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THE AFTER-ACQUIRED PROPERTY CLAUSE

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At common law property to be created or acquired in the future could not be transferred or encumbered prior to the creation or acquisition of the property.¹ Illustrative of the constant striving to make future assets available for present purposes was the attempt of common-law lawyers to add to the conveyances of the day the words: "Quae quovismodo in futurum habere potero."² But, as Littleton says, these words were "void in law". The reasoning upon which the rule was based was simple—"A man cannot grant or charge that which he hath not."³ This infallible bit of syllogistic logic received its first breakdown in the famous case of *Grantham v. Hawley*,⁴ the parent of the fictitious doctrine of "potential existence". Briefly stated, this principle permits the sale⁵ or encumbrance of future personal property⁶

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1. See 3 TIFFANY, REAL PROPERTY (2d ed. 1920) 2368.

2. The quotation in full reads: "Also, these words, which are commonly put in such releases, *scil.* (*quae quovismodo in futurum habere potero*) [freely translated: Whatever property I may have in the future] are as void in law; for no right passeth by a release, but the right which the releasor hath at the time of the release made. For if there be father and son, and the father be disseised, and the son (living his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements without clause of warranty, &c. and after the father dieth, &c. the son may lawfully enter upon the possession of the disseisor, for that he had no right in the land in his father's life, but the right descended to him after the release made by the death of his father, &c." LITTLETON'S TENURES *§ 446. This is the "earliest treatise on the English Law printed anywhere." WAMBOUGH, LITTLETON'S TENURES IN ENGLISH (1903) ix.

3. PERKINS, PROFITABLE BOOK *15.

4. Hobart 132 (K. B. 1616).

5. Only under the doctrine of potential existence may one "sell" property not yet in existence in the sense of passing "title" to such property. Realistically viewed, the difference between the sale and the mortgaging of property not yet in existence is that in the former the risk of loss is transferred whereas in the latter it remains in the mort-

having a so-called potential existence arising from the fact that the processes of creation have already begun, with the limitation that the basic substance which yields the increment must be owned by the vendor or mortgagor. Typical examples would be crops already planted upon land of the vendor, or wool to be grown upon sheep owned by the mortgagor. As stated by the court: "A parson may grant all the tithewool that he shall have in . . . a year; yet perhaps he shall have none; but a man cannot grant all the wool, that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually nor potentially."⁷ The doctrine rests, of course, upon the fiction that a man may own something that is not yet in existence but which in the normal course of events will come into being; thereby the rule that "a man cannot grant or charge that which he has not" is left inviolate. The refusal of the court to recognize the fictional quality of its rule prevented the satisfaction of more than a very small portion of the need for which the rule itself had been evolved. *Grantham v. Hawley* left us with little more than we had before; but it was the first step toward the solution of a problem, vexing even today—the problem of how to utilize future property for present credit.

The civil law had a simple device—a "mortgage on an estate to come."⁸ Therefore, it is not surprising that one of our greatest students of the civil law, Justice Joseph Story, should have been the first on the bench to establish the precedent in Anglo-American law that future property may be presently charged. The case is, of course, *Mitchell v. Winslow*.⁹ Cutlery manufacturers, in order to bolster their business, borrowed money, and as security therefor executed a deed of trust conveying the manufacturing plant "together with all tools and

gagor. This difference may account for the greater latitude allowed in the mortgaging as opposed to the sale of property not yet in existence. See Williston, *Transfers of After-Acquired Personal Property* (1906) 19 HARV. L. REV. 557, 570. Insofar as third persons are concerned the attempt of the parties to pass "title" to the property has no effect. Interests acquired between the date of the contract and delivery of the product are not divested. *Hamilton v. Klinke*, 42 Cal. App. 426, 183 Pac. 675 (1919), 18 MICH. L. REV. 165, 9 CALIF. L. REV. 76 (1920), 33 HARV. L. REV. 479; 1 WILLISTON, SALES (2d ed. 1924) 259.

6. The term "future property" is, of course, a contradiction in itself. However, as it is a shorthand expression referring to property not yet acquired or not yet in existence, or both, it has the utility of combining brevity with clarity.

7. Hobart 132a (K. B. 1616).

8. This provision reads: "Mortgage on an Estate to come.—Those who bind themselves by an engagement whatsoever may, for the security of their performance of the engagement on their part, appropriate and mortgage, not only the estate they are masters of at the time of contracting, but likewise all the estate which they shall be afterwards seized or possessed of. And this mortgage extends to all the things which they shall afterwards acquire, that are capable of being mortgaged, by what title soever it be that they acquire them, and even to those which are not in being when the obligation is contracted;" 1 DOMAT, CIVIL LAW (Strahan's Trans. Cushing's ed. 1850) 649. The civil law citation is: DOMAT, LOIX CIVILES (Nouvelle ed. by Hericourt, 1777) pt. I, bk. III, tit. I, § I, art. V.

9. 17 Fed. Cas. No. 9673 (C. C. D. Me. 1843).

machinery . . . which we may at any time purchase for four years from this date, and also all the stock which we may manufacture or purchase during said four years." The instrument was recorded and upon default the mortgagee took possession of some after-acquired tools. The mortgagor went into bankruptcy and thereupon perplexing questions arose. Did the trust instrument create a lien upon the after-acquired property? If it did, was such a lien good against creditors? The bankruptcy judge certified these two questions to Circuit Judge Story, and Story answered in the affirmative, stating that although it was true that future property could not be presently charged at common law, nevertheless equity would enforce the agreement. He pointed out that equity precedents existed, if authority was necessary, in the analogous cases of contracts to assign future claims and expectancies. His conclusion is the most frequently quoted passage in the field:

"It seems to me a clear result of all of the authorities, that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily, or with notice, or in bankruptcy." ¹⁰

Mitchell v. Winslow was paralleled about twenty years later by the celebrated English case of *Holroyd v. Marshall*,¹¹ decided by the House of Lords. Here, a deed of trust covering the machinery in a mill and containing the provision that "all machinery, implements, and things which, during the continuance of this security, shall be . . . placed in or about the said mill . . . shall . . . be subject to the trusts . . .," was executed and recorded. Subsequently, a creditor of the mortgagor levied on after-acquired property. The mortgagor then defaulted and possession of the property was taken by the mortgagees in disregard of the creditor's levy. The House of Lords upheld the claim of the mortgagees on the ground that "immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees . . ."¹²

With such excellent precedents on the books it would have appeared that the problem was solved and that after-acquired property

10. *Id.* at 533.

11. 10 H. L. Cas. 191 (1862).

12. *Id.* at 211 (Lord Chancellor Westbury).

could be mortgaged and that recording of the mortgaging instrument would constitute notice to would-be purchasers and creditors. Yet, three years after Story's excellent decision the Massachusetts Supreme Judicial Court held that a recorded mortgage on after-acquired property (stock of goods) was not effective against creditors.¹³ The action was at law and left open the possibility that the result might be otherwise in equity. But then came *Moody v. Wright*.¹⁴ Here, the owner of a tanning business executed a purchase-money mortgage which included an after-acquired property clause. The mortgage was recorded. Subsequently, an assignee for benefit of creditors was appointed under a state "insolvent law" and the mortgagee contested his right to the after-acquired property. The court held that the assignee prevailed on the ground that nothing had been done by either the mortgagor or the mortgagee to perfect the lien attempted to be created by the after-acquired property clause.

A cursory examination of the cases from a doctrinaire standpoint without consideration of the varying economic factors involved would reveal that some jurisdictions follow Story's Equity rule, others accept the Massachusetts doctrine, a few follow both, and still others have set up independent principles. Before analyzing the decisions from a factual standpoint it might be well to consider for a moment the legal conclusions resulting from the operation of several of the so-called rules.

The Equity Rule

Under the Equity rule an after-acquired property clause creates a lien upon the property at the time of its acquisition by the mortgagor. If the mortgage is recorded the lien of the mortgagee will be superior to the claim of purchasers,¹⁵ creditors,¹⁶ and subsequent mortgagees.¹⁷

13. *Jones v. Richardson*, 10 Metc. 481 (Mass. 1845).

14. 13 Metc. 17 (Mass. 1847).

15. *Rust v. Electric Lighting Co.*, 124 Ala. 202, 27 So. 263 (1899); *Farmers Trust & Sav. Bank v. Miller*, 203 Iowa 1380, 214 N. W. 546 (1927); *Loupee v. Mich. Cent. R. R.*, 243 Mich. 144, 219 N. W. 727 (1928); *Woodlief v. Harris & Parham*, 95 N. C. 211 (1886); *Barron v. San Angelo Nat. Bank*, 138 S. W. 142 (Tex. Civ. App. 1911); *Bonneville Lumber Co. v. Peppard Seed Co.*, 72 Utah 463, 271 Pac. 226 (1928); *Triumph Electric Co. v. Empire Furniture Co.*, 70 W. Va. 164, 73 S. E. 325 (1911).

16. *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87 (1916); *Pierre v. Pierre*, 210 Iowa 1304, 232 N. W. 633 (1930); *Smithhurst v. Edmunds*, 14 N. J. Eq. 408 (Ch. 1862); *Merchants & Farmers Bank v. Pearson*, 186 N. C. 609, 120 S. E. 210 (1923); *Parker & Co. v. Jacobs*, 14 S. C. 112 (1880); *Waters v. Ellington & Co.*, 289 S. W. 417 (Tex. Civ. App. 1926); *First Nat. Bank of Alexandria v. Turnbull & Co.*, 32 Gratt. 695 (Va. 1880); *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 475 (1894).

17. *Meyer v. Johnston*, 53 Ala. 237 (1875); *Bank of Oakman v. Union Coal Co.*, 15 F. (2d) 360 (C. C. A. 5th, 1926) (following Alabama law); *First Nat. Bank of Yuma v. Yuma Nat. Bank*, 30 Ariz. 188, 245 Pac. 277 (1926); *Ludlum v. Rothchild*, 41 Minn. 218, 43 N. W. 137 (1889); *Hickson Lumber Co. v. Gay Lumber Co.*, 150 N. C. 282, 63 S. E. 1045 (1909); *Richardson v. Washington & Costley Bros.*, 88 Tex. 339, 31 S. W. 614 (1895).

Liens already existing against the property will not, of course, be displaced by the lien of the after-acquired property clause.¹⁸

The Massachusetts Rule

Even under the Massachusetts rule an after-acquired property clause is valid as between the immediate parties.¹⁹ If the mortgagee takes possession of the after-acquired property before the claims of purchasers or *lien* creditors accrue, the mortgagee's claim is superior;²⁰ but if an interest is acquired in the property, by lien or purchase, prior to the taking of possession by the mortgagee, the mortgagee's claim is inferior even though the mortgage is of record.²¹ Courts appear to follow this rule throughout New England and in some other states.²²

The New York Rule

New York²³ follows the Equity rule with respect to subsequent purchasers, holding that as to them a recorded mortgage of after-

18. *Bear Lake & River Water Works & Irrig. Co. v. Garland*, 164 U. S. 1 (1896); *Weiss, Dreyfous & Seiferth v. Natchez Investment Co.*, 166 Miss. 253, 140 So. 736 (1932); *Galloway v. Blue Springs Mining Co.*, 37 S. W. 1016 (Tenn. Ch. 1896); *Community State Bank v. Martin*, 144 Wash. 483, 258 Pac. 498 (1927).

19. See *Chick v. Nute*, 176 Mass. 57, 58, 57 N. E. 219 (1900); *Wasserman v. McDonnell*, 190 Mass. 326, 328, 76 N. E. 959, 960 (1906).

20. *In re Robert Jenkins Corp.*, 17 F. (2d) 555 (C. C. A. 1st, 1927); *Rowley v. Rice*, 11 Metc. 333 (Mass. 1846); *Chase v. Denny*, 130 Mass. 566 (1881). Accord: *Tennis v. Midkiff*, 55 Ill. App. 642 (1894); *Burrill v. Whitcomb*, 100 Me. 286, 61 Atl. 678 (1905); *Cook v. Corthell*, 11 R. I. 482 (1877); *Peabody v. Landon*, 61 Vt. 318, 17 Atl. 781 (1889). Under this rule even if possession is taken by the mortgagee when he has reason to believe that the mortgagor is insolvent, no voidable preference in bankruptcy exists and the mortgagee is entitled to priority. *Humphrey v. Tatman*, 198 U. S. 91 (1905); cf. *In re Robert Jenkins Corp.*, 17 F. (2d) 555 (C. C. A. 1st, 1927).

21. In addition to cases already cited the following are holdings on this point: *Codman v. Freeman*, 3 Cush. 306 (Mass. 1849) (after-acquired furniture in an inn; attaching creditors prevail over mortgagee); *Davis v. Smith-Springfield Body Corp.*, 250 Mass. 278, 145 N. E. 434 (1924) (automobile to be acquired; subsequent incumbrancer taking possession awarded priority over prior after-acquired property mortgagee). Apparently, even the agreement of a subsequent incumbrancer to subordinate himself to a prior after-acquired property clause mortgagee will be of no avail to modify the rigor of the Massachusetts rule. *Chesley v. Josselyn*, 73 Mass. 489 (1856).

22. *American Surety Co. v. Worchester Cycle Mfg. Co.*, 100 Fed. 40 (C. C. D. Conn. 1900); *Gaylor v. Harding*, 37 Conn. 508 (1871); *Hunt v. Bullock*, 23 Ill. 320 (1860) (future-property mortgagee held inferior to execution creditors of office furniture included within the provisions of the after-acquired property clause of a railroad mortgage); *In re Danville Hotel Co.*, 33 F. (2d) 162 (E. D. Ill. 1929); *Long v. Hines*, 40 Kan. 216, 16 Pac. 339 (1888), *aff'd on rehearing*, 40 Kan. 220, 19 Pac. 796 (1888); *Schmidt v. Plummer*, 140 Kan. 436, 37 P. (2d) 1 (1934); *Griffith v. Douglass*, 73 Me. 532 (1882); *Williams v. Noyes & Nutter Mfg. Co.*, 112 Me. 408, 92 Atl. 482 (1914); *Dexter v. Citizens Nat. Bank*, 4 Neb. Unoff. 380, 94 N. W. 530 (1903) (corporate future-property mortgagee held inferior to subsequent purchaser with actual knowledge of the after-acquired property clause); *Spinney v. Meloon*, 74 N. H. 384, 68 Atl. 410 (1907); *Maher v. Smead Heating & Ventilating Co.*, 11 Ohio C. C. 381 (1896); *Clark v. Strickler Bros. Canning Co.*, 11 Ohio App. 250 (1919); *Williams v. Briggs*, 11 R. I. 476 (1877); *Single v. Phelps*, 20 Wis. 398 (1866); *In re Allen's Estate*, 65 Vt. 392, 26 Atl. 591 (1893).

23. See Stone, *The "Equitable Mortgage" in New York* (1920) 20 COL. L. REV. 519; WALSH, MORTGAGES (1934) 57-63.

acquired property is fully effective,²⁴ yet is in accord with the Massachusetts rule that the future-property mortgagee is inferior to the claims of creditors acquiring interests in the property before possession is taken by the mortgagee.²⁵

Miscellaneous Rules

In Kentucky the mortgagee under an after-acquired property clause has priority over third persons only with respect to the increase in female animals²⁶ and property subsequently acquired by a corporation to be used in performing functions authorized by its articles of incorporation.²⁷ Michigan follows the Equity rule²⁸ with the limitation that the future property must be related to the business of the mortgagor.²⁹ Alabama also applies the Equity rule generally³⁰ with the requirement that in a mortgage of crops to-be-grown the mortgagor must have a present interest in the land upon which the crops are to be planted,³¹ even though the interest be no more than a verbal lease.³² In Georgia, as a result of the judicial interpretation of a statute,³³ an after-acquired property clause creates no lien even as between the

24. *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811 (1890); *Duffus v. Bangs*, 122 N. Y. 423, 25 N. E. 980 (1890); *Central Trust Co. v. West India Improvement Co.*, 169 N. Y. 314, 62 N. E. 387 (1901).

25. *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632 (1894). The effect of taking possession in New York is not clear. See *Stone*, *supra* note 23, at 530, n. 51.

26. *Forman v. Proctor*, 9 B. Mon. 124 (Ky. 1849).

27. *Moulder Holcomb Co. v. Glasgow Cooperage Co.*, 173 Ky. 519, 191 S. W. 275 (1917); see *United States Cast Iron Pipe & Foundry Co. v. Vogt Mach. Co.*, 182 Ky. 473, 482, 206 S. W. 806, 809 (1918), where the court states that a mortgage on property to be acquired creates no lien upon the property as against third persons ". . . except in the instance of the increase of a female animal covered by a mortgage and where property is acquired by a corporation, when undertaking to exercise powers which are conferred upon it by its charter." The first half of this "exception" is obviously a relic of the rule of potential existence. Accord: *Westinghouse Electric Mfg. Co. v. Citizens State Ry.*, 24 Ky. L. Rep. 334, 68 S. W. 463 (1902) (on its facts, probably an accession case); cf. *Wender Blue Gem Coal Co. v. Louisville Property Co.*, 137 Ky. 339, 125 S. W. 732 (1910) (holding recorded after-acquired property mortgagee inferior to creditors' claims without discussion of Kentucky corporation rule).

28. *Eddy v. McCall*, 71 Mich. 497, 39 N. W. 734 (1888); *Pere Marquette R. R. v. Graham*, 136 Mich. 444, 99 N. W. 408 (1904).

29. *Ferguson v. Wilson*, 122 Mich. 97, 80 N. W. 1006 (1899); see *Fidelity Corp. v. Post*, 273 Mich. 697, 702, 263 N. W. 775, 777 (1935) (" . . . in this State a chattel mortgage may be given upon property . . . after-acquired in the usual and ordinary course of business. ").

30. *Meyer v. Johnston*, 53 Ala. 237 (1875); *Rust v. Electric Lighting Co.*, 124 Ala. 202, 27 So. 263 (1899).

31. *Windham & Co. v. Stephenson & Alexander*, 156 Ala. 341, 47 So. 280 (1908); *Vinson Bros. v. Finlay*, 206 Ala. 478, 90 So. 310 (1921); *Alexander v. Garland*, 209 Ala. 267, 96 So. 138 (1923); *Farmers Union Warehouse Co. v. McIntosh*, 1 Ala. App. 407, 56 So. 102 (1911). These cases overruled, *sub silentio*, *Hurst & McWhorter v. Bell & Co.*, 72 Ala. 336 (1882).

32. *Littleton v. Abernathy*, 195 Ala. 65, 70 So. 282 (1915).

33. GA. CODE ANN. (1937) § 67-103. A similar statute exists in Louisiana, LA. CIV. CODE (Dart, 1932) § 3308, and Porto Rico, PORTO RICO REV. STAT. (1913) tit. 108, no. 5, p. 1080.

parties,³⁴ except with respect to a deed of trust to secure an issue of bonds and other minor exceptions expressly authorized by statute.³⁵

The Result

The result has been a multitude of conflicting and confusing cases. For example, in Arkansas a well-reasoned decision,³⁶ based upon the Equity rule, held that a mortgagee under an after-acquired property clause was entitled to priority over a purchaser of subsequently-acquired lumber. Later, the court in a correctly-decided opinion ruled that an after-acquired property clause was of no effect as against attaching creditors of a stock of merchandise;³⁷ but the reason announced by the court was that the "trend of our decisions is in accord with the holding of the Supreme Court of Massachusetts."³⁸ In Maryland there is a line of old cases which accepts the Equity rule that an after-acquired property clause is effective against third persons;³⁹ but a dictum in a more recent case states that an after-acquired property clause "has no validity and no effect, except as it may have a bearing upon the intent" of the parties with respect to accession.⁴⁰ In Missouri there is a series of cases which recognizes the validity of an after-acquired property clause as against a subsequent mortgagee of land,⁴¹ of furniture,⁴² and as against other claimants of miscellaneous property.⁴³ At the same time, we find some cases which hold, and other cases which contain dicta to the effect that an after-acquired property clause mortgagee, even though the mortgage is recorded, is subordinate to the claims of execu-

34. *Durant v. D'Auxy*, 107 Ga. 456, 33 S. E. 478 (1899); *Penton v. Hall*, 140 Ga. 235, 79 S. E. 465 (1913); *Peoples Credit Clothing Co. v. Scottish Union & Nat. Ins. Co.*, 54 Ga. App. 832, 188 S. E. 913 (1936) (unconditional ownership insurance policy held not invalidated by a future-property mortgage because latter had no effect). Accord: *Dunson & Bros. Co. v. Unity Cotton Mills*, 34 Ga. App. 768, 131 S. E. 186 (1926).

35. The statute expressly permits the inclusion of after-acquired property in deeds of trust executed to secure issues of bonds, and mortgages of fluctuating stocks of goods. GA. CODE ANN. (1937) § 67-103. If there is statutory authority for the mortgaging of subsequently acquired property, the Georgia courts will hold such a mortgage valid, upon recording as against third persons. *Peoples v. Trust Co.*, 256 Fed. 627 (C. C. A. 5th, 1919); *Southern Ry. v. Lancaster*, 149 Ga. 434, 100 S. E. 380 (1919).

36. *Morton v. Williamson*, 72 Ark. 390, 81 S. W. 235 (1904). See discussion of stock of goods cases, *infra* p. 656.

37. *Farrow v. Farrow*, 136 Ark. 140, 206 S. W. 134 (1918).

38. *Id.* at 148, 206 S. W. at 137.

39. *Butler v. Rahm*, 46 Md. 541 (1877) (valid against third persons with knowledge); *Brady v. Johnson*, 75 Md. 445, 26 Atl. 49 (1892) (valid, when recorded, against attaching creditors); see *Diggs v. Fidelity & Deposit Co.*, 112 Md. 50, 72, 75 Atl. 517, 521 (1910).

40. See *Solter v. Macmillan*, 147 Md. 580, 587, 128 Atl. 356, 358 (1925). In 1935 a statute was passed in Maryland permitting the mortgaging of future personalty under certain conditions. MD. CODE ANN. (Flack, Supp. 1935) art. 21, § 54A *et seq.*

41. *Omaha & St. Louis Ry. v. Wabash, St. Louis & P. Ry.*, 108 Mo. 298, 18 S. W. 1101 (1892).

42. *Wright v. Bircher's Ex'r*, 72 Mo. 179 (1880).

43. *Page & Bacon v. Gardner*, 20 Mo. 507 (1855); see *Smith-Wallace Shoe Co. v. Wilson*, 63 Mo. App. 326, 331 (1895).

tion creditors and subsequent purchasers.⁴⁴ In Nebraska one set of cases adjudges the after-acquired property clause completely invalid even as between the parties,⁴⁵ and this is followed, chronologically, by a line of cases purporting to follow the early cases but which state that an after-acquired property clause does create a lien as between the parties.⁴⁶

Inconsistencies such as these, and many others not noted, can be explained in only one of two ways. Either the courts have floundered about so completely that their theories and rules have become unintelligible even to themselves, or they have sensed as they have proceeded from one case to another that a fair result reached upon one set of facts, and which was rationalized by resort to some theory of after-acquired property law, would be an undesirable result to reach where a different set of facts are presented, although the earlier rationalization is equally applicable and would compel the inequitable result. Only by a study of (1) the theories applied by the courts, and (2) the facts to which these theories were appended, can we determine which is the proper explanation. However, before such a study is presented, it probably would be wise to clear the air by disposing of those theories that have no bearing at all upon our problem but which have recurred sufficiently often in statements of judges and textwriters to have added to the otherwise almost complete confusion of thought.

The Doctrine of Estoppel

Some courts have, from time to time, utilized the doctrine of estoppel by deed to sustain the validity of a mortgage of future property.⁴⁷ Analysis demonstrates that this theory is inapplicable to the instant problem.⁴⁸ The essential basis of an estoppel is that there has been a misrepresentation, relied upon by the plaintiff to his detriment. In an equitable estoppel *in pais* the misrepresentation is made orally, in writing, or by means of conduct. In an estoppel by deed, the misrepresentation is contained in a sealed instrument. The reason for the rule

44. *France v. Thomas*, 86 Mo. 80 (1885); *Steckel v. Swift & Co.*, 56 S. W. (2d) 806 (Mo. App. 1933); see *New England Nat. Bank v. Northwestern Nat. Bank*, 171 Mo. 307, 71 S. W. 191 (1902) (possibly based on Kansas law, but see *id.* at 329, 330, 71 S. W. at 197).

45. *Thostesen v. Doxsee*, 78 Neb. 40, 110 N. W. 567 (1907); *State Bank of Gering v. Grover*, 110 Neb. 421, 193 N. W. 765 (1923), 23 Col. L. Rev. 680; see Ginsberg, *Mortgages of After Acquired Personalty in Nebraska* (1933) 11 NEB. L. BULL. 289, 299-300.

46. *Haver v. North American Hotel Co.*, 111 Neb. 13, 195 N. W. 483 (1923) (possibly limited to accession); *Kelly v. Kannarr*, 118 Neb. 472, 225 N. W. 230 (1929); *First Nat. Bank of Decatur v. Young*, 124 Neb. 598, 247 N. W. 586 (1933).

47. *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (U. S. 1870); *Dillon v. Barnard*, Fed. Cas. No. 3,915 (C. C. D. Mass. 1874), *aff'd*, 21 Wall. 430 (U. S. 1874); *Susquehanna Trust and Safe Deposit Co. v. United Telephone and Telegraph Co.*, 6 F. (2d) 179 (C. C. A. 3d, 1925).

48. See Blair, *The Allocation of After-Acquired Mortgaged Property Among Rival Claimants* (1926) 40 HARV. L. REV. 222, 227-8.

is the same in either instance, for the estoppel "concludes the truth in order to prevent fraud . . . and imposes silence on a party only when in conscience and honesty he should not be allowed to speak";⁴⁹ it "debars the truth . . . only in the case where its utterance would convict the party of a previous falsehood."⁵⁰ It is self-evident that when a person grants a mortgage of property to be acquired in the future he has told no falsehood and has made no misrepresentation. Both parties know the true state of affairs.⁵¹

In addition, estoppel by deed is a doctrine founded upon the intention of the parties.⁵² As a condition precedent to the application of an estoppel it must be shown that the parties intended that the fact in question should not be contradicted. Such a condition is never present in a problem involving the validity of an after-acquired property clause.

Finally, the omission of discussion of estoppel in the great bulk of cases constitutes tacit authority that the doctrine has no place in the law relating to after-acquired property clauses. A leading authority on estoppel has concluded that these cases "are not treated as belonging to the law of title by estoppel."⁵³

The passage of statutes in a number of states embodying the doctrine of estoppel by deed as applied to mortgages may cause additional confusion in the future unless the theory upon which such statutes are based is understood. A typical statute reads: "Title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution."⁵⁴ If regard is had only to the words of the statute, authority is present to support the validity of after-acquired property clauses. However, the history of the legislation does not warrant such smug dependence. At common law an estoppel by deed could not operate unless there were covenants or warranties expressed as to the title of the grantor.⁵⁵ The legislators, in order to enlarge the application

49. *Van Rensselaer v. Kearney*, 11 How. 297, 326 (U. S. 1850).

50. *Ibid.* See also, 2 *TIFFANY, REAL PROPERTY* (1920) 2118.

51. *Roller, Estoppel as Affecting Title to Real Property* (1923) 7 MARQ. L. REV. 81, 94: "Where the true state of the title is known to both of the parties, or both have same means of acquiring knowledge as to the true state of the title, there cannot be an estoppel."

52. *McCullough v. Dashiell*, 78 Va. 634 (1884); see 3 *DEVLIN, REAL PROPERTY AND DEEDS* (3d ed. 1911) 2433.

53. *BIGELOW, ESTOPPEL* (6th ed. 1913) 483, n. 6; see also (1936) 14 TENN. L. REV. 118, 120.

54. See, e. g., CALIF. CIV. CODE (Deering, 1937) § 2930; IDAHO CODE ANN. (1932) § 44-807.

55. *Allen v. Sayward*, 5 Me. 227 (1828); *Doane v. Willcutt*, 5 Gray 328 (Mass. 1855). Another limitation at common law was that title by estoppel could be acquired only if the original "conveyance" had been by means of a feoffment, fine, or common recovery. 2 *TIFFANY, REAL PROPERTY* (1920) § 545. Possibly a "lease" was included. See *BIGELOW, ESTOPPEL* (6th ed. 1913) 419. However, the limitation on the type of conveyance never was accepted in this country. See 2 *TIFFANY, loc. cit. supra*.

of the doctrine of title by estoppel to include mortgages not containing express covenants or warranties of title where all other facts necessary to constitute an estoppel are present, enacted these statutes.⁵⁶

Furthermore, it has been held that the statute will not be applied if the grantee has knowledge that the grantor did not have title at the time of the conveyance.⁵⁷ No such limitation can be found in the statutes; it is a limitation present only in the common law theory of estoppel by deed.

Accession to Mortgaged Property

Another doctrine that must be eliminated in order clearly to understand the future-property mortgage cases is that of accession, occasionally termed the doctrine of "fixtures".⁵⁸ The doctrine of fixtures properly belongs in that field of property law involving the conversion of personal property to real estate through annexation to the freehold, as for example, where the problem is one involving the type of property that can be the subject of larceny, or that can be replevied, etc. The doctrine is so different in substance when applied to mortgages that, to avoid confusion, it should have a distinguishing appellation. The following discussion will, it is expected, make this apparent.

At common law, physical annexation to the land was necessary.⁵⁹ However, when the doctrine was carried over into the field of mortgages it was broadened to include any property integrated by use with the mortgaged property. Thus, Chief Justice Gibson in a well-known passage stated:

" . . . the simple criterion of physical attachment is so limited in its range, and so productive of contradiction [that it will not be accepted]. . . . The courts will be drawn . . . by . . . liber-

56. This view is supported by *Kline v. Ragland*, 47 Ark. 111, 14 S. W. 474 (1886), and see particularly the language of the court at p. 117. A similar view is adopted in 17 CALIF. JURIS. 857 (1924).

57. *Viele v. Van Steenberg*, 31 Fed. 249 (C. C. N. D. Iowa, 1887). In this case, a county deeded land in 1861 to *A*. However, at this time the deed was ineffective because of a statute which provided that counties could not deed such lands unless there was clear title in the state. Later in the same year *A* purported to convey the same land to *B*. In 1874 the State of Iowa acquired title to the land. Thereafter, the county conveyed the same land to *A*. In 1875 *A* conveyed to *X* and thereafter there were several conveyances from *X* to *Y* and *Y* to the present complainant. The controversy is as to whether *B* has title predicated upon estoppel by deed as a result of the *A-B* deed of 1861. A statute in the state reads: "When a deed purports to convey a greater interest than the grantor was at that time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee." The court held that since *B* knew that *A* did not have title in the land at the time of the *A-B* deed, there was no estoppel despite the fact that the statute made no mention of the element of knowledge. An additional ground for the decision was that *B* had not demonstrated payment for the land and therefore would not receive help from an equity court.

58. McCLELLAND AND FISHER, *LAW OF CORPORATE MORTGAGE BOND ISSUES* (1937) 256.

59. Anon. Case, Y. B. 21 Hen. VII, f. 26, pl. 4 (1506).

ality and fitness . . . away from the old criterion [because of] . . . its narrowness and want of adaptation to the business and improvements of the age." 60

The doctrine now established in most jurisdictions is that any personal property, so connected *by use* with an estate subject to mortgage that it becomes an integral part thereof, also becomes subject to the mortgage, *whether the mortgage contains an after-acquired property clause or not*.⁶¹ Unfortunately, the courts have not always realized this and often when a case arises presenting a factual situation fitting squarely within the rule of accession, will, if an after-acquired property clause is present, base their decision upon the after-acquired property clause with the additional statement that the new property has now become "an integral part" of the mortgaged estate.⁶² The lawyer is then left in doubt as to whether (1) an after-acquired property clause is valid in the jurisdiction, or (2) the case is a precedent with respect to accession to mortgaged realty, or (3) both accession and an after-acquired property clause are necessary to create a lien.

It might be noted in passing that if the courts were consistent in applying the principle of accession there would be little need for the after-acquired property clause in many instances. However, the case law indicates that the field has become so confused as to render necessary a more practicable technique for the creation of security. As Professor Bingham has so aptly stated:

"There are some parts of our law that have been particularly favored dumping grounds for loose, inaccurate legal phraseology, careless definition of legal issues, artificial generalizations, and other such débris which in the course of the years have obscured the real criteria of judicial decisions and have unnecessarily rendered the law difficult of apprehension. The law of 'fixtures' has been one of these dumping grounds." 63

60. *Voorhis v. Freeman*, 2 W. & S. 116, 118 (Pa. 1841).

61. *In re East Stroudsburg Glass Co.*, 247 Fed. 614 (M. D. Pa. 1917) (attached hand glass molds used in glass manufactory, held integral part of mortgaged plant); *Morgan Utilities v. Kansas City Life Ins. Co.*, 183 Ark. 492, 37 S. W. (2d) 90 (1931) (oil-burning engine severed from base held to remain a "fixture" and part of mortgaged estate); *Commonwealth Trust Co. v. Harkins*, 312 Pa. 402, 167 Atl. 278 (1933) (removable machinery, patterns and dies held subject to industrial plant mortgage); *cf. Wurlitzer Co. v. Cohen*, 156 Md. 368, 144 Atl. 641 (1929) (organ placed in theatre held not a "fixture" so as to become subject to lessor's security lease).

62. *General Parts Corp. v. First Trust & Sav. Bank*, 87 Ind. App. 501, 161 N. E. 695 (1928); see, e. g., *Roebbling's Sons Co. v. Nebraska Electric Co.*, 106 Neb. 255, 183 N. W. 546 (1921); *Mackall-Paine Veneer Co. v. Vancouver Plywood Co.*, 177 Wash. 503, 32 P. (2d) 530 (1934); *cf. Judge Cardozo in Guaranty Trust Co. v. New York & Queens County Ry.*, 253 N. Y. 190, 206, 170 N. E. 887, 893 (1930), "Accession as a source of title is quite distinct from the operation of a covenant for after-acquired property."

63. Bingham, *Some Suggestions Concerning the Law of Fixtures* (1907) 7 COL. L. REV. 1; see also, generally, Friedman, *The Scope of Mortgage Liens on Fixtures and Personal Property in New York* (1938) 7 FORDHAM L. REV. 331.

An excellent illustration of this remark is found in a Minnesota case where steam radiators screwed to the steam pipes were held, as a matter of law, to have become part of the mortgaged property, while gas fixtures screwed to the gas pipes remained personalty; however, the status of cigar counters was in doubt, so that problem had to be left to the jury!⁶⁴ An equally amusing situation exists in Massachusetts. In one case the court held that a refrigeration system had not become so identified with the realty as to become a part thereof and thus subject to a real estate mortgage.⁶⁵ A few months later the court held otherwise.⁶⁶ The distinction of the court is based upon inferences drawn by the trial judge as to the intention of the parties!⁶⁷

With such precedents existing, the draftsman of a mortgage can hardly rely upon the principle of accession to operate to create sufficient security. An after-acquired property clause must be used whenever it is desired that property subsequently to be acquired should be subject to the lien of the mortgage.

Having discussed the doctrines that cannot be utilized to sustain the validity of an after-acquired property clause, we now turn to the modern theory which is somewhat more acceptable.

The Modern Theory

The prevalent reasoning of the courts in according validity to a present mortgage of property subsequently to be acquired is that an obligation is created which is specifically enforceable in equity.⁶⁸ Protection of the mortgagee against the claims of third persons is found in the equity rule that only bona fide purchasers for value cut off a mortgagee's equity.

This theory assumes that the mortgagor agrees by the insertion of the after-acquired property clause to execute additional conveyances every time he acquires new property. Since this is contrary to the intention of the parties, the theory is reinforced by an equitable maxim—equity regards that which ought to be done as done.⁶⁹ The combination creates a logical sequence pleasant to legalistic minds. The mortgagor, upon acquisition of property, is under a duty to transfer the property to the mortgagee. The law will enforce the obligation if the mortgagor is recalcitrant. Since equity will enforce the duty, equity will continually view the situation with its wishful lorgnette and regard

64. *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257 (1895).

65. *Stiebel v. Beaudette & Graham Co.*, 275 Mass. 108, 175 N. E. 267 (1931).

66. *Commercial Credit Corp. v. Commonwealth Mtge. & Loan Co.*, 276 Mass. 335, 177 N. E. 88 (1931).

67. See Note (1935) 15 B. U. L. REV. 410, 419-20.

68. See *Pennock v. Coe*, 23 How. 117, 129 (U. S. 1859); WILLISTON, *supra* note 5, at 560 *et seq.*

69. See *In re Lind* [1915] 2 Ch. 345, 360; 2 MACHEN, MODERN LAW OF CORPORATIONS (1908) 1507; Blair, *supra* note 48, at 226.

the duty as having been performed; therefore, equity will subject newly-acquired property to the lien of the mortgage.

The Conflict of Interests

The modern theory employed by the courts may not rest upon too firm a foundation,⁷⁰ but it can do no harm so long as it is understood that it merely provides a doctrinaire rationale for arriving at desirable results. The basic difficulty is that it proves too much. To apply it with inflexible rigidity to every situation would result in the absence of any restrictions upon the power of a man or a corporation to subject to charge all and any property that he or it may ever acquire. There are three major social interests that must be counter-balanced in evaluating the wisdom of such an unlimited rule. The first two concern the mortgagor; the last involves the third parties concerned.

1. It is undoubtedly true that "permitting parties to realize on future prospects by present . . . encumbrances of their chances or expectations, for a present price paid, would make available a considerable additional range of intangible assets for present use in supporting productive activities for the more complete satisfaction of human wants." ⁷¹

2. However, "if such a framework can extend indefinitely into the future, the possibility would be open of a man's alienating for present advances not to be sure his entire personal freedom, but still the entire produce of his labor for an indefinite period in the only line in which he knows how to make a living—a somewhat refined sort of peonage." ⁷²

3. Interrelated is the constant problem of notice to creditors and purchasers that the property is subject to a lien in order that there be no reliance upon a false appearance of prosperity.

Here, then, we have a sharp conflict of interests, and a feasible limitation upon the scope of the after-acquired property clause must be found so that a proper balance will be achieved. The courts, through their judicial subconscious perception of the economic problems involved, have, from time to time, laid down rules directed toward a solution of the conflict. The tendency has been, when holding an after-acquired property clause valid, to utilize every available fact without regard to its relevancy to the issue before the court. By stating too many grounds for a given decision, the court has often made it seem that it is only by the presence of that particular combination of facts

70. WILLISTON, *supra* note 5, at 561; see also ASHBURNER, PRINCIPLES OF EQUITY (Browne ed. 1933) 245-247 (advocating the theory that the mortgagor holds the property in trust for the mortgagee).

71. VOLD, SALES (1931) 101-102.

72. LLEWELYN, CASES AND MATERIALS ON THE LAW OF SALES (1930) 577.

that validity is achieved. On the other hand, where the facts before the court have properly called for an adjudication of invalidity, the language of the opinion has tended to be unlimited in scope, debarring, for all time, it would seem, any effective use of the after-acquired property clause. As a result, the rules announced, in the main, have been too narrow or too broad, successfully solving the immediate issue before the court, but leaving for the future an uncertainty that has no basis for existence.

Differentiation between Public Service Corporations and Private Corporations

The first limitation to appear was that while a public service corporation may mortgage effectively its after-acquired property, a private corporation may not.⁷³ Although criticized as "illogical"⁷⁴ and "unfortunate",⁷⁵ a true evaluation of the rule can only be made by reference to its historical basis.

Courts were, from the first, reluctant to permit the present charging of future property, but "were early driven, by commercial necessity, to hold that a mortgage of a railroad, covering rolling stock, machinery, etc., was operative upon after-acquired property."⁷⁶ Then, as other cases arose involving canal companies, power companies, and the like, the courts realized that railroads comprised too small a unit to be accorded preferential treatment, and the rule was enlarged to include public service corporations generally.⁷⁷ Subsequently, as is customary, rationalization set in, and the rule was justified on the ground that it was important in the public interest that enterprises serving the public be kept intact and not dismembered by the separation of the after-acquired property from the original property.⁷⁸ With respect to this observation it should be noted (1) that it is rationalization after the fact, and (2) that while it is undoubtedly true, it is at best only an additional reason for upholding after-acquired property clauses in public service corporation mortgages, and is no reason for shackling the powers of a private corporation. Furthermore, since the line between public service corporations and private corporations is often a very hazy

73. See 4 COOK, CORPORATIONS (7th ed. 1913) 3238: "The rule that a mortgage may cover after-acquired property applies only to a quasi-public corporation." A similar view is taken by Hamilton, *Future Property Clauses in Corporate Mortgages* (1930) 4 TEMP. L. Q. 131. Today such a view is clearly erroneous except in a few isolated jurisdictions. See *infra* note 80.

74. McCLELLAND AND FISHER, *op. cit. supra* note 58, at 318.

75. MACHEN, *op. cit. supra* note 69, § 1857.

76. MACHEN, *op. cit. supra* note 68, at 1502. See *McTighe v. Macon Const. Co.*, 94 Ga. 306, 320, 21 S. E. 701, 706 (1894).

77. See *In re Adamant Plaster Co.*, 137 Fed. 251, 255 (N. D. N. Y. 1905).

78. See e. g., *Mallory v. Maryland Glass Co.*, 131 Fed. 111, 113 (C. C. D. Md. 1904). The reasoning of the court was accepted in 4 COOK, CORPORATIONS, *loc. cit. supra* note 73.

and indistinct one, it seems not the wisest policy to use that criterion in a matter so fundamental and vital.

Finally, this distinction fails to consider the interests to be served by the after-acquired property clause and the reasons justifying a limitation of its scope. The argument concerning public service looks only to the termination of an enterprise and execution upon its property by its creditors. It ignores the fact that the after-acquired property clause is designed to promote productive enterprise by providing security for credit expansion. Limitations are necessary in order to prevent a corporation from straitjacketing its credit.⁷⁹ The restriction here imposed will do this, but it will also do much more; it will render useless the after-acquired property clause as a means of securing present funds on the basis of future assets in the vast field of private enterprise. Present authority is clearly opposed to the acceptance of the rule that effective after-acquired property clauses may be created only by public service corporations.⁸⁰

79. See Note (1935) 48 HARV. L. REV. 474, 475. The problem of how far a corporation shall be permitted to bind its after-acquired property presents its own peculiar conflict of interests. With the prevalence of after-acquired property clauses in corporate mortgages, a corporation seeking to expand is today extremely handicapped in its efforts to offer the necessary security for loans it must make. However, the subject is not only worthy of separate treatment but the space required for an adequate discussion of its many perplexities makes such procedure essential. The writers, with regret, therefore, leave the subject untouched for the present.

80. *In re Medina Quarry Co.*, 179 Fed. 929 (W. D. N. Y. 1910) (quarry corporation); *Equitable Trust Co. v. United States Oil & Refining Co.*, 35 F. (2d) 508 (D. Wyo. 1928) (oil producing corporation), *rev'd on other grounds sub. nom.*, *Werner, Harris & Buck v. Equitable Trust Co.*, 35 F. (2d) 513 (C. C. A. 10th, 1929); *Mason v. Citizens' Nat. Trust & Sav. Bank*, 71 F. (2d) 246 (C. C. A. 9th, 1934), 23 CALIF. L. REV. 628 (1935) (manufacturing corporation); *Indian Creek Coal Min. Co. v. Home Sav. & Merchants' Bank*, 80 Colo. 96, 249 Pac. 499 (1926) (mining company); *Cummings v. Consolidated Mineral Water Co.*, 27 R. I. 195, 61 Atl. 353 (1905) (mineral water corporation); *McClung, Buffat & Buckwell v. Quincy Carriage & Wagon Co.*, 117 Tenn. 250, 96 S. W. 960 (1906) (carriage building corporation); *First Nat. Bank of Alexandria v. Turnbull & Co.*, 73 Va. 695 (1880) (cotton manufacturing company); *Triumph Electric Co. v. Empire Furniture Co.*, 70 W. Va. 164, 73 S. E. 325 (1911) (furniture company); *Benson v. Wood Motor Parts Corp.*, 115 W. Va. 200, 174 S. E. 895 (1934) (motor parts corporation); *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 475 (1894) (livestock corporation). It should be remembered that the very cases that established the equitable rule permitting mortgages of after-acquired personalty were cases involving an unincorporated cutlery manufactory (*Mitchell* case) and an unincorporated damask manufactory (*Holroyd* case).

The distinction between public service corporations and private corporations has been preserved in Ohio by statute. Code of Ohio (Throckmorton's Baldwin, 1934) § 8623-75. But even in the absence of a specific statute so permitting, a railroad may create a future-property mortgage. *Coe v. Peacock*, 14 Ohio St. 187 (1863); *Coopers & Clark v. Wolf*, 15 Ohio St. 523 (1864). For a discussion of Ohio law, see 27 OHIO JURIS. 267 (1933). Pennsylvania cases tend to follow this rule. *Philadelphia, W. & B. R. R. v. Woelpper*, 64 Pa. 366 (1870) (bondholder under railroad mortgage containing an after-acquired property clause enjoined execution upon subsequently acquired cars and locomotives; language of opinions indicates that power is confined to railroads); see also, *Covey v. Pittsburgh, Ft. W. & Chi. R. R.*, 3 Phila. 173 (C. P. 1858); cf. cases cited *infra* note 117, and *Baker's Ex'rs v. Consumers' Box Board & Paper Co.*, 21 Pa. Dist. 113 (1911).

Differentiation between Corporations and Individuals

Permitting a corporation to mortgage future property but denying the power to unincorporated entrepreneurs approaches closer to a solution of the problem. But inherent within such a rule is the vice that it denies the benefit of an important economic measure in many instances where social desirability requires the opposite result. For example, an impecunious farmer⁸¹ desires to rent a farm. The owner of the farm in question is willing to rent it but, naturally enough, wants security for the payment of the rent. There being no other available security, the crops to be raised in the current year would appear to be the logical solution to the problem. Or a chemist wants to set up a small manufacturing plant experimentally to produce a new commodity he has developed. A banker is willing to extend credit if security can be furnished. The plant to be erected is obviously the best security. It should be remembered that incorporation is not always possible, feasible, or inexpensive. The courts have generally refused to accept this limitation.⁸²

"In Prasesenti"

A limitation that runs vaguely through some decisions,⁸³ and although unsupported by texts has been accepted by one law review writer, is that "after-acquired property may not be mortgaged in gross, but only as an appurtenance to property *in esse* and owned by the mortgagor at the date of the mortgage."⁸⁴ This thought is probably a relic of the common-law limitation of *Grantham v. Hawley* lingering

81. Example taken from Ginsberg, *Mortgages of After-Acquired Personalty in Nebraska* (1933) 11 NEB. L. BULL. 289, 290.

82. Mortgages by individuals held valid as against third persons: *In re Dagwell*, 263 Fed. 406 (E. D. Mich. 1920) (stock of merchandise); *Louden v. Vinton*, 108 Mich. 313, 66 N. W. 222 (1896) (stock of hardware); *Ludlum v. Rothchild*, 41 Minn. 218, 43 N. W. 137 (1889) (furniture); *Stoll v. Sibson*, 65 N. J. Eq. 552, 56 Atl. 710 (Ch. 1903) (drug merchandise); *Collerd v. Tully*, 77 N. J. Eq. 439, 77 Atl. 1079 (Ch. 1910) (horses and wagons), *aff'd*, 78 N. J. Eq. 557, 80 Atl. 491 (1911); *Parker & Co. v. Jacobs*, 14 S. C. 112 (1880) (turpentine); *Iverson v. Soo Elevator Co.*, 22 S. D. 638, 119 N. W. 1006 (1909) (crops); *Richardson v. Washington & Costley Bros.*, 88 Tex. 339, 31 S. W. 614 (1895) (crops); *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487, 40 S. E. 564 (1901) (books in bookstore).

In two jurisdictions a corporation may mortgage property to be acquired while an individual may not. In Louisiana a statute provides that "Future property can never be the subject of conventional mortgage." LA. CIV. CODE (Dart, 1932) § 3308. A conventional mortgage is a contractual mortgage, *id.* at § 3290, as opposed to a legal mortgage, i. e., a lien arising by operation of law, *id.* at § 3311. The latter occasionally is termed a "tacit" mortgage. Section 3308 has been interpreted to apply only to individuals and to offer no restrictions to corporations. *Bell v. Chicago, St. L. & N. O. R. R.*, 34 La. Ann. 785 (1882). Cf. *Daggett, The Chattel Mortgage in Louisiana* (1938) 16 TEX. L. REV. 162. By statute, utility corporations may now mortgage future property. See, e. g., LA. GEN. STAT. ANN. (Dart, 1932) § 1160 (electric light and power companies). The same rule prevails in Kentucky. Compare *Patterson v. Louisville Trust Co.*, 17 Ky. L. Rep. 234, 30 S. W. 872 (1895) with *Moulder Holcomb Co. v. Glasgow Cooperage Co.*, 173 Ky. 519, 191 S. W. 275 (1917), and see *supra* note 27.

83. It first appeared in a dictum in *Morrill v. Noyes*, 56 Me. 458, 467, 468 (1863); see *Fidelity & Deposit Co. v. Sturtevant Co.*, 86 Miss. 509, 522, 38 So. 783, 785 (1905).

84. Blair, *supra* note 48, at 228; also found in 17 CALIF. JURIS. 863 (1924).

to torture present-day lawyers and a confusion of the principle of accession with principles of after-acquired property clause law. There are cases which definitely line up against such a limitation and most courts faced with it have rejected it in unmistakable terms.⁸⁵ As phrased in the above quotation the restriction would probably limit the operation of the after-acquired property clause to factual situations calling for the application of the rule of accession to mortgaged realty. Certainly the after-acquired property clause is broader than that, and any view which demands that some property be subjected to mortgage before future property may be charged imposes a wholly artificial limitation.

Not only would this rule hinder the operation of the future-property mortgage device in many instances where social desirability calls for its use, but it would not be enough of a brake where limitation is both desirable and necessary. Under this principle, a farmer could mortgage the crops to be grown on *his* land for the next succeeding twenty years; but the chemist could not presently mortgage the plant to be built with the borrowed funds, for this would be a mortgage "in gross". The overwhelming probability is that the courts will not accept this limitation.

Descriptive Requirements

Occasionally there has been suggested the rule that an after-acquired property clause must specifically describe the property intended to be charged. Unfortunately, the elementary unanalytical texts have gone whole-hog in swallowing this limitation.⁸⁶ Only one rarely cited case has actually applied the rule to hold an after-acquired property clause invalid.⁸⁷ Contrary to this case there are a host of holdings that a broad after-acquired property clause, i. e., "all the property now owned or hereafter acquired by the mortgagor", will subject future property to the lien of the mortgage at the time of acquisition by the mortgagor. In a Pennsylvania case⁸⁸ a trust indenture created by its terms a lien upon "all . . . property . . . either now owned, pos-

85. *Galveston R. R. v. Cowdrey*, 11 Wall. 459, 481 (U. S. 1870): "Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed. . . ." Accord: *Meyer v. Johnston*, 53 Ala. 237 (1875) (see particularly page 324); *Hogan v. Atlantic Elevator Co.*, 66 Minn. 344, 69 N. W. 1 (1896) (mortgage of crops to be grown at a time when grantor had no interest in any property at all held valid against subsequent specific mortgage); *Richardson v. Washington & Costley Bros.*, 88 Tex. 339, 31 S. W. 614 (1895) (same).

86. 41 C. J. 302, 400-401 (1926); 1 JONES, LIENS (3d ed. 1914) § 33. Others have, parrot-fashion, repeated this doctrine: 1 JONES, MORTGAGES (8th ed. 1928) 265; GINSBERG AND GINSBERG, MORTGAGES AND OTHER LIENS IN MARYLAND (1936) 31.

87. *Calhoun v. Memphis & P. R. R.*, Fed. Cas. No. 2,309 (W. D. Tenn. 1879).

88. *Colonial Trust Co. v. Harmon Creek Coal Co.*, 287 Pa. 284, 135 Atl. 134 (1926).

sessed or acquired" by the grantor-mortgagor. A bill in equity was filed to include within the lien of the indenture land acquired by the mortgagor. The action was contested on the ground that the land was distant from the original property mortgaged and not directly related to it. The court gave short shrift to this argument, stating that there is not ". . . the slightest limitation as to the location of land to be acquired . . . Nor is there the slightest intimation of such a limitation . . . it is said that *all* after-acquired property is to be subject to the lien of the mortgage, and we can only repeat that '*all*' means all." ⁸⁹ In another leading case ⁹⁰ a mortgage was created on "all the property . . . now owned by the Gay Lumber Co. or [which] shall be owned during the continuance of the debt hereinafter mentioned." The mortgage was recorded and thereafter the mortgagor acquired some land. Subsequently, the mortgagor company executed a specific mortgage of the newly-acquired property. In a controversy concerning the priority between the specific mortgagee and the prior mortgagee claiming under the after-acquired property clause, the court upheld the latter. The holding is particularly strong because, although the specific mortgagee offered to produce evidence that he had advanced the funds used to purchase the property in question, the court affirmed the trial court's exclusion of the evidence, ruling, as a matter of law, that the after-acquired property clause mortgagee had priority. Other cases are substantially in accord with these decisions.⁹¹ In view of the imposing array of authorities it is a reasonable conclusion that the requirement, as stated by the texts, will not be accepted.

In a more modified form there is something in the limitation. However, the restriction should be stated as a matter of intention. If, from the entire mortgage instrument, it is apparent that the parties did not intend the property in question to become a part of the mortgaged estate, the courts will observe the intention of the parties.⁹² Insofar

89. *Id.* at 288, 135 Atl. at 136. (Italics by the court.)

90. *Hickson Lumber Co. v. Gay Lumber Co.*, 150 N. C. 282, 63 S. E. 1045 (1909).

91. *Parker v. New Orleans B. & R. & V. R. R.*, 33 Fed. 693 (C. C. W. D. La. 1888); *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87 (1916); *Davis v. Horne*, 54 Fla. 563, 45 So. 476 (1907); *Hughes v. Wheeler*, 66 Iowa 641, 24 N. W. 251 (1885); *Minnesota Loan & Trust Co. v. Peteler Car Co.*, 132 Minn. 277, 156 N. W. 255 (1916); *Omaha & St. L. Ry. v. Wabash, St. L. & P. Ry.*, 108 Mo. 298, 18 S. W. 1101 (1892); *Metropolitan Trust Co. v. Dolgeville Electric Light & Power Co.*, 35 Misc. 467, 71 N. Y. Supp. 1055 (Sup. Ct. 1901); *Medford v. Myrick*, 147 S. W. 876 (Tex. Civ. App. 1912); *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 475 (1894).

92. *Old Colony Trust Co. v. Standard Beet Sugar Co.*, 150 Fed. 677 (C. C. N. D. Neb. 1907) (mortgage including any after-acquired "plant", held not intended to cover a tract of land subsequently acquired 200 miles from the factory for the purpose of raising beets for use in manufacturing sugar); *Kastner v. Fashion Livery Co.*, 10 Ariz. 23, 85 Pac. 120 (1906) (mortgage on "all the property now used and hereafter being used" interpreted as not intended to include after-acquired property but merely inserted to grant permission to use the mortgaged property); *Maxwell Lumber Co. v. Connelly*, 34 N. M. 562, 287 Pac. 64 (1930) (cash interpreted to be excluded from operation of a broad after-acquired property clause); *Flanagan Bank v. Graham*, 42 Ore. 403, 71 Pac.

as third persons are concerned, the instrument should be sufficiently informative to indicate clearly that the property in question is subject to the lien of the after-acquired property clause.⁹³ A broad clause mentioning "all after-acquired property" will generally do this more effectively than a minute description. The question then becomes one of intention. Sometimes the problem will be difficult to solve, but in a great number of instances the question will be an easy one. For example, the private owner of a manufacturing plant mortgages the plant and "all property hereafter acquired by the mortgagor"; subsequently he acquires a new residence. Most courts would probably find little difficulty in concluding that the lien of the mortgage does not embrace the mortgagor's personal home.⁹⁴ But all property acquired by the mortgagor relating to the manufacturing plant would be included.

The same problem can rarely arise in the case of a corporate mortgage, and here a broad after-acquired property clause should be construed to cover *all* property subsequently acquired by the mortgagor at least to the extent that the property is related to the type of business carried on by the mortgagor at the time of the execution of the mortgage.⁹⁵

Having cleared the picture of doctrinaire débris such as estoppel and accession, and having discussed the various limitations suggested, we come now not to the promulgation of dogmatic rules, but to the consideration of certain operative facts which seem, from a study of the cases, to have had most to do with framing the decisions. Since by

137 (1903) (court interpreted conduct of mortgagor as indicating intention to subordinate his lien to later lien); *Murray v. Farmville & Powhatan R. R.*, 101 Va. 262, 43 S. E. 553 (1903) (railroad mortgage included grant of all after-acquired property "connected with or issuing from or relating to said railroad", held, not to include subsequently acquired property not related to the railroad then mortgaged); see *South Texas Implement & Mach. Co. v. Anahuac Canal Co.*, 280 S. W. 521, 523 (Tex. Comm. App. 1926).

93. The description need be only sufficient to constitute a warning. *Roe v. State*, 82 Ala. 68 (1886); *Eddy v. McCall*, 71 Mich. 497, 39 N. W. 734 (1888). In *Smith v. McCoy-Kessinger Lumber Co.*, 108 Ark. 162, 157 S. W. 735 (1913) a recorded mortgage of the mortgagor's "last sawing" of lumber was held invalid against creditors because the description was insufficient to give notice of the property intended to be charged. In *Alberts v. Alberts*, 53 S. D. 463, 221 N. W. 80 (1928) a mortgage of an automobile to be acquired was held inferior to the claim of a subsequent specific mortgagee because the incorrect automobile number was inserted in the recorded mortgage.

94. See *Rose v. Lurton Co.*, 111 Fla. 424, 149 So. 557 (1933), where a partnership mortgaged the property of the business and included any property "which may be hereafter acquired by the parties of the first part and each of them." One partner subsequently acquired individual property. Held, the latter property was not included within the partnership mortgage. In *Ferguson v. Wilson*, 122 Mich. 97, 80 N. W. 1006 (1899) a farmer executed a mortgage of his farm, the implements, and machinery used in and about the farm and "all other personal property which I may own or acquire." He subsequently acquired personal property unrelated to the farm. Held, the latter could not be included within the lien of the mortgage.

95. See cases cited *supra* note 91; cf. *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. R.*, 58 Miss. 896 (1881); *Fidelity & Deposit Co. v. Sturtevant Co.*, 86 Miss. 509, 38 So. 783 (1905).

far the outstanding determinative force has been that of the type of property involved, we have partitioned our discussion in that fashion.

Land

An attempt to mortgage land to be acquired in the future should always be upheld, and the mortgage, when recorded, should grant the mortgagee priority over all creditors, subsequent purchasers and lienors. The great weight of authority favors this view.⁹⁶ Permitting this does not reduce a man to peonage, for the increment to the land is still his. Creditors and prospective purchasers are protected, for a search of the record will reveal the charge and give fair warning.

Personalty Utilized in Business

Machinery, equipment, and other fixed apparatus should receive the same treatment as land. Comments under that heading are applicable here.

Assuming that chattel mortgages may be created, after-acquired personal property mortgages should be permitted in the absence of a strong prohibitive public policy. None is present with respect to this type of material. Furniture in hotels and inns constitutes capital goods and often can be acquired only with funds advanced and secured by a lien on the furniture to be acquired. No attempt will here be made to itemize all property that should come within the operation of an after-acquired property clause. Suffice it to say that all capital goods used in business and industrial enterprises should come within a future property mortgage. The bulk of case authority supports this contention.⁹⁷

96. *Lang v. Choctaw, O. & G. R. R.*, 198 Fed. 38 (C. C. A. 8th, 1912), *cert. denied*, 227 U. S. 680 (1913); *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87 (1916); *Lamar Land & Canal Co. v. Belknap Sav. Bank*, 28 Colo. 344, 64 Pac. 210 (1901); *Hamlin v. European & N. A. Ry.*, 72 Me. 83 (1881); *Pere Marquette R. R. v. Graham*, 136 Mich. 444, 99 N. W. 408 (1904); *Howard v. Iron & Land Co.*, 62 Minn. 298, 64 N. W. 896 (1895) (creditors, however, not involved as court treated the case); *Blum v. Planters' Bank & Trust Co.*, 161 Miss. 226, 135 So. 353 (1931) (contract to create a mortgage on land, though unrecorded, held superior to creditors obtaining statutory liens upon death of mortgagor); *Omaha & St. L. Ry. v. Wabash, St. L. & P. Ry.*, 108 Mo. 298, 18 S. W. 1101 (1892); *Commonwealth Trust Co. v. Salem Light, Heat & Power Co.*, 77 N. H. 146, 89 Atl. 452 (1914) (no secured creditors involved); *Ehret v. Price*, 122 Okla. 277, 254 Pac. 748 (1927). *Contra: Maher v. Smead Heating & Ventilating Co.*, 11 Ohio C. C. 381 (1896) (mortgage of land to be acquired held inferior to subsequent mortgage); see 27 OHIO JURIS. 267 (1933); *Massachusetts Gasoline & Oil Co. v. Go-Gas Co.*, 259 Mass. 585, 593, 156 N. E. 871, 874 (1927) ("In this Commonwealth a mortgage of real or personal property to be acquired does not attach to that property, at law or in equity, as it comes into the hands of the mortgagor.").

97. *Stearns Lighting & Power Co. v. Central Trust Co.*, 223 Fed. 962 (C. C. A. 6th, 1915) (case involved electric transmission lines and court applied Michigan law; on its facts case may well be one of accession); *Mason v. Citizens' Nat. Trust & Sav. Bank*, 71 F. (2d) 246 (C. C. A. 9th, 1934), 23 CALIF. L. REV. 628 (1935); *Washington Trust Co. v. Dunaway*, 3 Alaska Fed. 301, 169 Fed. 37 (C. C. A. 9th, 1909) (judgment creditor sought to levy on locomotives and cars of railroad; injunction obtained by mortgagee under recorded future property mortgage); *Indian Creek Coal Min. Co. v. Home Sav. & Merchants Bank*, 80 Colo. 96, 249 Pac. 499 (1926) (machinery); *Marion*

Crops

Agricultural financing presents the conflict of interests in its most acute form. Although farmers must be able to mortgage crops to be grown in order to obtain funds with which to buy seed, etc., nevertheless legal sanction cannot be given to a device that will cause even more farmers to become sharecroppers. The legislatures⁹⁸ and courts⁹⁹

Mortgage Co. v. Teate, 98 Fla. 713, 124 So. 172 (1929) (furniture in a hotel); Dover Lumber Co. v. Case, 31 Idaho 276, 170 Pac. 108 (1918) (logging camp outfit); Poage v. Co-operative Pub. Co., 57 Idaho 561, 66 P. (2d) 1119 (1937) (office furniture); Westinghouse Electric Mfg. Co. v. Citizens' St. Ry., 24 Ky. L. Rep. 334, 68 S. W. 463 (1902) (electrification system; possibly a case of accession); Brady v. Johnson, 75 Md. 445, 26 Atl. 49 (1892) (works of canal company); Ludlum v. Rothchild, 41 Minn. 218, 43 N. W. 137 (1889) (furniture and fixtures in a saloon); Wright v. Bircher's Ex'r, 72 Mo. 179 (1880) (hotel furniture); Pierce v. Emery, 32 N. H. 484 (1856) (cargo of iron); Smithurst v. Edmunds, 14 N. J. Eq. 408 (1862) (hotel furniture); Monmouth County Electric Co. v. Central R. R., 54 Atl. 140 (N. J. Ch. 1903) (poles and electric transmission lines); McClung, Buffat & Buckwell v. Quincy Carriage & Wagon Co., 117 Tenn. 250, 96 S. W. 960 (1906) (machinery and tools). *Contra*: Griffith v. Douglass, 73 Me. 532 (1882) (furniture to be placed in an inn); New Lincoln Hotel v. Shears, 57 Neb. 478, 78 N. W. 25 (1899) (hotel furniture); see Farmers' Loan & Trust Co. v. Commercial Bank, 11 Wis. 207, 209-10 (1860) (dictum that railroad chairs could not be included in railroad future-property mortgage; holding based on terms of the mortgage).

Much of the type of property enumerated in this section will occasionally become subject to a general mortgage by virtue of the doctrine of accession to mortgaged property. See *supra* p. 644. However, there is no certainty. For example, despite the broad rule of accession adopted by the Pennsylvania courts (see cases cited *supra* note 61), it will not include furniture placed in an apartment hotel. Klaus v. Majestic Apartment House Co., 250 Pa. 194, 95 Atl. 451 (1915).

98. E. g., see ALA. CODE ANN. (Michie, Supp. 1936) § 9008 (mortgages on crops to be planted limited to those grown within period of one year, otherwise mortgage void); ARK. DIG. STATS. (Pope, 1937) § 9446 (similar one year limitation); N. D. Laws 1933, c. 150 (abolishes crop mortgages except those executed in favor of the Federal Government). See Note (1937) 47 YALE L. J. 98.

99. In Alabama the courts ruled that a mortgage of crops to be grown would not be effective unless the mortgagor had some interest in the land on which the crops were to be grown, Moring v. Helms, 210 Ala. 175, 97 So. 647 (1923), 37 HARV. L. REV. 765 (1924) (invalid as between the parties); Windham & Co. v. Stephenson & Alexander, 156 Ala. 341, 47 So. 280 (1908); Vinson Bros. v. Finlay, 206 Ala. 478, 90 So. 310 (1921); Alexander v. Garland, 209 Ala. 267, 96 So. 138 (1923). The earlier case of Hurst & McWhorter v. Bell & Co., 72 Ala. 336 (1882), seems clearly to have been overruled.

In Colorado a mortgage of crops to be grown in the future is valid between the parties but despite recording is ineffective as against third persons. First Nat. Bank of Montrose v. Felter, 65 Colo. 370, 176 Pac. 496 (1918); Tolland Co. v. First State Bank of Keenesburg, 95 Colo. 321, 35 P. (2d) 867 (1934). However, this is not the law of Colorado with respect to property other than crops. Lamar Land & Canal Co. v. Belknap Sav. Bank, 28 Colo. 344, 64 Pac. 210 (1901) (land); Indian Creek Coal Min. Co. v. Home Sav. & Merchants Bank, 80 Colo. 96, 249 Pac. 499 (1926) (machinery, recorded mortgage held superior to execution creditors). See Note (1935) 7 ROCKY MT. L. REV. 264, 270-1.

The probability is that mortgages of cattle to be acquired by farms and ranches are in the same position as crop mortgages. This would explain the holding in Steckel v. Swift & Co., 56 S. W. (2d) 806 (Mo. App. 1933), that a recorded mortgage on cattle to be acquired was ineffective against a purchaser, although the law of Missouri up to this time was clear that after-acquired property could be mortgaged and that the mortgage, when recorded, was effective as against third persons. Page & Bacon v. Gardner, 20 Mo. 507 (1855) (debts under a general deed of trust executed by newspaper owner; law of after-acquired property clause applied); Wright v. Bircher's Ex'r, 72 Mo. 179 (1880) (after-acquired furniture in a hotel); Omaha & St. L. Ry. v. Wabash, St. L. & P. Ry., 108 Mo. 298, 18 S. W. 1101 (1892) (after-acquired hotel); see Langford v. Fanning, 7 S. W. (2d) 726, 728 (Mo. App. 1928).

conversant with the problem have imposed limitations upon farmers' attempts to subject crops to the lien of an after-acquired property mortgage. These limitations may be justifiable and desirable. However, the important point from the legal viewpoint is the understanding that a decision with reference to crops does not create a rule applicable to land or capital goods. More recently the courts have begun to give expression to this distinction. In a late Mississippi case¹⁰⁰ the court held that a mortgage on crops to be grown in the three years following the execution of the instrument was inferior, though recorded, to the lien of a later mortgage of crops to be grown during the current year. However, the court is careful to warn that "what we . . . say here . . . must be understood as confining our decision strictly to annual crops . . . And, moreover, we must be understood as dealing with crops and with no other class of property."¹⁰¹

If it were realized clearly that crop cases are not authority in situations involving other types of property, much of the present confusion in the law of after-acquired property would disappear.¹⁰² The hybrid New York rule that despite recording an after-acquired property clause mortgagee is inferior to creditors but superior to purchasers would be revised. That such a rule exists has been stated by eminent authorities;¹⁰³ but examination of the objectionable portion of the rule, i. e., that creditors prevail over the mortgagee reveals that that rule is based upon the decision in a crop case.¹⁰⁴ The reasoning of the court in that case was not limited to crops, but, as is true in many instances, the court was groping toward a proper result and indulged in sophistry to reach it. By discarding the reasoning and dealing with facts, holdings, and underlying motivating forces, a more accurate picture will come into focus.

Stock of Goods Held for Resale

What to do with mortgages executed by a merchant on a stock of goods held for resale has been a vexatious problem to the courts. The acute conflict of interests is accentuated by the desire to protect creditors. When having nothing else to utilize for security, merchants

In Nebraska a mortgage of crops to be grown or animals to be acquired is invalid against creditors. *Cole v. Kerr*, 19 Neb. 553, 26 N. W. 598 (1886) (crops); *Battle Creek Valley Bank v. First Nat. Bank*, 62 Neb. 825, 88 N. W. 145 (1901) (animals). But the indication from *Roebeling's Sons Co. v. Nebraska Electric Co.*, 106 Neb. 255, 183 N. W. 546 (1921) is that this rule will not be applied to after-acquired property of manufacturing and service corporations. On its facts this case is an accession case, but the language of the court is quite broad. Cf. *Ginsberg*, *supra* note 45. *Contra*: *Steele v. Ashenfelter*, 40 Neb. 770, 59 N. W. 361 (1894).

100. *Coffey v. Land*, 176 Miss. 114, 167 So. 49 (1936).

101. *Id.* at 116, 167 So. at 49.

102. For example, compare discussion of Nebraska law in note 99 *supra* with *Ginsberg*, *supra* note 45.

103. *Stone*, *supra* note 23, at 519; *WALSH, MORTGAGES* (1934) 57-63.

104. *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632 (1894).

can offer only a mortgage of their stock in trade. However, complete power of sale must be granted to the mortgagor or there is a termination of the mercantile business. Courts sympathize with the struggle to obtain credit and yet must be solicitous lest the individual find himself unable to conduct his business because of an unrestricted mortgage. The courts must be mindful, too, that others may extend credit relying upon the false appearance of prosperity engendered by a huge display of merchandise. The legalistic answer to the latter problem is easy: the mortgage will be recorded and therefore creditors will be warned. Obviously, this ignores the practical situation. The credit problems involved in the merchandising side of business are handled rapidly, and, in addition, are continuing arrangements. Those furnishing merchandise and stock should not be required to search the record prior to each delivery; it would constitute an unwarranted expenditure of time and money and would be a major obstacle to free flow in marketing. The attempt satisfactorily to resolve this quandary exemplifies the adage that hard cases make bad law. Briefly, and without purporting to develop the various ramifications into which this enigma has led the courts, in about half the states a mortgage of a stock of goods held for resale with a power of sale vested in the mortgagor is invalid against creditors of the mortgagor,¹⁰⁵ while the other jurisdictions hold that it is merely evidence of fraud but valid unless additional proof of intention to defraud creditors is forthcoming.¹⁰⁶ Within these rules can be found a multitude of variations, apparently without rhyme or reason.¹⁰⁷

Most of these cases concern after-acquired property. It must be borne in mind, however, that when a court subordinates the claim of a mortgagee of a stock of goods to the claims of creditors it is not because after-acquired property is involved but simply because it is a mortgage of a stock of goods held for resale with a power of sale in the mortgagor. The fact that after-acquired property is involved should not be an operative fact in these cases; it generally is not if one goes beneath the veneer of the decisions to the true interests protected.¹⁰⁸ Most of the decisions of the Massachusetts court could be

105. See 2 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES (6th ed. 1933) § 415.

106. *Ibid.*

107. E. g., see Kerr, *Chattel Mortgages on Shifting Stocks of Goods in Washington* (1936) 11 WASH. L. REV. 199; JONES, *op. cit. supra* note 105, § 397 (Missouri), § 401 (New York).

108. E. g., in Arkansas a mortgage of future additions to a retail stock of goods was held invalid against creditors. *Farrow v. Farrow*, 136 Ark. 140, 206 S. W. 134 (1918). But a "retail stock of goods" mortgage is invalid as to creditors in Arkansas even when no future additions are involved. *Gauss Sons v. Doyle & Co.*, 46 Ark. 122 (1885); *Coffman v. Citizens' Loan & Investment Co.*, 172 Ark. 889, 290 S. W. 961 (1927). A recorded future property mortgage not involving retail stock of goods is valid against purchasers and creditors. *Morton v. Williamson*, 72 Ark. 390, 81 S. W. 235 (1904) (purchaser); *Little v. National Bank*, 97 Ark. 57, 133 S. W. 166 (1910).

explained by an inquiry into the nature of the property involved.¹⁰⁹ These decisions, accepted for the broad proposition that future property cannot be presently mortgaged, have led to unfortunate results both in Massachusetts¹¹⁰ and elsewhere.¹¹¹ They should be understood for what they are—holdings that stock of goods cases involve peculiar problems and therefore demand solutions distinct from the answers given in the ordinary instances of the mortgaging of after-acquired property.

Another series of cases, similar to the above but not identical, are those in which a manufacturer or processor attempts to mortgage the finished product and stock to be created in the future. The financing problem is the same; the "peonage" fear is reduced; but the delusive appearance to creditors is again present. There are, however, some important differences. By and large the transactions involve larger sums and therefore it is not unreasonable to require a more complete credit-rating search,¹¹² including examination of mortgage records.¹¹³ Also, creditors do not rely solely upon the stock as security but frequently upon the plant, machinery, and equipment as well.

It is not surprising, then, to find a tendency on the part of the courts to accord validity as against creditors and purchasers to a mortgage of a processor's or manufacturer's stock of goods.¹¹⁴ Again, it

(creditors); *Lang v. Choctaw, O. & G. R. R.*, 198 Fed. 38 (C. C. A. 8th, 1912), *cert. denied*, 227 U. S. 680 (1913). In Mississippi, a mortgage of future additions to a stock of merchandise is invalid against creditors. *Andrews v. Partee*, 79 Miss. 80, 29 So. 788 (1901). If a stock of goods is not involved, the mortgage on chattels not *in esse* is valid as to third persons. *Everman & Co. v. Robb*, 52 Miss. 653 (1876) (crops); *Blum v. Planters' Bank & Trust Co.*, 161 Miss. 226, 135 So. 353 (1931) (contract to create mortgage on lands to be acquired). There are no cases involving capital goods in Mississippi.

109. E. g., the leading cases in Massachusetts are stock of goods cases. *Jones v. Richardson*, 10 Metc. 481 (Mass. 1845); *Moody v. Wright*, 13 Metc. 17 (Mass. 1847).

110. The early Massachusetts decisions were followed in cases involving equipment used in a printing establishment, *Chesley v. Josselyn*, 73 Mass. 489 (1856); property of an electric light company, *Harriman v. Woburn Electric Light Co.*, 163 Mass. 85, 39 N. E. 1004 (1895); and property of a street railway, *Federal Trust Co. v. Bristol County St. Ry.*, 222 Mass. 35, 109 N. E. 880 (1915) (possibly not a holding but at least a considered dictum).

111. See, e. g., *Chynoweth v. Tenney*, 10 Wis. 397 (1860), following the Massachusetts rule properly in a stock of goods case but accepting the broad language and therefore later causing the judicial pronouncement that as against a subsequent mortgagee, a future-property railroad mortgage was invalid. *Farmers Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207, 209-10 (1860), *aff'd*, 15 Wis. 424 (1862). See also *Little v. National Bank*, 97 Ark. 57, 61-2, 133 S. W. 166, 167 (1910); *Farrow v. Farrow*, 136 Ark. 140, 148, 206 S. W. 134, 137 (1918).

112. See for differentiation in need for credit search in case of retailer and manufacturer, *CREDIT MANAGEMENT* (Am. Inst. Bank. 1931) 436-439. See for an example of the case with which retailers obtain credit, *Plummer & Ritter, Credit Extension and Causes of Failure of Philadelphia Grocers*, U. S. Dep't Comm., Trade Info. Bull. No. 700, 1930, p. 5.

113. See TREGOE, *CREDIT AND ITS MANAGEMENT* (1930) 134; TRUESDALE, *CREDIT BUREAU MANAGEMENT* (1927) 149-152.

114. *Sieg v. Greene*, 225 Fed. 955 (C. C. A. 8th, 1915) (contract to deliver bricks to be manufactured construed to be a mortgage and held that mortgagee thereof is superior to creditors); *Morton v. Williamson*, 72 Ark. 390, 81 S. W. 235 (1904) (re-

should be carefully noted that the basic controversy is over the nature of the property without regard as to whether it is after-acquired or not. The fact that it is after-acquired property should not be an obstacle, if the fact that it is stock with a power of sale in the mortgagor is not.

Other Personal Property

When we leave the fields already discussed we enter virgin territory.¹¹⁵ New precedents will have to be built up on a basis of the balance of interests with credit expansion, protection of the individual from a status akin to serfdom, and the desire to relieve creditors and purchasers from too great a burden of record inquiries all playing a part. Statutes have been passed in some states apparently permitting unlimited freedom in the mortgaging of future property.¹¹⁶ Whether courts will give them full effect or emasculate them to their own satisfaction is another matter. The latter result should not be entirely unexpected.¹¹⁷

corded mortgage of lumber to be acquired by lumber mill held valid against purchaser); Eddy v. McCall, 71 Mich. 497, 39 S. W. 734 (1888) (lumber to be processed; recorded mortgage valid against execution creditor); Parker & Co. v. Jacobs, 14 S. C. 112 (1880) (after-acquired turpentine mortgaged by processor held valid against judgment creditors); First Nat. Bank v. Turnbull & Co., 32 Gratt. 695 (Va. 1880) (after-acquired cotton mortgage valid against execution creditors). *Contra*: Townsend Brick & Contracting Co. v. Allen, 62 Kan. 311, 62 Pac. 1008 (1900) (recorded mortgage of bricks to be manufactured held invalid against purchaser); Zartman v. First Nat. Bank, 189 N. Y. 267, 82 N. E. 127 (1907) (recorded corporate mortgage to secure a bond issue held invalid against creditors as to the after-acquired manufactured stock); Case v. Fish, 58 Wis. 56, 15 N. W. 808 (1883).

115. There are several types of property that have been the subject of attempts to mortgage in advance of acquisition but which have not been discussed here because the problems in these cases are unrelated to the broad question dealt with in this article. Notable examples are future income, rents, and profits. As to this see Israels and Kramer, *The Significance of the Income Clause in a Corporate Mortgage* (1930) 30 COL. L. REV. 488. The mortgaging of future book accounts was considered in Benedict v. Ratner, 268 U. S. 353 (1925), where the court held the mortgage invalid.

116. The usual statute reads: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien or not yet in existence. In such case, the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest." CAL. CIV. CODE (Deering, 1937) § 2883; IDAHO CODE ANN. (1932) § 44-107; MONT. REV. CODE ANN. (1935) § 8227; N. D. COMP. LAWS (1913) § 6706; OKLA. STATS. ANN. (1937) tit. 42, § 8; 1 S. D. COMP. LAWS (1929) § 1529.

117. In Montana where the above statute has been in existence for many years the courts continue to make statements generally found only in the cases following the Massachusetts rule. For example, the following dictum appears in Hackney v. Birely, 67 Mont. 155, 159, 215 Pac. 642, 644 (1923): "This recording is equivalent to a delivery of the property by the mortgagor to, and its retention by, the mortgagee. Whatever delivery and retention of possession will enable the mortgagee to hold will be equally held by the recorded mortgage, but what cannot be delivered and retained, except as to property potentially in being in which the mortgagor has a personal interest, cannot be placed of record as to what is to be mortgaged. The statute thus making the one the equivalent of the other, the record is valid only to protect that which the statute provides may be mortgaged." Obviously the statement is contradictory but the inference may be drawn that the court permits the statute to deal only with what can be mortgaged as between the parties, but with regard to recordability the common-law limitations prevail! This inference is strengthened by the fact that the quotation above is a "lift" from a leading Maine case which held that a recorded after-acquired property clause mortgage was invalid as to attaching creditors. Griffith v. Douglass, 73

Conclusion and Caveat

The writers feel that by adopting the factual approach they have probed beneath the sometimes plausible but more frequently sophistical reasoning of the courts and revealed that the type of property involved is the most important operative fact in the determination of whether property to be acquired in the future may be presently mortgaged. However, in some jurisdictions the chronic disregard of this type of analysis by the courts and bar may make it a Sisyphean task to overturn general ideas as to the law of the state or to obtain the reversal of precedents, which, under this analysis, are founded upon false bases.¹¹⁸ On the whole, however, we believe that the analysis here

Me. 532, 535 (1882). There are no square holdings in Montana but the cases indicate judicial reluctance to follow the statute. See also *Security State Bank v. Mariette*, 69 Mont. 536, 223 Pac. 114 (1924); *Isbell v. Slette*, 52 Mont. 156, 155 Pac. 503 (1916).

The situation is reminiscent of the Pennsylvania cases dealing with statutes permitting the mortgaging of personal property. In an early and leading case the statute involved permitted mortgaging by corporations of "their property". Pa. Laws 1867, no. 1287, p. 1372. It was held that this meant "only such property as had been usually mortgaged before the time of [the] passage" of the act. *Roberts' Appeal*, 60 Pa. 400, 402 (1869). A later statute, still in effect, provided that corporations may borrow money and "secure the payment of the principal or interest, or both, of all or any part of such indebtedness, by mortgage, deed of trust, or other pledge or conveyance, by way of security, of *all or any part of its real and personal property*. . . ." (Italics supplied.) PA. STAT. ANN. (Purdon, 1938) tit. 15, § 241. The court held that the statute was neither specific nor clear and therefore was to be interpreted as granting power to execute mortgages with respect to land and to allow for the recording of such mortgages so as to bar third parties. With respect to personalty, however, the court held that such mortgages would be valid as against third persons only if possession were given to the mortgagee, recording having no effect at all. *Klaus v. Majestic Apartment House Co.*, 250 Pa. 194, 95 Atl. 451 (1915). It should thus be noted that the Pennsylvania rule effectively prevents the use of a chattel mortgage insofar as priority over third persons is concerned. The rule a fortiori applies to personalty to be acquired.

Real estate to be acquired can be validly mortgaged. *Colonial Trust Co. v. Harmon Creek Coal Co.*, 287 Pa. 284, 135 Atl. 134 (1926). See *Madden v. Borough of Mt. Union*, 322 Pa. 109, 185 Atl. 275 (1936), 3 U. OF PITTSBURGH L. REV. 160 (problem of conflicting indentures containing after-acquired property clauses; the validity of an after-acquired real estate mortgage was decided in limine). Today by statute there may be chattel mortgages in Pennsylvania of leaseholds, PA. STAT. ANN. (Purdon, 1930) tit. 21, § 838; iron, iron products, boilers, engines, and miscellaneous personalty, *id.* at § 861; vessels, *id.* at § 921; of any chattels, including after-acquired chattels, if the mortgagee is the Federal Government, *id.* (Supp. 1938), tit. 21, § 841. Railroads may mortgage "personal property", *id.* at tit. 67, § 523, but the mortgage is not valid against third persons unless the property is conspicuously marked with the name of the trustee. This statute does not authorize mortgages of shares of stock. *Miners' Bank of Wilkes-Barre v. Acker*, 66 F. (2d) 850 (C. C. A. 3d, 1933).

118. See *In re Niagara Lead & Battery Co.*, 202 Fed. 298 (W. D. N. Y. 1913) where the factual approach was urged upon the court and rejected. In *Harriman v. Woburn Electric Light Co.*, 163 Mass. 85, 39 N. E. 1004 (1895), the court ruled that after-acquired personalty of an electric light and power company could not be mortgaged effectively as against creditors unless possession was taken. The court states that this was conceded by counsel for the mortgagee. This was the first time the question had arisen with respect to a corporate mortgage to secure a bond issue in the state. Apparently it was accepted by both bench and bar that stock of goods cases, etc., were authoritative here. See *Olins, Mortgages on After-Acquired Property* (1936) 7 LAW. SOC. J. 227 (considering Massachusetts cases only). The writer not only accepts the present rule enunciated by the Massachusetts courts but also seeks to show that as a result of some cases the mortgage of future property in Massachusetts has no effect even as between the parties. He bases this conclusion upon *Leahy v. George*, 273 Mass. 130, 173 N. E. 421 (1930). This case dealt with an *unrecorded* bill of sale for security and had nothing to do with after-acquired property. He also cites *Burach v. Peters*,

presented will prove a more accurate criterion by which to prognosticate future results. Especially is this true for those advising the creditor of the mortgagor, the proposed purchaser of property possibly within the operation of the after-acquired property clause, and others who wish to rely upon property free from lien. However, to the draftsmen of the mortgage instruments and corporate trust indentures there must be a word of caution. The Massachusetts courts have firmly adopted a policy antipathetical to the mortgaging of future personal property, even though the mortgagor is a corporate entity.¹¹⁹ The decisions of the Massachusetts courts have had great weight in many fields of law and the persuasive effect of its cases here too has been felt.¹²⁰ Whether a new approach is enough of a counterbalance remains to be seen. Therefore, where the practice has been as it is in Massachusetts to execute supplemental mortgages at periodic intervals,¹²¹ as the mortgagor acquires additional property, the safety system will have to continue until such time as there is more general acceptance of such an obvious conclusion as that a dictum in a stock of goods case is not imperative authority with respect to a case involving a power company mortgage.¹²²

B. M. C. No. 319535 (1934). This is not a reported decision and apparently was decided by the Boston Municipal Court, a *nisi prius* court. In any event, the decision of such a court could hardly be taken as overruling a settled rule. Compare the more realistic attitude taken in Note (1935) 7 ROCKY MT. L. REV. 264.

119. Federal Trust Co. v. Bristol County St. Ry., 222 Mass. 35, 109 N. E. 880 (1915); Harriman v. Woburn Electric Light Co., 163 Mass. 85, 39 N. E. 1004 (1895).

120. See *supra* note 111.

121. The writers have been informed by Massachusetts counsel that the corporate practice is to take a supplemental mortgage each year to catch all property acquired during the year. This is an expensive method of avoiding the effect of an unfortunate rule of law.

122. In Harriman v. Woburn Electric Light Co., 163 Mass. 85, 39 N. E. 1004 (1895), the court accepted Blanchard v. Cooke, 144 Mass. 207, 11 N. E. 83 (1887), as controlling. In the latter case possession had been taken of an after-acquired stock of goods and therefore the mortgagee was superior to creditors. Statements with regard to invalidity not only related solely to stock of goods but also were mere dicta.