

Mortgages--After-Acquired Personal Property Clause in Real Property Mortgage--Right of Subsequent Chattel Mortgagee (Herold v. Cohrone Boat Co., Inc., 292 N.Y. Supp. 81 (1936))

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to enter the premises to perform the work mentioned without committing a breach of the covenant of quiet enjoyment.

A stipulation in a lease giving the landlord the right to enter demised premises to make repairs and improvements should not be extended beyond its express provisions, particularly where the lease granting the license was prepared by the landlord. Such an instrument must be construed most strongly against the party who drew it.⁹

V. E. C.

MORTGAGES—AFTER-ACQUIRED PERSONAL PROPERTY CLAUSE IN REAL PROPERTY MORTGAGE—RIGHT OF SUBSEQUENT CHATTEL MORTGAGEE.—Plaintiff became the owner of a recorded real property mortgage containing *inter alia*, an after-acquired personal property clause. The mortgagor conveyed the property subject to the plaintiff's mortgage to the defendant boat company which subsequently executed a chattel mortgage covering machinery on the premises, to a security company. Plaintiff's action to foreclose on the first mortgage and that of defendant Hirsch to foreclose on the chattel mortgage were consolidated. Defendant Hirsch appealed from a decision for plaintiff, on the ground that the personal property clause relating to after-acquired personal property is ineffectual as to him and his rights under the chattel mortgage. *Held*, affirmed. A subsequent chattel mortgage purporting to cover in whole or in part the same personalty is subordinate to the lien of a prior real property mortgage with an after-acquired personal property clause.¹ Mortgagor must, however, secure title to personalty subsequently acquired to have the lien of the real property mortgage attach.² *Herold v. Cohrone Boat Co., Inc.*, — App. Div. —, 292 N. Y. Supp. 81 (1936).

The validity of after-acquired property clauses has been well established by numerous authorities³ which hold that a mortgage on after-acquired property though without means of enforcement at law is nevertheless enforceable in equity,⁴ and the mortgagee will be pre-

⁹ *Bank of Montreal v. Recknagel*, 109 N. Y. 482, 17 N. E. 217 (1888); *Moran v. Standard Oil Co.*, 211 N. Y. 187, 105 N. E. 217 (1914).

¹ *President and Directors, etc. of Manhattan Co. v. Newberry*, 265 N. Y. 588, 193 N. E. 333 (1934); *Shelton Holding Corp. v. 150 East Forty-Eighth St. Corp.*, 264 N. Y. 339, 191 N. E. 8 (1934).

² *Central Chandelier Co. v. Irving Trust Co.*, 259 N. Y. 343, 182 N. E. 10 (1932); *Modfes v. Beverly Development Corp.*, 251 N. Y. 12, 166 N. E. 787 (1929); *Central Union Gas Co. v. Browning*, 210 N. Y. 10, 103 N. E. 822 (1913).

³ *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811 (1890); *People's Trust Co. v. Schenck*, 195 N. Y. 398, 88 N. E. 647 (1909); *Mitchel v. Winslow*, Fed. Cas. No. 9673 (C. C. D. Me. 1843).

⁴ *Central Trust Co. v. Kneeland*, 138 U. S. 414, 11 Sup. Ct. 357 (1891); *Foley and Pogue, After Acquired Property Under Conflicting Corporate Mortgage Indentures* (1929) 13 MINN. L. REV. 81, 88.

ferred, to general creditors or to mortgagor's assignee, in his claim to inclusion of such property within the lien of his mortgage.⁵ Although the maxim is true that a person cannot grant nor mortgage that which he does not own,⁶ a court of equity looks to the intent of the parties and construes an after-acquired clause as operating by way of a present contract to give a lien which takes effect and attaches to the property as soon as it comes into existence and the ownership of the mortgagor.⁷ Real property mortgages have not been held invalid because they cover after-acquired personal property⁸ but rather, where it clearly appears from the instrument that such was the manifest intent of the original parties, the mortgage will be held to cover both the realty and personalty⁹ and if properly recorded give notice to all persons asserting subsequent claims thereto.¹⁰ The after-acquired property clause operates by way of an estoppel and the first mortgagee under such circumstances has a prior equity to that of a subsequent chattel mortgage.¹¹

It is essential, however, that the mortgagor acquire title to the subsequently acquired personalty¹² for while it is true that an after-acquired property clause creates a lien upon this property it is subject to all the liens and equities valid against the vendee mortgagor, arising in the act of purchase or acquisition.¹³ Failure on the part of the mortgagor to secure title to the after-acquired property will render ineffectual the efforts of the mortgagee to create a lien upon it.¹⁴ This concept naturally qualifies the scope and extent of the mortgage¹⁵ and is based on the fact that the mortgage lien can only attach to the interest acquired by the mortgagor.¹⁶

R. I. R.

⁵ Blair, *The Allocation of After-Acquired Mortgaged Property Among Rival Claimants* (1926) 40 HARV. L. REV. 222, 224; Williston, *Transfers of After-Acquired Personal Property* (1906) 19 HARV. L. REV. 557.

⁶ Pennock v. Coe, 64 U. S. 117, 16 L. ed. 430 (1859).

⁷ Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811 (1890); Guaranty Trust Co. v. N. Y. and O. C. Ry. Co., 253 N. Y. 190, 170 N. E. 887 (1930); Gridley v. Gates, 228 App. Div. 579, 240 N. Y. Supp. 260 (4th Dept. 1930).

⁸ New York Security Co. v. Saratoga Gas Co., 88 Hun 569 (N. Y. 1895).

⁹ 1 JONES, MORTGAGES (8th ed. 1928) § 208; Thompson v. White Water etc. R. Co., 132 U. S. 68, 10 Sup. Ct. 29 (1889).

¹⁰ New York Security Co. v. Saratoga Gas Co., 88 Hun 566 (N. Y. 1895).

¹¹ 1 JONES, MORTGAGES (8th ed. 1928) § 208.

¹² Pennock v. Coe, 64 U. S. 117, 16 L. ed. 430 (1859).

¹³ Harris v. Youngstown Bridge Co., 90 Fed. 322 (C. C. A. 6th, 1898); Note (1935) 48 HARV. L. REV. 475; Central Trust Co. v. Kneeland, 138 U. S. 414, 423, 11 Sup. Ct. 357 (1891).

¹⁴ United States v. New Orleans R. R. Co., 12 Wall. 362 (U. S. 1870); 1 JONES, MORTGAGES (8th ed. 1928) § 247.

¹⁵ Central Chandelier Co. v. Irving Trust Co., 259 N. Y. 343, 182 N. E. 10 (1932); Modfes v. Beverly Development Corp., 251 N. Y. 12, 166 N. E. 787 (1929).

¹⁶ (1910) 10 COL. L. REV. 780; Blair, *supra* note 5, at 240; Central Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. 357 (1891).