ST. LOUIS LAW REVIEW

Vol. I | Published by the Undergraduates of the Washington University Law School | No. 4

TRANSFERS OF FUTURE PROPERTY

I.

1. Various theories, slightly related, have been applied to the decision of questions arising under the attempt to transfer property not existing at the time of the transfer, and the blending of the discussion of these theories in the decisions leads to no little obscurity. This article is not a treatise on the subject of transfers of future property, but rather an attempt at an analysis of the questions involved and their relations to each other, introductory to specific investigation.

2. "Future property" is here used somewhat arbitrarily, (suggested by the use of "future goods" in the Sales Acts), to include only the property in which the transferror has no legal interest at the time of the transaction. It excludes all cases where the transferor at the time has a right in the property which the law recognizes, however unlikely it may be that his chance ever materialize. If the thing transferred is a contingent remainder, it is outside our topic, though the chance of vesting be infinitessimal. A devise to A in fee, to pass to B in fee whenever B travels around the earth in ten days, gives B a present interest of however little value, recognized in the law, and is not future property. On the other hand, should the only child of an insane man convey his interest in his father's estate during the life time of the latter questions arising under the conveyance would concern future property, for though the child's chance of inheriting is very strong, it does not constitute a present interest in the legal sense.

3. The future goods may not be in existence at the time of

the transaction, as in case of a crop not yet planted, or the unborn young of animals. The goods may be existent at the time of the transaction, but the transferror may then have no interest in them. The transferror may agree to acquire a specific thing, a tract of land, a horse, a claim against a third person, and to give it to the transferee at some future time. The agreement may contemplate future acquisition of goods of a certain kind, without reference to specific goods, in which case it is a matter of indifference whether or not the goods are in physical existence at the time of the agreement. A contract for future delivery of grain to be acquired by the vendor is an illustration; so also a provision in a mortgage covering property which may be substituted for what is specifically described. The coming into existence of the future goods may be wholly contingent. A sale of a prospective catch of fish before the fishermen leave port is an illustration; so an assignment of a chance of obtaining something either under will or ab intestato from a living person; and an employe's transfer of unearned wages. The discussion includes, as some of the foregoing illustrations show the transfer of choses in action not in existence at the time of the agreement.

4. The non-existence of the future property, or of any interest therein in the assignor thereof, at the time of the transfer, raises the problem common to all the situations coming under our topic. But wholly apart from this consideration, there are classes of cases where entirely independent matters of public policy inhibit the transfer of such property. An enumeration of such situations calling for consideration of special public policies, excluding them from the main topic, will simplify the examination of the latter.

II.

5. *Public Officers' Salaries.* Public officers cannot make valid assignments of salaries or fees before they are due and payable. The reason given is that "if the emoluments of the office might be separated from it and transferred to another, it would leave the duties of the office as a barren charge to be borne by the incumbent. It is evident that transfers of this kind would not tend to promote activity and care in the discharge of official obligations." *In the matter of Worthington,* 141 N. Y. 9.

Illustrative cases—assignment by a clery in U. S. Treasury.

Bliss vs. Lawrence. 58 N. Y. 442 (1874), reviewing prior cases; English and American.

By a clerk of a court: *Field vs. Chipley.* 79 Ky. 260. By a mail-carrier: *State vs. Williamson,* 118 Mo. 146. By a sheriff: *Bank vs. Wilson,* 9 L. R. A. 706 (1890). By a retired army officer: *Schuenk vs. Wychoff.* 46 N. J. Eq. 560.

By an executor of an estate: *In re Worthington, supra.*

6. This public policy does not extend to future wages in private employment. "It is argued that such contracts (assignments of future wages) "are so much against public policy that they ought not to be supported, but we think they are rather beneficial, and enable the poor man to obtain credit when he could not otherwise do it, and that too, without detriment to the creditors." *Smith vs. Atkins,* 18 Vt. 461.

Mabin vs. Wenham, 209 Ill. 252, sustains the holding in full opinion, and is followed in *Chicago R. R. vs. Provolt,* 42 Colo. 103.

Some states have, however, enacted statutes prohibiting the assignment of future wages, (which it may be remarked, though outside our topic, have been held constitutional, e. g.: *Internatonal Text Book Company vs. Weissinger,* 160 Ind. 349; *Heller vs. Lutz.* 254 Mo. 704.). The foregoing deals only with public policy as to assignment of unearned salary or wages. When we deal with the general problem of transfer of non-existent property, we shall recur to the special case of salary and wages as viewed under that aspect.

7. *Assignment of Contracts.* If the assignor attempts to assign not merely future earnings under a contract, but further rights thereunder, another question is presented. If A, the owner of a vineyard is under contract with B to deliver the grapes raised thereon for ten years to come to B, B being under obligation to accept them and pay a stipulated price, it would seem at least questionable that C as purchaser of the vineyard and assignee from A of that contract with B, could hold B for breach of contract when he refused to accept grapes raised by C. Yet such was the holding in *La Rue vs. Groezniger,* 84 Cal. 281. The general rule is that when the contract involves the personality of a party, his skill, knowledge, or solvency, the contract is not assignable. The difficulty lies in applying the test. So the assignment of an option to buy real estate has been upheld. *Rice vs. Gibbs,* 33 Nebr. 460. The assignment of a right to a piano to be selected by the purchaser, 41 Vt. 533. The assignment of a contractor who had engaged to sink an oil well for defendant was enforced by the assignee in *Galey vs. Mellon,* 172 Pa. St. 443. The owner of a house, who had a contract for putting a heating plant into it, could assign the right under the contract to the purchaser of the house in *Voight vs. Murphy,*

164 Mich. 539. See, also *King vs. Grocery Co.*, 72 Wash. 132, *Levarand vs. Farrington*, 124 Minn. 110. On the other hand when an Ice Company assigned its written contract with defendant for delivery of ice, it was held the assignee could not recover at law though he had delivered as per contract, *Boston Ice Co. vs. Potter* 123 Mass. 30. So the contracts were held personal, and therefore not assignable in *Arkansas Smelting Co., vs. Belden*, 127 U. S. 388 and in *A. M. Wooden Co. vs. R. R.*, 82 Iowa 735.

The topic of assignment of contracts is mentioned here without attempting a full discussion merely to segregate the numerous cases on the subject from our discussion of assignments of future property.

8. *Option Deals.* A contract for delivery of goods at a future date at a fixed price with an agreement between the parties that the goods shall not be delivered, but the contract adjusted by payment of the difference between the price agreed and the market price at the date for what is called delivery in the contract, is clearly a wager. On the other hand if the parties contemplate actual delivery when the contract is made, it is not a wager, and a subsequent adjustment on the basis of difference in market price does not make it so. The test is thus stated in *Harvey vs. Merrill*, 150 Mass. 1.

"If it is agreed by the parties that the contract shall be performed according to its terms, if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract because one or both of the parties intend when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price, and the market price at the time. Such an intention is immaterial except so far as it is made part of the contract, although it need not be made expressly a part of the contract. To constitute a wagering contract it is sufficient, whatever be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver the merchandise and the other to receive it and pay the price, but that the settlement shall be made by the payment of the difference in prices."

"In England it is held that the contracts, although wagers, were not void at common law, and that the statute had not made them illegal, but only non-enforcible, while generally in this country all wagering contracts are held to be illegal and void as against public policy." *Irwin vs. Miller*, 110 U. S. 499. (510).

As an historical fact, it may be remarked that Lord Tenterden believed that any agreement for sale of goods which the vendor intended to go into the market and buy was, without any further element, a wagering contract; and emphatically so held in *Bryan vs. Lewis*, Ry. M. 386-1826; but the decision was specifically overruled in *Hibblethwaite vs. McMorine*, 5 M. & W. 462, (1839), since when the law has been as above stated.

The question whether or not an option contract constitutes a wager belongs appropriately to a discussion of the general law of wager.

9. *Post-Obits.* An assignment of the chance of obtaining an interest either under will or ab intestato in the estate of a living person presents in typical form the questions inherent in all transfers of future property, and in that aspect comes up later for discussion. But on independent grounds this special class of transfers may be attacked, as in their nature against public policy. On one hand, the transaction is apt to be a fraud on the ancestor, whose property goes into strangers' hands without his consent, or perhaps even knowledge. Again, the effect on the assignor is very apt to be bad. "Heirs, who ought to be under reasonable advice and direction of their ancestor, who have no other influence over them than what arises from a fear of his displeasure, from which the heirs may be induce, to live industriously, virtuously, and prudently, are, with the aid of money speculators, let loose from this salutary control, and may indulge in prodigality, idleness and vice, * * * Certainly the policy of the law will not sanction a transaction of this kind, from a regard to the moral habits of the citizens." Parsons, C. J., in *Boynton vs. Hubbard*, 7 Mass. 112 (121). The decided preponderance of authority both in England and in this country refuses to recognize the public policy as sufficiently strong to void all such transactions indiscriminately, but enforces them where they are shown to be fair, imposing, however, on the claimant under the assignment the burden of showing such fairness.

Steele vs. Frierson, 85 Tenn. 430; *Hoyt vs. Hoyt*, 61 Vt. 413; *Kuhn's Estate*, 163 Pa. St. 438; *Taylor vs. Swafford*, 122 Tenn. 303; *Bridge vs. Kedon*, 163 Cal. 493; *Estate of Wickersham*, 138 Cal. 361.

Indeed, where there are unfair elements (e.g., excessive interest) the Court, rejecting them, is ready to enforce the assignment for what is fairly due. *Martin vs. Marlow*, 65 N. C. 695. Against the weight of authority Kentucky holds that public policy prohibits all assignments of chances in the estate of a living person. *McCall*

vs. Hampton, 98 Ky. 166; *Hall vs. Hall*, 153 Ky. 382; *Spears vs. Spaw*, 118 S. W. 275. In Indiana, while the bare possibility of upholding such a conveyance is somewhat grudgingly admitted it is held that it is always a fraud on the ancestor unless made with his consent. *McClure vs. Rabe*, 125 Ind. 139; and that too, even though the ancestor, being insane, cannot assent. S. C. 133 Ind. 507. On assent see *Stevens vs. Stevens*, 148 N. W. 225 (Mich.) In *Mercier vs. Mercier*, 59 Ga. 546, a father threatens a son with disinheritance if he contracts a certain marriage. The propective heirs of the father agree on equal division, whatever the will may be. The agreement is held non-enforcible, on grounds of public policy.

10. Obviously, public policy is opposed to present alienation of everything a person may acquire for the rest of his life. Theoretically, a restrictive line should be drawn somewhere. But at common law, the technicalities as to transfer of future property practically, if not theoretically, constitute an adequate barrier against excessive present use of indefinite future property. While expanding liberality as to such transfers, may in equity call for restrictions in course of time, the courts have as yet seen no necessity for such action; and legislatures, though they have occasionally restricted the power of conveying future property, in some separate special situations, have nowhere attempted to lay down a general rule. The history of the creation of future estates in realty suggests an analogy. The rules of the common law, even though not formulated for that purpose, effectually restricted the creation of vested future estates. When, under the construction of the Statute of Uses, it became possible to evade the common law technicalities the courts met the situation with their rule against perpetuities.

III.

11. Coming now to the general problem of the transfer of future property, unaffected by considerations of public policy applicable to specific classes of cases, logically the matter must be first examined as it arises between the original parties to the transaction. In litigation the questions are more apt to arise between the transferee and some one claiming rights through the transferror, a subsequent purchaser, or a creditor of the transferror. Here a distinct problem is superposed on that concerning the relation between the original parties; a problem that should be approached only after the original relation is settled.

Again, equity has acted on these problems only in compara-

tively late times, whereas the common law view has been shaping itself through centuries. So, in dealing with transfers of future property, we first take up the subject as developed at common law, ignoring the equitable view, and limit ourselves for the time to the original parties, omitting intervening rights so far as they can be eliminated.

12. At common law the view was that a transfer required a transferror, a transferee, and a thing transferred. The three were essential. If the subject matter did not exist at the time of the transaction, its subsequent springing into existence could not affect the situation as far as rights in and to that thing were concerned. How far an action for damages might arise out of a breach of such an agreement is beyond the scope of this inquiry, which is limited to the rights in the future property itself.

This fine specimen of scholasticism came into sharp conflict with practical human requirements at so early a period that the first projected method of escape has all the irritating serio-comic ingenuity of the original proposition. We are still laboring under some of the effects of this chop-logic.

13. *Potential Existence.* For the first case on the main avenue of escape from the old common law on the subject, for the origin of the doctrine of "potential existence" we are referred back to 21 Henry VI. (1443). The first generally accessible reported case is *Grantham vs. Hawley*, Hobard 132 (1616). In that case a lessor in a lease for twenty-one years covenanted that it should be lawful for the lessee to take away such corn as may be growing on the ground at the end of the term. The conveyance was upheld: "Though the lessor had it not actually in him, nor certain, yet he had it potentially, for the land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. (21 Henry VI.) A person may grant all the tithe wool that he shall have in such a year; yet perchance he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy thereafter, for there he hath it neither actually nor potentially." The doctrine of potential existence has a firm place in the law of today. In several situations the rule works substantial justice; in others it fails to furnish the sensible solution. Such practical considerations have naturally affected courts, it would seem in part, at the expense of logical consistency. As to some property, *e.g.*, future crops, many courts still allow to the rule its original force, as to some other property, it seems to be generally

rejected. Again, what constitutes the potentiality out of which the future property can issue is a matter in no little confusion, independent tests being applied in the different classes of cases. The rule is therefore most satisfactorily studied by first taking up independent classes of situations in succession.

14. *Future Crops.* The doctrine of *Grantham vs. Hawley* above cited, which makes an interest in the land from which the crops are expected the source of the potentiality for the transfer of such crops, of course permits transfer of an annual crop long before it is planted. This broad view is accepted without qualification in England in *Petch vs. Tuttin*, 15 M. and W. 109 (1846), Alderson, J. simply saying: "As to the question whether it" (an annual crop planted long after the conveyance) "may pass by such deed, the case cited from Hobart is quite decisive." Many cases in America are in accord with this. As examples see *Arques vs. Wasson*, 51 Cal. 620, followed in *Wilkinson vs. Thorp*, 128 Cal. 221; *Dickey vs. Waldo*, 97 Mich, 235; *McCaffrey vs. Worden*, 65 N. Y. 23; *Briggs vs. U. S.* 143 U. S. 346 (354). But in many if not most states, the Courts can no longer find the potentiality in the soil, but insist that the contemplated crop must have been at least planted when the transaction occurs. *Rochester Distilling Co. vs. Rasey*, 142 N. Y. 570; *Appersen vs. Moon*, 30 Ark. 56; *Keysor vs. Maas*, 111 Ala. 390. In several states statutes bring the law in practical conformity to this theory. In *Comstock vs. Sears*, 7 Wis. 159, it is not enough that the crop is planted; it must have sprouted. A third group of cases concerning future crops which clearly call for application of this theory of potential existence are decided by the Courts on equitable principles as hereinafter discussed. In some of these cases it is expressly said that such a transfer has no standing at law. *Brown vs. Nelson*, 61 Nebr. 765; *Kelly vs. Goodwin*, 95 Me. 538. But even where nothing is said as to potential existence, the mere fact that it is ignored makes such cases substantial authorities for the repudiation of the whole theory. *De Vaughn vs. Howell*, 82 Ga. 336; *Andrew vs. Newcomb*, 32 N. Y. 417.

15. The well established principle that where by the agreement the vendor is to do anything to the goods to put them into a deliverable state, the performance of these things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property, might well seem to require consideration when dealing with these transfer of future crops. The transferror ordinarily assumes the obligation of caring for the crop till maturity. The principle is thus applied

in *Witter vs. Hill*, 65 Minn. 273, where the transferee of a crop under an agreement made before planting had to yield to a levy by a judgment creditor of the transferror on the growing crop, the Court holding that the title would not pass till the crop was threshed. So the Court says in *Cole vs. Kerr*, 19 Nebr. 553: "Soil alone does not produce crops in these degenerate days, if it ever did. It now requires in addition to soil, seed and labor, both of man and beast." But the argument is generally ignored in discussion of cases of potential existence where the subject matter is merely a future crop. Where, however, the subject of the agreement is some product of a future crop, *e.g.*, oil to be extracted by the transferror from unplanted mint, the rule is applied, and the transferee is held to have no interest in the property until the transferror has put the article in deliverable shape. *Langton vs. Higgins*, 28 L. J. Ex. 252. But in opposition to this, and against many authorities, and it would seem against logic as well, in *Van Hoozer vs. Cory*, 35 Barb. 9, the Court protected the lessor as to cheese made by the lessee on his farm. The argument in this decision goes on lines of potential existence.

16. *Reservation of Title.* Where the parties to the transaction are landlord and tenant there are cases which uphold the landlord's right to future crops, when it is rested on a reservation thereof made in the lease. The doctrine has no relation to that of potential existence, and is parenthetically introduced here simply because it rounds out the special case in hand of future crops. Under this doctrine of reservation, the title to the crop never is in the lessee; it is in the lessor to the exclusion of the lessee from the time the seed is planted. *De Vaughn vs. Howell*, 82 Ga. 336; *Andrews vs. Newcomb*, 32 N. Y. 417. It may be questioned whether such a reservation is not void as conflicting with the grant. See *Turner vs. Bachelder*, 17 Me. 257.

17. *The Unborn Young of Domestic Animals.* The doctrine of potential existence has been applied to transactions as to colts unborn. In *Hull vs. Hull*, 48 Conn. 250, 40 Am. R. 165, the colt in question was born a couple of years after the transaction, and the decision turns on a discussion of potential existence. The undiluted doctrine of *Grantham vs. Hawley*, *supra*, is applied. The decision ignores, and on the facts of the case, rejects the analogy suggested by the line of American cases as to future crops, requiring the planting of the crop before the doctrine as to potentiality can be invoked (*Rochester Distilling Co. vs. Rasey*, 142 N. Y. 570, and other cases in Par. 14). See also in accord, *Sawyer vs. Gerrish*,

70 Me. 254, and *Walcott vs. Hamilton*, 61 Vt. 79. But another line of cases, alluding vaguely, if not disapprovingly, to the doctrine of potential existence, makes the decision turn on reservation of title, as discussed, with reference to future crops, in Par. 16. Under this view the sale of the mare with reservation of the unborn colt, leaves the title to the colt in the vendor. *Andrew vs. Cox*, 42 Ark. 473; *Maize vs. Bowman*, 93 Ky. 205. The vendor of the unborn colt, thus reserving title, recovered against an innocent purchaser of the colt after birth from the vendee in *McCarty vs. Blevins*, 5 Yerg. 195. So far as the case recognizes a legal title to the colt in the original vendor as against his vendee, it calls for no comment; but in rejecting the claims of the innocent purchaser even as against the legal title, it involves principles to be discussed later, our view for the present being limited to the relation between the original parties.

18. *Future Wages.* It is not an uncommon transaction for a wage earner to assign the wages for which he has as yet not rendered services. The situation being considered here only as between the parties to the transfer, *i.e.*, the right of the assignee to recover the wages when they mature as against the oppostion of the assignor, no third claimant having intervened, the decisions turn on the application of the doctrine of potential existence. The test of potential existence however, is not the muscle skill or the like of the wage earner as analogy to *Grantham vs. Hawley* would suggest, but the source of potentiality is a subsisting employment, and only what may be earned thereunder in the future can be assigned. This calls to mind the "planted crop" cases cited ante in Par. 14. But the rule is laxer as to wages than under the "planted crop" theory. It is not necessary that the arrangement between employer and employee should be broad enough to cover the period for which the assignment is made. A subsisting relation of employer and employee, terminable it may be at any time by either party, or a current employment from month to month is a source of potentiality adequate to sustain assignments of wages for as long as the relation may be continued by the parties thereto. *Mallin vs. Wenham*, 209 Ill. 252; *Citizens Loan Co. vs. R. R.* 196 Mass. 528; *Chicago etc., R. R. vs. Provolt*, 42 Colo. 103; *Wellborn vs. Buck*, 114 Ala. 277; *Thayer vs. Kelly*, 28 Vt. 19, 65 Am. Dec. 220; *Metcalf vs. Kinkaid*, 87 Iowa 443, 43 Am. St. R. 391; *Angar vs. Bellvue Co.*, 39 Conn, 536. Where the assignor has no employment at the time, the assignment is void, though wages described are thereafter earned. *Lehigh etc. R. R. vs. Woodring*, 116 Pa. St. 513; *Stronberg vs. Hill*,

170 Ill. App. 323. In Minnesota the general doctrine as above given is recognized with the restriction that an assignment of wages to be earned without limit as to amount or time is void. *Leitch vs. R. R.* 95 Minn. 35. This seems to be a matter of public policy rather than a ruling as to potential existence.

19. *Future earnings.* The doctrine as to future wages does not seem to be altered when the subject matter is broadened out to include other forms of future earnings. Thus in *Skipper vs. Stokes*, 42 Ala. 255, 94 Am. Dec. 646, a physician assigned such accounts against patients as might accrue to him for a number of years. As the accounts involved in the litigation were not based on relations existing between the physician and the patients at the time of the transfer, it was held that they were not then in potential existence, and so they did not pass. By the same test a transfer of claims to become due to the transferror from time to time as he performed his contract with a third person was upheld in *Buser vs. Bank*, 167 Fed. Rep. 486. So, of an assignment of profits or commissions to be derived from existing charter parties *Bank of Yolo vs. Bank of Woodland*, 3 Cal. App. 561. See also *First National Bank vs. School District*, 77 Nebr. 570; *First National Bank vs. Kimberlands*, 16 W. Va. 555 (592); *Johnson vs. Donohue* 113 Tenn. 446; *Spengler vs. Stiles*, 94 Miss. 780; *Brindge vs. Police Association*, 75 N. J. Eq. 405; *St. Johns vs. Charles*, 105 Mass. 262; *Godwin vs. Bank*, 145 N. C. 320. Though it is thus possible for a party to contract to assign whatever he is to earn under the contract, it is of course impossible for him to transfer his obligation so as to relieve himself of his duties under the contract, to the other party thereto.

20. *Conveyance of Future Additions and Substitutions.* The transfer of property may purport to include such other property as may in the future be added to that described or substituted for it. Practically the transaction only occurs in security transfers, mortgages, or pledges. In Equity the assignment is upheld as to the parties thereto. But at law the transferee acquires no right as the property comes into existence. No serious attempt seems to have been made to stretch the doctrine of potential existence to cover the situation. Such cases as may seem to suggest the idea will be found to rest on a very different principle. A mortgage, like any other transfer, gives the transferee the accretions to the thing transferred, without need of specific provision in the mortgage. A mortgage of realty covers subsequent improvements of the land; a mortgage of a herd of cattle covers the calves subsequently born

—[at least where the mortgage is held to give legal title (which is all that concerns us here), *Ellis vs. Reaves*, 94 Tenn. 210; though it may be otherwise where a mortgage is considered only a lien. See *Battle Creek Bank vs. First National Bank*, 62 Nebr. 825, 56 L. R. A. 124]. A mortgage of pickles in process of curing holds good after they are "greened" and bottled, (*Crosby vs. Baker*, 88 Mass. 295); a mortgage of lumber in a factory covers the furniture made out of it (*Deherity vs. Paxon*, 97 Ind. 253). In extension of this doctrine it has been held that a mortgage of a printing press with its appurtenances covered property after purchased to replace what was worn out (*Holly vs. Brown*. 14 Conn. 255), and even that a mortgage of a railroad may cover a locomotive subsequently purchased which is necessary for proper operation of the road. *Morrill vs. Noyes*, 56 Me. 458, 96 Am. Dec. 486. But, as is specially stated in the last cited decision, the doctrine of potential existence is not involved in these cases. Later cases have not sought to advance by further stretching the doctrine that a mortgage covers property in the form in which it may be subsequently modified, and rely on the equitable principles for determination of rights under such conveyances.

21. *Transfer of Expectation.* A transfer of an expectation, as of the fish to be caught by the transferror on his next trip, raises a somewhat close question as to application of this doctrine of potential existence. *In Jones vs. Webster*, 48 Ala. 109, (112) it is said: "A fisherman may sell the next cast of his net, because being a fisherman, it is his business to have a net, and to cast it within reasonable time. It is more than probable that he will do so." This would seem a plausible application of the reasoning of *Grantham vs. Hawley*. But the quoted remark is obiter in that case; and in *Low vs. Pew*, 108 Mass. 347, which is directly in point, it is held, on the narrower construction which seems the modern tendency when the doctrine of potentiality is considered, that the transferror had a mere possibility, and not an interest. The holding is the same in *Robinson vs. MacDonnell*, 5 M. and W. 228. The case must be distinguished from a seaman's assignment of the interest in the catch which is to be taken by him in lieu of wages. Here, though the consideration be uncertain, the subsisting agreement for wages is held to furnish the requisite potentiality. *Gardner vs. Hoeg*, 18 Pick. 168.

22. *Conveyance of Chance to Inherit.* The conveyance of the prospective heir or devisee of a living person, when not against public policy (ante Par. 9) has no standing in law, though upheld

in equity, as will hereafter appear. The claim is held to be a mere chance, and to have no "potential existence" under the rule we are discussing. Authorities are collected in the note to *McCall vs. Hampton*, 56 Am. St. R. 335, at page 442.

23. The Sales Act, Sec. 5 (3), provides "where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods." This may abolish the doctrine of potential existence, which gives the vendee rights as to the goods, in *sales* of goods, wherever that act is in force.

24. *Enurement of Title.* Conveyances of future property are supported on another ground, entirely distinct from the doctrine of "potentiality," and of the reservation of title mentioned *ante* Par. 16. It seems the prevailing doctrine in realty cases that if the grantor in a warranty deed having no title or a defective one at the time of the conveyance, thereafter acquires title, that title as so acquired by the warrantor immediately passes to the grantee. This principle is applied to a conveyance of realty by a prospective heir in the ancestor's lifetime. *Blackwell vs. Hamilton*, 99 S. C. 264 (1914). The rule applies as to realty only where the conveyance is a warranty deed or its equivalent under the local law. In sales of personalty the law raises a warranty of good title. The principle has been applied to sales of future personalty, where there was no specific warranty beyond what the law implied, giving the vendee title by inurement when the vendor subsequently acquired legal title. *Clark vs. Slaughter*, 34 Miss. 65; *Curran vs. Bordsall*, 20 Fed. 835; *Watkins vs. Crenshaw*, 59 M. A. 184; *Frazer vs. Hilliard*, 2 Strobh. 309. If the conveyance is void for reasons of public policy, of course the warranty is of no avail. Such was the holding under the Kentucky rule as to conveyances by prospective heirs (ante Par. 9), in *Spears vs. Spaw*, 118 S. W. 275.

25. From all the foregoing it appears that the common law general doctrine that there can be no conveyance of future property as defined in Par. 2 has its limitations, even at law, when the title is reserved (Par. 16), when it inures (Par. 24), and when the future property has potential existence, as discussed above in various classes of cases. Under reservation, the title never leaves the transferror; under inurement, it passes to the transferee as soon as the transferror acquires title, and of course not before. Under the doctrine of potential existence however, the transferee has something back of the title at the time the property comes into existence. As soon as the contract is made he has rights as to that property, as yet non-existent, which are entitled to legal protection. For in-

stance, the vendee or mortgagee of a crop, though it have not even sprouted, is entitled to protection against devastation of the field where it is planted.

IV.

26. So far we have considered from its common law side the effect of an attempt to transfer future property as between the parties, simply from the standpoint of the attempted transfer. But further action may supervene, even when the transferee gets no rights under the principle above discussed, and change the results. Should for instance a transferror in such an abortive attempt to transfer, actually deliver the property when it comes into existence, to the transferee in pursuance of the prior understanding, the transferee would obviously acquire the title of the transferror as between them. But may not less suffice? May there not perhaps be situations where the transferee acquires title by himself, taking possession, as the property comes into existence, without action by the transferror?

27. "An instrument which assumes to convey or encumber a thing which has not even a potential existence must be regarded as a mere executory contract. And whatever might be the status of these contracts in courts of equity, where that is considered done which ought to be done, it is well settled both in this country and in England, that they do not create legal right to, or interest in, the thing to which they relate, without what is called by the old writers a new intervening act." *Battle Creek Bank vs. First National Bank*, 62 Nebr. 825, 56 L. R. A. 124.

Since the new intervening pact must suffice to transfer the title, it must derive its force from the owner, the transferror. No act of the transferee not authorized by the transferror, can affect the title to the thing when it comes into existence. That title remains in the transferror. *Lunn vs. Thornton*, 1 C. B. 379; *Jones vs. Richardson*, 10 Metc. 481. Most of the cases are on mortgages of after acquired property, and the ruling is laid down that the mere acquisition of such property by the mortgagor is not enough: It must be shown that it was done by the grantor "for the avowed object and with the view of carrying the former grant or disposition into effect." *Lunn vs. Thornton*, supra; *Griffith vs. Douglass*, 73 Me. 532, 40 Am. R. 395.

28. *Authority to Grantee to Seize.* As was suggested in *Lunn vs. Thornton*, and definitely ruled in *Congreve vs. Evetts*, 10 Exch. 298, if in the agreement the transferror gives the transferee the

power to take the property when it comes into existence, then the exercise by the transferee of this power, coming from the transferor through the original agreement, vests title as between the parties. *Hope vs. Haley*, 5 El. & B. 830; *Carr vs. Allatt*, 3 Hurl & N. 964. *Cook vs. Corthell*, 11 R. I. 482. *Thompson vs. Foerstel*, 10 M. A. 290; *Thompson vs. Fairbanks*, 75 Vt. 361. As it is stated in *Burrill vs. Whitcomb*, 100 Me. 286(295):" It is universally conceded that possession taken by the mortgagee by virtue of the mortgagor's consent given after the property is acquired, is to be deemed equivalent to a voluntary delivery by the mortgagor, and such a 'new act' as will effectuate the previous agreement. It has now been shown by a uniform current of modern decisions, that the law has advanced another step, and now holds that actual possesson of such property taken by the mortgagee in the exercise of an authority expressly granted in the mortgage, is also equivalent to a voluntary delivery by the mortgagor, and if such possession is retained, it makes the mortgagee's lien good as against an attaching creditor."

29. In cases where the transaction deals with future property alone, there are decisions that construe this power in the transferee as being a mere license. As such it is revocable at the transferror's pleasure, at law. If the transferror does not revoke, the exercise of the power gives the transferee a good title. Here the transferee has no legal interest in the power, since he has no right at the time of the agreement in the property. *Chenoweth vs. Jenney*, 10 Wis. 397.

30. But if, as is generally the case, the transferree has an interest in the agreement; if, for instance, it includes a valid transfer of existing property, the holdings are that the power is coupled with an interest, and is therefore irrevocable. On this view the transferee can take possession of the property after it has come into existence and acquire good title against the opposition of the transferror. *McCaffery vs. Woodin*, 65 N. Y. 459; *Leland vs. Collver*, 34 Mich. 418 (424).

31. A growing line of cases seems to hold that the transferee has the right to take future property as it comes into existence under a mortgage that does not in terms give that right of seizure. A mortgage "operates as an executory agreement that such goods shall be holden by the mortgagee as security when acquired by the mortgagor; and the mortgagee may take possession before the rights of third persons intervene." *Wasserman vs. McDonnell*, 190 Mass. 326. See *Walker vs. Vaughan*, 33rd Conn. 577. This view, a practical reversal of *Lunn vs. Thornton*, furnishes a good

illustration of the way in which the ideas of Equity gradually eat into the old notions of Law.

32. In *Reeves vs. Barlow*, 12 Q. B. D. 436, the agreement provided that all building material brought by the intended lessee on the lessor's land should become property of the latter. It was held that the lessor had title to bricks brought on the land by the intended lessee as soon as they were placed there without any further act. To the same effect is *Allen vs. Godnow*, 71 Me. 424. Under this view it would seem that the chief remaining distinction between the legal and equitable view is that the former requires an express agreement that the title to the future property shall vest in the transferee at coming into existence; whereas the latter is ready to imply such agreement from the nature of the transaction. It still is true, however, that the titles continue respectively legal and equitable, a matter of importance when intervening rights are under consideration.

This attempt at a systematic outline for the study of transfers of future property, after fixing the limits of the subject (Pars.1-3), deals next with cases where some public policy prohibits transfer of some special kind on grounds wholly alien to considerations controlling the fundamental idea of transferring future property (Pars. 4-10). The refusal of the common law to recognize such transfers of future property in general, has its exceptions which are next taken up: The reservation of title (Par. 16) the enurement of title (P. 24) and the doctrine of potential existence (Pars. 11-25). Though the purported transfer be inadequate, subsequent events may make the transferee's title good at law. This is the topic in Pars. 26 to 32. A continuation of the outline would next deal with the equitable view of such transfers; and finally (since the prior discussion limits itself to rights as between transferror and transferee), take up the rights of intervening third persons, *e.g.* creditors of the transferror, or bona fide purchasers from him.

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