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A. C. Burnett
Cornell Law School

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Chattel Mortgages

On Property

Not In Possession.

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By

A. C. Burnett.

Cornell University, School of Law.

1889.

Under the old Common Law the similarity between chattel mortgages and mortgages on real estate was much greater than at the present time. With the Common Law mortgage on realty the title to the property passed with the mortgage to the mortgagee, while at present the mortgagor retains the legal title, the mortgagee having only an equitable lien on the property mortgaged. This was indeed a wise invasion on the rights of the mortgagee, but owing to the character of chattels a similar change would perhaps be impracticable. As has always been in the law of chattel mortgages, they still retain the character of a conditional sale, absolute title passing to the mortgagee subject to revertment upon performance of the condition; and they differ from a pledge in that the property is retained

by the mortgagor, while in the latter the title remains in the pledgor and the property itself passes to the pledgee.

In Roman Law the term pignus was used and corresponded to the present term pledge, but where there was no actual transfer then the Latin hypotheca was applied, but later, hypotheca was only applicable to real property or immovable things.

The law of chattel mortgages is of wide extent in this country and it would be useless to attempt to give a comprehensive idea of its different divisions in a discussion of this kind, in view of which fact this subject will be confined to Chattel Mortgages on Property not in Possession.

The most natural divisions of the subject are: (a) Property non in esse, (b) though in esse, not in

possession; but for convenience they will be discussed together.

CIVIL LAW DOCTRINE.

The doctrine of the Civil Law as given in brief by Domat is as follows: " Those who bind themselves by any engagement whatsoever may, for the security of their performance of the engagement on their part, appropriate and mortgage, not only the estate which they are masters of at the time of contracting, but likewise all the estate they shall thereafter be seized or possessed of. And this mortgage extends to all the things they shall afterward acquire, that are capable of being mortgaged, by what title soever it be that they acquire them, and even to those that are not in being when the obligation is contracted; so that the fruits which shall grow upon the lands will be comprehended in

a mortgage of an estate to come. Although the mortgage be restrained to certain things, yet it will, nevertheless, extend to all that shall arise or proceed from that thing which is mortgaged or that shall augment it and make part of it. Thus the fruits which grow on the lands that are mortgaged are subject to the mortgage while they continue unseparated from the ground. Thus, when a stud of horses, a herd of cattle, or a flock of sheep is put in pawn into the creditor's hands, the foals, the lambs and other beasts which they bring forth, and which augment their number, are likewise engaged for the creditor's security. And if the whole head or flock be entirely changed, the heads which have renewed it are engaged in the same manner as the old stock. Thus, when the bounds of a piece of ground that is mortgaged happen to be enlarged by

that which the course of a river may add to it, the mortgage entends to that which has augmented the ground. Thus, a house built on ground which is mortgaged is subject likewise to the mortgage. And if, on the contrary, a house be mortgaged, and it perishes by fire, or falls through decay, the mortgage will subsist on the ground where the house stood. Thus, when a debtor mortgages a piece of ground of which he has only the bare property, another enjoying the usufruct of it, when the said right to the usufruct of it comes to be extinct, the mortgage will comprehend the grounds with the fruits."

From this doctrine of the Civil Law there seems to be no difficulty in making a mortgage which shall operate on property acquired in futuro, or on property non in esse.

C O M M O N   L A W   D O C T R I N E .

There seems to be little conflict in the earlier cases that it is impossible to grant a title to any person in property in which there is at the time no potential interest. But an attempt to grant an interest in such property is looked upon by Lord Bacon as a declaration precedent which may be ratified after possession is obtained, or may be countermanded.

What might constitute ratification is doubtful. A conveyance, of course, would be sufficient, but unquestionably the simple acquisition of the property would be insufficient. The question of ratification, however, will be discussed later.

In the court of Common Pleas it was concluded, in the case of Lane vs. Thornton, that a grant of goods not in esse or which do not belong to the grantor

at the time of the grant is void unless there is a ratification of the grant after acquisition of the property; which was supported by the case of Grantham vs. Hawley, Hob. Reps., 132.

In 50 Miss. 399, the doctrine was deduced that at law the property or thing must be in esse at the time, yet in equity, there may be a pledge or hypotheca as soon as the chattel shall be acquired or produced. In 20 Barb. 37, it was held that a chattel mortgage cannot be given on future products of the land, but this case is to be distinguished from Stuart vs. Taylor, 7 How. Pr. Reps. 251, in which the mortgagor owning the land, mortgaged his <u>interest</u>, a certain number of acres of wheat, and the mortgage was held good.

In Comstock vs. Scales, 7 Wis. 159, a chattel mortgage was given on oats, wheat and corn about the

time the grain was planted, but before it was up. Held not good, because it not being in esse, there was nothing to which the mortgage could attach.

In making a digest of the cases we find from the earliest decisions down to the present time the opinions are quite consistent with little digression from what may be considered a uniform doctrine that at law, grants or assignments of property having no actual or potential existence at the time of such grant or assignment are void ab initio, and that such possibilities or expectancies are not assignable.

In order, however, that there may be no misunderstanding of the above statement it will be necessary to give a definition of what constitutes potential existence. A precise definition which may be applied in all cases is difficult to give, but it may be broadly defined as

the natural product or expected increase of something already existing, and therefore potential interest arises when there is possession or ownership of the agent of production.

Mr. Overton, in his treatise on the law of Liens, after a careful consideration of the possibility of mortgages on property acquired in futuro, gives three different conclusions at which the courts seem to have arrived.

1. "That a mortgage which undertakes to convey after-acquired property, or accession to property actually conveyed is null and void wholly as to such after-acquired chattels, both as between the parties to the mortgage, and as to all third persons. Hence the mortgager may sell, and in all respects deal with such property as if it be wholly his own."

2. "That while such mortgage is not binding as a contract of conveyance at law, yet, it will be as between the parties and third persons who have by attachment, conveyance or otherwise, acquired intervening rights, treated in equity as valid and obligatory, and may be enforced."

"3. "That such a mortgage is valid and binding both at law and in equity, and if duly recorded, will be upheld and sustained by the courts, both as between the original parties and against third persons."

It appears that the cases do not uniformly support his conclusions, but had he inserted in his first division "after-acquired property in which there is no potential interest ," the conclusion would have been more nearly correct; for it seems not to have been disputed that a person can grant the wool not yet grown

from the sheep of which he is actual owner, or the milk of his cows of which he is in possession. But a grant of wool from sheep not the property of the mortgagor, or of dairy products, the cows not being the property of the mortgagor, are, by reason of there being no potential interest, void ab initio at law.

We have ever to keep prominently in mind the question of potential existence and potential possession. If we could always definitely determine what constitutes potential interest there would be little reason for conflicting opinions, but it is here the difficulty arises. Doubtless a lessee of property has a potential interest in the property which he has leased; but by reason of such lease, does he acquire a potential interest in the crops not yet sown, and can he mortgage such interest, if there be any? In this case there seems to be two

sides to the question, and the opinions are conflicting to quite an extent, but in general a lessee may grant a valid mortgage on crops thereafter to be grown to his lessor, as a guarantee of the rent of the premises, but a mortgage to third persons where the crops are yet unplanted is generally held invalid; and this is so even between the lessor and lessee where the mortgage is executed as security for payment of rent, and the lessee has not yet taken possession; for in this case, there can possibly be no potential interest in the lessee by virtue of which he may execute this mortgage. In nearly all the late cases the validity of the mortgage depends upon the peculiar circumstanees of each case.

The discription given in the mortgage of the crops intended to be mortgaged must be definite, so that no question may arise as to the intention of the parties.

In 11 N. W. Rep., 621, where a description of the property mortgaged was " all the crops raised by me in any part of Jones County, for the term of three years" it was very justly held to be too indefinite and uncertain a description to charge third persons with notice of the existence of the mortgage, though the former opinion in the case was reversed. In 24 Iowa, 322, it was said that a description of property in a chattel mortgage is sufficient when it is such as will enable third parties, aided by inquiries which the instrument itself indicates and directs, to identify the property covered by it.

Though the mortgage be valid as between mortgagor and mortgagee, whether such chattel is valid as against creditors of the mortgagor is an unsettled question. In the case above cited the decision is not based on

this question, but in 35 Iowa 66, a mortgage was given upon all the stock in trade of the mortgagor and the mortgage contained the following clause: "including all stock and fixtures now or hereafter kept in my said leather business in the city of Keokuk, Lee County, Iowa." The mortgagee gave the mortgage to the sheriff for foreclosure who took possession of the stock, including that added after the making of the mortgage, and a compromise was made between the mortgagor and mortgagee by which the mortgagee took the property and gave the mortgagor credit for the agreed value. Later, créditors attached the property in the hands of the mortgagee, claiming that the mortgage, so far as the property acquired in futuro was concerned, was void, but the mortgage was held good as covering the entire property; and this case was upheld in 35 Iowa 306, and

in 9 N. W. Rep., 215. But is there any difference in principle, between a mortgage upon crops to be planted and grown upon specified lands, and a mortgage upon additions made to the mortgaged stock of a merchant? It is said in the first case there is no potential existence, while in the latter additions are merely incidents of the original property included in the mortgage.

It is also held in a Wisconsin case (21 N. W. Rep., 62) that a mortgage on a crop thereafter to be raised is void as against a subsequent purchaser, unless before such purchase the mortgagee takes actual possession of the property; and so far as I am able to ascertain, from any cases where there are any decisions on the question, it seems to be universal that subsequent purchasers without notice have a preference over

the mortgagee.

An agreement between lessor and lessee that the lessor shall have title to the crop as security for the payment of rents should act, it seems to me, as an equitable lien or equitable interest in the crop, rather than as a chattel mortgage; but the cases generally hold it to be a chattel mortgage, and it even has been held to cover a crop after it has been sold to a third person. This is clearly inequitable and oversteps the boundry of the general holding of the courts, where no notice has come to the purchaser.

The case of Hutchenson vs. Ford, 9 Bush, will at first appear to overturn the doctrine that future crops may be mortgaged; but in this case, the mortgagor had not entered into possession at the time of the execution of the mortgage, a fact that must always be taken

into consideration,as was stated in the early part of the article. And too, the execution of the mortgage was to a surety on a note given for payment of the rent; so this case would scarcely fall within the general rule as a contra case. This decision is founded upon the purely legal doctrine, but such a mortgage would be supported in equity.

It seems peculiar that the products of a dairy, or a growth of wool not yet in esse, might, at Common Law,be mortgaged, while a crop not yet planted was not subject to mortgage. The idea of potential existence arises, but why the courts should hold that the products of a dairy were any more in potential existence, why there should be any more of a potential interest existing in them than in an unsown crop, is by no means clear. The fact of the existence in the one case de-

pends as much on, and is as much the result of the productivemess of the soil as in the other. True, the the relation between the soil and the products of the dairy, or the wool from the sheep is one step farther removed than the relation between the soil and crops; but why that fact should be considered is not explainable, nor, strictly speaking, is there any more of a potential existence in the one case than in the other.

It seems that the courts must draw a line somewhere as to possibility of mortgaging property, and it was said that property having a potential existence might be mortgaged, and that anything not existing potentially could not be the subject of a mortgage. And then the line was no more distinct, because it could not be determined definitely what constituted potential existence and interest.

As soon as we reach perennial crops, however, the same difficulty does not arise, for there labor is not required to produce the existence of the crop, and the roots are continually in the soil. In this case there can be no reason for litigation.

EQUITABLE DOCTRINE.

When we look at the equitable side of the question, there immediately arises a different theory; a theory which it is most unfortunate the courts of earlier times did not reach; a theory which looks after the interests of the parties, and does not adhere to the strict formalities of the old Common Law; a theory which is not the slave of precedent, but which has done so much for the rights of the people by breaking away from the cast iron rules by which the judges have been bound, and throwing open to the world a path by which one

may acquire what properly belongs to one, or may compel one to do what ought in all justness and fairness to be done.

At law , we determined that there must be an actual or potential interest in property in order that a mortgage may be valid between persons other than those to the mortgage, unless the mortgagee had possession of the property before third persons acquired rights against it. Under the equitable theory, however, no legal title vests in the mortgagee, but like the present mortgage of real estate, he acquires an equitable interest in the property the moment it comes into existence, and it is not necessary that the mortgagar in any way acknowledge the mortgagee's title, nor can third persons, with notice, acquire any rights by reason of being subsequent purchasers or creditors.

While the Common Law doctrine was too strict, this would seem to have reached the opposite extreme. In equity, however, each case stands upon its own peculiar ground, and the interest of the parties is always of paramount consideration. The doctrine was settled by the most important English case of Holroyd vs. Marshall, 10 House of Lords Cases, 189, in which a very thorough review was made of all the cases affecting this doctrine, and for the purpose of this article, it will be profitable to give the facts of the case and the conclusion of the court, which is a complete digest of the English law as it now stands.

James Taylor was the owner of certain machinery in a mill, and this machinery was purchased by A. P. and W. Holroyd. Taylor executed a deed declaring the ma-

chinery to be the property of Holroyd, and that Taylor desired to repurchase it, but by reason of his not having the money to do so, it was conveyed to one Isaac Brunt as trustee, until demand of payment was made upon Taylor, and if he should then pay the Holroyds 5000 pounds, with interest, it should re-vest absolutely in Taylor, but upon default by Taylor, Brunt should have power of sale and hold the money to pay off the Holroyds. There was a covenant to insure, and also a covenant that all the machinery thereafter placed in the mill in addition to, or in substitution for the original machinery, should be subject to the same trusts. Some of the original machinery was sold by Taylor and new machinery placed in the mill, and notice of the same was sent to the Holroyds, but nothing was done by them to take possession of the new machinery. In April

1860, Holroyd served Taylor with notice of demand for payment of the 5000 pounds, and later a creditor of Taylor put in an execution against him, and the question arose as to whether the equitable mortgagees were entitled to preference over the execution creditor with respect to the added, as well as the original machinery. In the lower court, Lord Chancellor Campbell gave judgment in favor of the execution creditor; resting his decision on Lord Bacon's maxim, "Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio praecedens quae sortiatur effectum, interveniente novo actu," thus thinking it necessary that there be the "interveniente novo actu" in order that the equitable mortgagee's title have precedence over a legal interest; but it appears that Lord Campbell labored under the delusion that this maxim extended to equitable as

well as legal rights and interests, and in consequence, his decision was rendered under a false impression of the application of the maxim.

In the House of Lords, Lord Westbury in his opinion says: "A contract for a valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is such as a court of Equity would direct to be specifically performed. A contract for the sale of goods, as, for example, of 500 chests of tea, is not a contract which would be specifically performed, for no particular chests are referred to; but a contract to sell 500 chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed." So we must bear closely in mind that equity

jurisdiction will attach only where there may be a specific performance. "It is true," he says, "that a deed which confesses to convey property which is not in existence at the time of the conveyance is void at law, simply because there is nothing to convey. So in Equity, a contract which engages to transfer property which is not in existence, cannot operate as an immediate alienation, merely because there is nothing to transfer. But if a mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of the property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in Equity, transfer the beneficial interest to

the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree a specific performance. If it be so, then immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards acquired."

The case of Tadman vs. D'Epineuil, 20 Ch. Div. 758, though at first reading, might be considered to hold differently than the above case, is to be distinguished from it. In this case, "all present and future person-

alty" was charged to secure the plaintiff for any sums the defendant might become indebted to him. This instrument was held to operate as a charge against all property belonging to the debtor at the date of the instrument, but did not charge after-acquired property, because in this case, the goods were undetermined, and equitable title to goods is confined to specific goods.

In the case of Joseph vs. Lyons, 15 Q. B. Div. 280, argued in 1884, a jeweler, by a bill of sale, for a valuable consideration, assigned to the plaintiff his after-acquired stock-in-trade, subject to proviso for redemption, and before the plaintiff took possession of the after-acquired stock, the jeweler pledged a portion of it with the defendant who had no notice of the plaintiff's bill of sale. It was held that the defendant was entitled to retain the stock in trade pledged with

him as against the plaintiff. It was argued by the plaintiff that the Supreme Court of Judicature Acts had abolished the distinction between equitable and legal interests, and therefore he had a valid legal, as well as equitable title ; but the court held that this case was to be distinguished from Holroyd vs. Marshall in that, in as much as there was a pledge to the defendant, he thus acquired a legal title to the goods, he having no notice of the existence of the equitable lien, and that the Supreme Court of Judicature Act did not abolish, in any way, the distinction between equitable and legal interests. This case was also sustained in Hallas vs. Robinson, 15 Q. B. Div. 288.

So I think we may conclude that the equitable doctrine as set forth in Holroyd vs. Marshall is settled law in England, and any cases apparently holding differ-

ently can in some way be distinguished from it.

The American courts have in most cases arrived at the same conclusions but a few of the state courts are loth to adopt an invasion of the common law principles. Judge Story states the rule, in the case of Winslow vs. Mitchell, 2 Story 630, to be as follows: "Wherever by their contract, intended to create a positive lien or charge, either upon real or upon personal property, whether it is then in being or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquirers a title thereto, against the latter, and all other persons asserting a claim thereto, under him, either voluntarily or with notice or in bankruptcy."

A leading case in New York is that of McCaffrey vs. Wooden, 65 N. Y., 459, in which the lien theory was up-

held, but in Rhode Island, Massachusetts, and a few of the states where they keep themselves bound down to the Common Law this case does not receive support. Gradually, however, the law of Equity is spreading, and its influence is being felt in every state of the Union, and it is only a question of time when the early decisions on this subject will no longer be cited as authority, and law of chattels will have followed the path of mortgages on realty.

W A G E S

In the question as to whether one may make an assignment of wages there arises the fact that there must be potential interest in order to make the assignment valid at law, and in this case potential interest is acquired by the contract by virtue of which the wages are to be earned. This is within the rule against a mort-

gage of a mere possibility or expectancy where there is no present interest.

In Equity, however, it seems that future wages might be mortgaged, even though the interest be not a present one, provided there be a description sufficient to determine specifically what particular wages are to be mortgaged. This is quite as consistent as the possibility of an equitable mortgage of the earnings of a vessel for a voyage not yet undertaken and where no particular voyage is specified, but simply a general description is given of the freight to be earned.

A D D I T I O N S.

In the case of a mortgage on an unfinished article the mortgage is held to cover the additions made in the course of completion as against all parties.

In 10 Gray, 334, it was held that a mortgage on

leather cut and prepared to be manufactured into shoes covered the shoes after they were manufactured.

Also where a debtor mortgaged a number of unfinished pruning shears, and they were afterward finished, thus greatly increasing their value, the mortgage was held to cover the finished articles and the mortgagee could hold against an attachment by a creditor of the mortgagor

In the opinion the court said: "In case materials were mortgaged by particular description and with the assent of the mortgagee were manufactured into articles not answering to that description, and so changed that with reasonable diligence a creditor could not know that they were the same, if he should, without actual notice of the claim under the mortgage, attach them for the debt of the mortgagor, it would deserve serious attention whether, under our statute requiring mortgages of person-

al property to be registered, the mortgagee could hold against the attaching creditor. But if the mortgagor, after the mortgage add to the value of the mortgaged property, no matter how much, the added value as between the mortgagor and mortgagee goes to increase the security."

S U B S T I T U T I O N S.

Generally in substitutions of articles for chattels mortgaged the mortgage does not cover the article substituted where it is possible to keep those articles separate from the mortgaged property. Thus, a mortgage given upon goods in a store and "all renewals and substitutions for the same" does not cover subsequently acquired goods so that the mortgagee may maintain an action at law against the creditor. As between the parties, however, to the mortgage such a mortgage would be enforceable in a Court of Equity. But as between third

parties the mortgagee can obtain no right to the articles substituted unless he take actual possession of the goods.

Where there has been a commingling of goods not mortgaged with the mortgaged property, the burden of proof rests upon the mortgagee to show that such goods were the property of the mortgagor at the time of the execution of the mortgage, and where the mortgage is worded to cover goods acquired in futuro, and such goods are so intermixed the rights of third persons are not thereby affected, but if necessary they will be entitled to the entire property, if the intermingling was done with the consent of the mortgagee.

N O T I C E.

It is very important to determine what consitutes notice with reference to this class of chattels under

consideration.

The recording of a mortgage on real or personal property is a sufficient notice of its existence, but can this be the case with property not in possession? At law such a mortagage was invalid unless actual possession was taken by the mortgagee, and therefore actual knowledge of the purchaser of the existence of such a mortgage did not cut off his right to seize the property as against the mortgagee not in possession. We may conclude then that there can be no registration which will be effectual against creditors or purchasers even though they have actual notice of the registration of the mortgage.

In Equity we again find a different rule. There the mortgagee has preference over any person with actual or constructive notice, and a record of the mortgage

constitutes the constructive notice.

R A T I F I C A T I O N.

It being impossible at law to grant goods in which there is no interest, it becomes necessary that there be a ratification by the mortgagor upon obtaining possession in order that the mortgagee obtained good title. The fact that the mortgagor simply bringing future chattels on his premises will not constitute a sufficient ratification. It must clearly be the intention of the grantor that the grantee shall acquire title to such chattels in order to give the grantee good title. A power in the mortgage to seize such property, when taken advantage of by the mortgagee will as between the parties, be sufficient to give the mortgage effect, and may as against third persons claiming under the mortgage. But if it be the intention of the mortgagor that such power is to ex-

tend to subsequent chattels, that intention must be clearly expressed. If the mortgagee take possession of the goods with the mortgagor's consent, after the mortgagor has obtained good title, though they may never have been in the possession of the mortgagor, the effect is the same as if the mortgagor had actually delivered them to the mortgagee; but the property seized by the mortgagee must be clearly included in the mortgage in order that he may obtain good title.

Any agreement between the parties to subject property not in possession to seizure is binding between themselves and as against third persons with notice, or an indorsement on the mortgage giving the mortgagee right of sale or seizure of property not in possession at the time of its execution, is binding.

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