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whereby rights of the accused are amply protected. If any misunderstanding occurs then there is a discretion vested in the trial judge, and he may permit a plea to be changed or retracted.²⁴ Otherwise, the Baumes Laws have withdrawn all discretion from the court in such actions. "The Legislature has provided a mechanistic rule to take the place of the discretionary powers of the judge in passing sentence on second offenders."²⁵

R. A. B.

CHATTEL MORTGAGES ON AFTER-ACQUIRED PROPERTY—VALIDITY AS TO CREDITORS.—At common law, a grant of chattels not in being or not in the possession of the grantor at the time of the execution of the instrument, passed no interest to the grantee even though the grantor subsequently acquired the subject of the grant. To relieve the obvious hardship worked on the grantee, who had in the meantime conferred some benefit on the grantor, relying on the promised future security, courts of equity, without putting themselves in conflict with the principle that there can be no present transfer of that which is not in being, construe the agreement as a present contract to give a lien, which as between the parties takes effect and attaches to the subject of the agreement as soon as it is acquired by the mortgagor.¹ The validity of such an agreement between the contracting parties is unquestioned where the rights of third parties do not intervene.² Upon settled principles of equity, such an agreement should be equally valid and enforceable against all subsequent transferees of the mortgaged property except *bona fide* purchasers, since the lien of the mortgage attaches simultaneously with the possession of the mortgagor and there is no lapse of time during which the rights of third parties may attach to the same property.

Our law on this point is unexplainably inconsistent. In *Kribbs v. Alford*³ we have a logical and intelligible disposition of the question. A mortgage covering chattels to be brought on the premises in the future was properly filed as required by the Recording Act. Subsequently, the property was sold to purchasers who had no actual knowledge of the existence of this mortgage, but it was held that they were not *bona fide* purchasers as the recording of the mortgage

²⁴ *Ibid.*

²⁵ *Supra*, note 20 at 399.

¹ *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811 (1890); *McCaffrey v. Woodin*, 65 N. Y. 459 (1875); *Coats v. Donnell*, 94 N. Y. 168 (1893); *In re Roseboom*, 253 Fed. 136 (N. D. N. Y., 1918).

² *Deeley v. Dwight*, 132 N. Y. 59, 30 N. E. 258 (1892); *Coats v. Donnell*, 94 N. Y. 168 (1893).

³ *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811 (1890).

gave them constructive notice, and that it might therefore be enforced against them. Citing and claiming to follow the *Kribbs* case we have *Rochester Distilling Co. v. Rasey*.⁴ This was an action in conversion by a judgment creditor against a purchaser who claimed under a chattel mortgage which covered crops to be sown or planted in the future. The decision was rendered in favor of the creditor on three distinct grounds which are equally untenable: *

1. That the defendant could not set up any equitable rights in an action at law which concerned the strictly legal rights of contending creditors.

2. That *Kribbs v. Alford* recognizes the invalidity at law of a chattel mortgage on property thereafter to be acquired; but holds that *as between the parties*, their contract would be construed in equity as creating an equitable lien which could be enforced.

3. That as the statute provides for filing as a substitute for "an immediate delivery" or "an actual or continued change of possession of the things mortgaged," it excludes the idea of a chattel mortgage on non-existent things, or that such an instrument could operate to defeat the lien of an attaching or an execution creditor upon subsequently acquired property.

The first contention is plainly erroneous. Long before the *Rasey* case equitable defenses were allowed at law.⁵ The second ground is a slight misstatement of the holding in the *Kribbs* case. Since the lien of the chattel mortgage on after-acquired property was impressed against a purchaser for value without actual notice, it can hardly be said that such a mortgage, though invalid at law, is enforceable only between the parties. In the third instance, the argument that the provisions of the recording act exclude the idea of a chattel mortgage on non-existent things, is plainly *contra* to the *Kribbs* case which held such a mortgage was within the act and that when filed it was constructive notice to subsequent purchasers. Since the *Rasey* case cites the *Kribbs* case and does not distinguish or explain the difference between the equities of the parties in the two actions, it seems that attaching or execution creditors, or any other class of creditors, for that matter, should have no greater rights than a purchaser who gives a present, valuable consideration.

The *Rasey* case by itself would be little cause for anxiety, for there are numerous instances of isolated, unsound holdings in all jurisdictions. The trouble, however, arises with the fact that subse-

⁴ *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632 (1894).

* There is a very thorough and illuminating discussion of the subject by Dean Stone, in *Columbia Law Review*, volume XX, at page 519.

⁵ *Chase v. Peck*, 21 N. Y. 581 (1860); *Goman v. Lakey*, 80 N. Y. 345 (1880); Section 507, Code of Civil Procedure.

quent cases have repeatedly cited the *Rasey* case as controlling.⁶ Investigation of these decisions discloses an interesting and complicated state of affairs. Let us take, for example, some of the most outstanding. In *Zartman v. The Bank*,⁷ the dispute arose between the trustee in bankruptcy, representing the creditors, who had supplied the mortgagor with the goods in question, and a mortgagee who had received the mortgage as security for negotiable bonds. Under the terms of the mortgage, the mortgagor was to have the absolute right to possession and enjoyment with no duty to apply the proceeds of the property to the payment of the mortgage debt. The court decided in favor of the trustee not only because of the greater equities of the creditors who had furnished the shifting stock on which they relied, but because of the great danger to manufacturing firms in the future, if such a mortgage be declared superior to the rights of creditors. People would hesitate to extend credit to any concern that had its property similarly encumbered and large firms would have to do business on a purely cash basis or go out of business entirely.

The *Zartman* case can hardly be cited as supporting the *Rasey* case. The decision was the result of economic conditions and would have been the same had the *Rasey* case never been decided. It seems unfortunate that courts should deem it necessary to apologize for sound decisions based on broad economics and equitable principles by attributing them to such an illogical decision as the *Rasey* case.

In *Westinghouse v. B. R. T.*,⁸ a mortgage covering after-acquired property was held ineffective against bondholders, who may be considered creditors for the purpose of this discussion. Although the court again stated that, "It is of course settled * * * that a mortgage of after-acquired * * * property is ineffective as against creditors of the mortgagor, and some further act is necessary to make it an effective lien against creditors,"⁹ the reason for the decision was not so narrow. To quote the words of the court (at p. 873): "The doctrines calculated to protect creditors, of which the *Zartman* case, *supra*, is an illustration, really sprang up from the requirements of business, from the need of furnishing and supplying persons and corporations with such merchandise or other articles as they might need, unembarrassed by the fear that precedence would be given to unenforced and unheard of equitable rights. By the same token, the same safeguards should be thrown around holders of bonds of the charac-

⁶ *Zartman v. Bank*, 189 N. Y. 267, 82 N. E. 127 (1907); *In re Midtown Contracting Company*, 238 Fed. 871 (S. D. N. Y., 1916); *In re Roseboom*, *supra*, note 1; *Westinghouse Electric & Manufacturing Co. v. B. R. T.*, 263 Fed. 537 (C. C. A. 2nd, 1920); *Titusville Iron Co. v. City*, 207 N. Y. 203, 100 N. E. 806 (1912); *Pintsch Compressing Co. v. Buffalo Gas Co.*, 280 F. 830 (C. C. A. 2nd, C. 1922).

⁷ *Zartman v. Bank*, *supra*, note 6.

⁸ *Westinghouse v. B. R. T.*, 291 Fed. 863 (S. D. N. Y., 1922).

⁹ At 871 citing *Pintsch Compressing Co. v. City*, *supra*, note 6.

ter here involved. In no other way can great transactions necessary to the business welfare of the community or nation be carried on. * * *

In other cases,¹¹ the preferred creditors were originally the vendors of the property in question, which was never paid for, besides claiming under the receiver in bankruptcy. The mortgagees claimed the property under contracts made before the purchases from the vendor. They had given up nothing at the time, while the creditors, besides having parted with the property without receiving value, paid additional consideration for the right to retrieve their goods.

There seems to be no case flatly holding the creditors prior to the mortgagee on facts similar to those in the *Rasey* case.

In referring to cases on the subject in other jurisdictions, one finds great diversity of opinion. This is due to the interpretation placed on the statutes of each state by the various courts. In perusing these holdings, one gets some slight inkling of the reason behind the *Rasey* case. Oklahoma,¹² California,¹³ Washington,¹⁴ and a number of other states, have statutes similar to ours governing chattel mortgages. "A mortgage on personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value unless * * *" filed, etc. It is said in these cases,¹⁵ that the words "in good faith and for value refer only to subsequent purchasers and encumbrancers of the property" and not to creditors so that a creditor who had actual notice of the mortgage was nevertheless prior to a mortgagee who received his mortgage as security for a loan. The *Rasey* case apparently gave our statute the same interpretation. But again we are up against a wall. Even though we may consider them unsound, these interpretations would be helpful if the facts were the same. There is no question of filing in the *Rasey* case. On the contrary, in that case, the court holds that there can be no filing of a chattel mortgage on after-acquired property which can affect creditors.

*In re Karmar Mercantile Co.*¹⁷ in spite of the above-mentioned interpretation placed on the statute there involved, a chattel mortgage covering after-acquired property was held good as against creditors, where, by the terms of the mortgage, the mortgagor was not to pur-

¹⁰ *Westinghouse v. B. R. T.*, *supra*, note 8 at 873.

¹¹ *Wilds v. Board of Education*, *Titusville v. City*, *Westinghouse v. B. R. T.*, *supra*, note 6.

¹² Section 3578, *Wilson's Revised and Annotated Statutes Okl.* 1903.

¹³ *Civil Code of Calif.*, Sec. 2957.

¹⁴ Sec. 1648, 1 *Hills Annotated Statutes & Codes*.

¹⁵ *Kimball v. Kirby*, 4 S. D. 152, 55 N. W. 1110 (1893); *Williamson v. R. R.*, 29 N. J. Eq. 311 (1878); *Sayre v. Hewes*, 32 N. J. Eq. 652 (1880); *Brothers v. Mundell*, 60 Tex. 240 (1883); *Freiberg v. Magale* (Tex. Sup.), 7 S. W. 684 (1888); *Earle v. Burch*, 21 Neb. 702, 33 N. W. 254 (1887); *Cardenas v. Miller*, 108 Calif. 250, 39 P. 783 (1895); *Madison v. Rutten*, 16 N. D. 281, 113 N. W. 872 (1907).

¹⁶ *Cardenas v. Miller*, *supra*, note 15.

¹⁷ *In re Kramer Mercantile Co.* (Okla.), 21 F. 2d series 614 (1927).

chase goods on credit. The court said (at p. 616): "The filing of a chattel mortgage in compliance with the recording statute imparts not only notice of the act of filing, but of the contents of the mortgage, and third parties are charged with notice of the contents thereof * * * as if they had actual notice. * * *"

In *Eddy v. McCall*,¹⁸ a chattel mortgage given as collateral security covered all lumber on the ground and to be subsequently added. The mortgage was properly filed and the court said: "The clause was valid and effectual between the parties; and where the agreement is written into the mortgage plain and specific, and there is no question but that the property sought to be held is within the description given, I can see no reason why the clause should not be held valid as to third persons. * * *"

There are still other cases wherein the mortgage covering after-acquired property is valid not only against the mortgagor, but against all except purchasers for value without notice.¹⁹

There is a very vital discussion of the question in *Etheridge v. Sperry*.²⁰ Here at last the court seems conscious of the fallacy of a rule which prefers creditors to chattel mortgagees of after-acquired property. To quote the language of the court (at pp. 277-8): "We are aware that there is great diversity in the rulings on this question by the courts of the several states, but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein. Indeed, if this were an open question we could not be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith; and it is at least worthy of thought, whether the rulings made by the Supreme Court of Iowa do not tend to make chattel mortgages more valuable for commercial purposes, without endangering the rights of unsecured creditors. The law now generally requires a record of all such instruments, and that, like the recording of a real estate mortgage, gives notice to all parties interested of the fact and extent of encumbrances. Why should a transaction like this be condemned if made in good faith and to secure an honest debt? * * * The interests of the general public are not prejudiced. * * * The fact that fraudulent relations are

¹⁸ *Eddy v. McCall*, 71 Mich. 497, 39 N. W. 734 (1888).

¹⁹ *In re Dagwell*, 263 Fed. 406 (E. D. Mich. N. D., 1920), at page 408 the court said: "It is the settled law in Michigan that a chattel mortgage covering after-acquired property of the same kind as, and to be added to, property actually owned by the mortgagor, and covered by such chattel mortgage at the time of its execution, such as additions to a stock of merchandise, to be purchased by the mortgagor after the time of the execution of the mortgage and added to such stock, is valid both as to the parties thereto and as against third parties. * * *"

²⁰ *Murray v. Satterfield*, 125 Ark. 85, 187 S. W. 927 (1916).

²¹ *Etheridge v. Sperry*, 139 U. S. 266 (1891).

possible, is hardly a sufficient reason for denouncing transactions which are not fraudulent. So, if the question were open, or a new one, unaffected by any settled law of the State, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith, and that the decision of the Supreme Court of Iowa rests on sound principles."

E. N. J.

WORKMEN'S COMPENSATION—"ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."—The compensation acts, according to their usual phraseology, provide for the award of compensation in cases of "injury by accident arising out of and in the course of the employment."¹ Practically every court has attempted an explanation of these rather indefinite terms, but without any marked success. Lord Wrenbury in *Herbert v. Fox*² said, "No recent act has provoked a larger amount of litigation than the Workmen's Compensation Act. The few and seemingly simple words 'arising out of and in the course of the employment' have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favor, on whichever side he may be, the question in dispute."

The New York Court of Appeals' latest interpretation of this phrase involved a quite unique set of facts and an award based upon grounds so fine that either side might well have prevailed.

In *Corrina v. Debardieri*³ the claimant's deceased husband was employed as a driver. In the course of his duties he drove a team of horses, hitched to a coal wagon, upon a Hudson River ferry boat. He fell asleep while lying full length on the seat of the wagon. A deckhand attempted to arouse him when the ferry arrived at Jersey City, but just at that time the team of horses started to walk off the boat and the driver was jolted from the seat. The wagon passed over him and he sustained injuries which resulted in his death.

The Industrial Board found that the injuries were accidental and arose "out of and in the course of his employment."

The Appellate Division reached a contrary conclusion, holding that the deceased had temporarily abandoned his employment and that the injury suffered during such abandonment did not arise "in the course of his employment."

¹ New York Workmen's Compensation Act, Sec. 10.

² Appeal Cases (Eng.) 419, (1916).

³ 247 N. Y. 357, 160 N. E. 397 (1928).