior promise prevails. The result is the same where A contracts to sell Blackacre when he acquires it.⁶⁸ The analogy seems quite close for the successor contracted with the trustee under its own mortgage to subject all after-acquired property to the lien of that mortgage, and later the same company contracts or has imposed upon it an in personam obligation to subject some of such property to the lien of a predecessor's mortgage.

A still closer analogy is found in the case where A mortgages his after-acquired property to B and later mortgages his after-

⁶⁵McGinn v. Willey (1914) 24 Cal. App. 303, 141 Pac. 49. See also *Bethea v. McCullough*, (1916) Ala. 195 480, 70 S. E. 680; *Thistle Mills Co. v. Bone*, (1900) 92 Md. 47 48 Atl. 37 Cf. *Alston v. Savage*, (1917) 173 N. C. 213, 91 S. E. 842.

⁶⁶2 Pomeroy *Equity Jurisprudence*, 4th ed., sec. 756.

⁶⁷*Howe v. Howe & Owen Ball Bearing Co.*, (C.C.A. 8th Cir. 1907) 154 Fed. 820.

⁶⁸*White Marble Lime Co. v. Lumber Co.*, (1919) 205 Mich. 634, 172 N. W. 603.

acquired property to C. It has been held in such cases that B, who has the prior promise in point of time, is entitled to a prior lien.⁶⁹ This is of course subject to what might appear to be an exception, namely, that if the mortgage to C is a purchase money mortgage, C will get an effective prior lien. This seeming exception is not an exception at all but is based upon the fact that that portion of the property sufficient to satisfy C's lien really never became the property of A and that A could not mortgage to B more than his interest remaining after the satisfaction of C's purchase money mortgage.⁷⁰ It is submitted therefore that where there is an assumption or imposition, as above considered, of the after-acquired clause or the maintenance or some similar covenant or covenants by a merging or purchasing company, after-acquired property which fits the after-acquired clauses of both mortgages will feed first the mortgage of the merging or purchasing company and then that of the predecessor.⁷¹ The net effect of such assumption, or imposition, is that the mortgage of the merged or selling company obtains a second lien on such property which but for the assumption or imposition it would not have.

Accessions added by the merging or purchasing company will feed the mortgage or mortgages on the property to which such new property is an accession. Where the new property is accessory to property subject to more than one mortgage, it feeds each mortgage in the order of the priority between them.⁷²

⁶⁹*Westinghouse Elec. & Mfg. Co. v. Brooklyn R. T.*, (D.C. N.Y. 1921) 276 Fed. 152. See *Meyer v. Johnson*, (1875) 53 Ala. 344; *Thompson v. Valley R. Co.*, (1889) 132 U. S. 68, 10 Sup. Ct. 29, 33 L. Ed. 256. *Boston Safe Deposit & Trust Co. v. Bankers & Merchants Tel. Co.*, (C.C. N.Y. 1888) 36 Fed. 288, 298, *affd.* 147 U. S. 431, 13 Sup. Ct. 396, 37 L. Ed. 231.

⁷⁰This view is in harmony with the cases which hold that where the property supplied by the purchase money mortgagee becomes accessory to other property of the mortgagor, the mortgagor having an after-acquired clause in a previous mortgage to another mortgagee and the property supplied by the purchase money mortgagee being within the scope thereof, the purchase money mortgagee secures only a subsequent lien thereon. See in this connection *Galveston R. R. v. Cowdrey*, (1870) 11 Wall. (U.S.) 459, 20 L. Ed. 199. *Tippett and Wood v. Barham*, 180 Fed. 76. *Porter v. Steel Co.*, (1887) 122 U. S. 267 8 Sup. Ct. 101, 31 L. Ed. 160. Compare *Cox v. Lighting Co.*, (1909) 151 N. C. 62, 65 S. E. 648.

⁷¹Of course, as before indicated, if only the merged or selling company's after-acquired clause obligation is assumed by or imposed on the successor, unless, properly construed, it covers property acquired by other than the merged or selling company, after-acquired property of the successor does not "fit" such clause and hence will not feed at all the merged or selling companies' mortgage.

⁷²*Hamlin v. Jerrard*, (1881) 72 Me. 62.

Facts permitting the application of principles discussed in connection with the case of *Wade v. Chicago, Springfield & St. Louis Railroad*,⁷³ may occur in the case of a merger or sale. If A Company sells its assets to or merges into B Company, and it appears that one of the objects of the sale or merger is an attempt to relieve A Company of its affirmative obligations, express or implied, to acquire certain property and to subject it to its mortgage, such action, if such property when acquired by B Company is not subjected voluntarily to the mortgage of A Company, would be tortious and such property should be subjected to the mortgage of A Company as a matter of specific reparation. The question remains, in this situation, as to which of the two obligations will prevail—the promise of B Company to its own mortgagee or its obligation, arising subsequently, to subject certain property to the mortgage of the predecessor. It is submitted that since the obligation in each case is to convey the same property, that obligation which arose first should prevail as in the case where B Company assumes the mortgage obligations of A Company. The net result would be that the mortgagee of B Company would obtain a first lien on such property and the mortgagee of A Company would have a second lien thereon.

It appears, then, that where a predecessor merges into or sells its assets to a successor (each company at the time of such succession having a mortgage with an after-acquired clause) property thereafter acquired by the successor will ordinarily feed only its own mortgage but will sometimes feed the two mortgages according to the following order

(1) Where a statute manifests an intent that the successor be treated as the substantial continuation of the predecessor for these purposes, if the predecessor's mortgage has an after-acquired clause it seems likely that after-acquired property of the successor used solely in connection with what was the predecessor's business and within the terms of the mortgage of both companies should, if acquired in a charter state, feed first the predecessor's mortgage and then that of the successor, but if acquired outside that state, should feed these mortgages in the inverse order. Property used partly in connection with what was formerly the predecessor's business and partly in connection with what was formerly the successor's business and within the terms of both mortgages should be allocated in part to the predecessor's mortgage under the

⁷³(1893) 149 U. S. 327 13 Sup. Ct. 892, 37 L. Ed. 755.

principle indicated above. As to property so allocated and acquired in a charter state, that mortgage should have a prior lien and the successor's mortgage a second lien while as to property acquired outside the charter state the converse should be held true, but as to the balance the successor's mortgage should have a prior lien regardless of where the property is situated.

(2) Where the successor has assumed the mortgage obligations of the predecessor or has had such obligations imposed upon it by a statute other than of the type considered in (1) above, such property will nevertheless feed the mortgage of the successor first but the predecessor's mortgage will, if the predecessor's mortgage contained an after-acquired clause broad enough to include property of a successor or covenants to maintain the mortgaged property, or to acquire property and subject it to the mortgage or some similar covenant or covenants, have a second lien on such types of property when acquired,

(3) Accessions to property will feed the mortgages on that property in the order of their priority, and

(4) In certain situations, the acts of the successor, in causing a breach of the predecessor's affirmative obligations to acquire property or the like, being tortious, such or similar property when acquired by the successor will feed the successor's mortgage first and the mortgage of the predecessor will obtain a second lien thereon.