TRANSFER OF FUTURE PROPERTY*

V. Transfers in Equity.

33. That Equity should take a more liberal view of such transaction, and recognize in some way equitable rights in the transferee is a natural suggestion. There are earlier cases in both America and England, but the leading authority is *Holroyd v. Marshall,* 10 H. of L. 191, decided in 1862, which has been the starting point for all subsequent discussion. In that case a mortgagee of a mill and of all machinery that should be placed in the mill in addition to or substitution for that specifically described prevailed over a creditor of the mortgagor who had levied on additional machinery in the mortgagor's possession before the mortgagee had taken any steps to perfect his right. It should be noted that the case proceeds on the theory that "the right of the judgment creditor who has no specific lien, but only a general security over his debtor's property, must be subject to all the equities which attach upon whatever property is taken under this execution. But it was said (and truly said) that those equities must be complete, and not inchoate or imperfect, or, in other words, they must be actual equitable estates, and not mere executory rights." (Lord Chelmsford, at page 215.) The holding for the mortgagee therefore is that he has a complete *equitable* title, requiring no intervening act to make it good in equity. The well-known doctrine that the right of a purchaser of the legal title for value without notice prevails over an equitable title is expressly recognized in the decision.

34. The opinion of Lord Westbury in the *Holroyd* case has left room for discussion as to the equitable doctrine on which it rests. It has been construed as recognizing the transferee's right only when specific performance would lie. This view influences a number of English decisions, and is carried to its full consequences by Chancellor Cooper in *Phelps v. Murray,* 2 Tenn. Ch. 746 (1877).

35. But in England the test is repudiated in *Tailby v. Official Receiver,* 13 A. C. 523 (1888). Says Lord McNaughton (p. 547), "The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained, you have only to

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*A prior article has dealt with the transfer of future property at Common Law (St. Louis Law Review, Vol. 1, p. 277), classifying the restricted list of circumstances where exceptions were allowed to the general proposition that a transfer of property not existing at the time of the transfer is a nullity at Common Law as far as concerns interest in the thing transferred.

apply the principle that equity considers that done which ought to be done if that principle is applicable under the circumstances of the case. The doctrines relating to specific performance do not, I think, afford a test or measure of the right created. There are cases where the rights of the parties may be worked out by means of specific performance, though no specific lien is effected by the agreement itself. More frequently a specific lien is effected though no case of specific performance is contemplated." The mortgage in that case covered all book debts "which may during the continuance of this mortgage become due and owing to said mortgagor." The decision was in favor of the assignee of the mortgagee who had collected such a debt, created after the mortgage, against the receiver in bankruptcy of the mortgagor. The conflicting case of *Belding v. Read,* 3 H. & C. 955, was overruled.

36. Though possibility of specific performance is not the test, the right to the specific lien in equity must have the elements necessary to evoke the exercises of the Chancellor's powers. Thus the Court refuses to act where there is no consideration for the transfer. A purely voluntary settlement by a prospective heir of his expectancy in the estate of his ancestor will not be enforced after that ancestor's death. *In re Ellenborough,* 1903, 1 Ch. L. R. 697. So where the subsequent property is acquired by the mortgagor by a fraudulent purchase, a court of equity will not deprive the vendor of his right to rescind the contract. *Williamson v. N. J. Southern R. R. Co.,* 29 N. J. E. 311 (1878).

37. Nor will the transferee be protected in equity where the future property is not described with such clearness that it can be specifically identified on coming into existence. The proposition is, of course, not limited to future property. A contract concerning described land "reserving the land necessary for a railway" is unenforcible. *Pearce v. Watts,* L. R. 20, Ex. 493. "There is but one condition that must be fulfilled in order to make the assignee's right attach to a future chose in action, which is, that on its coming into existence it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing, or as one of the things, assigned. When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee." (Lord Watson in *Tailby v. Receiver,* 13 A. C. 533.) The test applies a *fortiori* to future chattels. Indeed, it was conceded in

the *Tailby* case that the assignment of choses in action to accrue *in a particular business* was good in equity; it was merely claimed that an assignment of all choses in action *to accrue from any source* was too indefinite. This contention that the description is too indefinite is disposed of by irrefutable logic. But several of the Law Lords alluded to an underlying sentiment that a disposition of *all* one's future property would be against public policy. The answer made is that in the case under consideration there is no such disposition of *all* future property, and that the Court does not feel called on to treat of restrictions on disposition of future property based on such a public policy. The subject is touched on in paragraph 10 of the prior article. (St. Louis Law Review, p. 282.)

38. Generally speaking, it may be said that *Holroyd v. Marshall*, as interpreted in *Tailby v. Receiver*, has been followed in the United States. But some strong courts have refused to accept it, and others restrict its application with a rigor that falls little short of hostility. The difficulty seems to be that this equitable rule annihiliates the restrictions of the Common Law under which a conveyance (more especially a mortgage) of future property was, when made, a nullity save in a few well-defined classes of cases. The equitable rule makes it possible to create rights in all kinds of future property which attach in equity as soon as the property comes into existence without a new intervening act. Its tendency is to cloud the title to personality; and to imperil the rights of innocent third persons in connection with such property. It may well be felt that public policy is opposed to the unlimited extension of the right to deal with future property. The matter is reserved for later examination when the rights of third parties in future property so transferred are discussed. Till then it is sought to limit our examination, as far as may be, to the rights between the original parties to the transfer.

39. Massachusetts refuses to follow *Holroyd v. Marshall*. The original ruling that a mortgage of future property could be rendered effective only when possession was taken with consent of mortgagor (*Jones v. Richardson*, 10 Metc. 481), was extended by what seems to have been dictum (subsequently followed) in *Moody v. Wright*, 13 Metc. 17, to the effect that the mortgagee is protected if he takes possession under the provisions of the original mortgage before other claimants intervene, though without the mortgagor's assent at the time of taking possession. (For the analogous question as to the

"new act" in transfer at law see prior article, par. 26-31.) In short there must be a new act; the doctrine of *Holroyd v. Marshall* that the mortgagee gets equitable title as soon as the future property accrues to the mortgagor is repudiated. *Blanchard v. Cooke,* 144 Mass. 207 (1887), lays down the doctrine in that state, discussing the prior authorities, and *Wasserman v. McDonnell,* 190 Mass. 326 (1906), is in accord. The cases of *Rowan v. Sharp Co.,* 29 Conn. 283, and *Walker v. Vaughan,* 33 Conn. 577 (1866), rest on the same doctrine. *Brown v. Neilson,* 61 Nebr. 765, also repudiates the doctrine of equitable lien on future property in a lengthy opinion citing prior authorities from Nebraska and elsewhere. *Kelly v. Goodwin,* 95 Me. 538 (1901), intimates that such an equitable mortgage is not good until possession is taken of the future property.

40. New York now gives the equitable doctrine full effect; see Judge Parker's opinion in *Kribbs v. Alford,* 120 N. Y. 519 (1890); but an early decision in that state, *Otis v. Still,* 8 Barb. 102 (1849), has been the reliance of several decisions repudiating the theory of equitable title in future property. In that case, it was held that a mortgage of future property, if enforcible in equity at all, can only be enforced as a right under the contract and not as a trust attached to the property. The *Holroyd v. Marshall* case is of later date, but this *Otis* case expressly repudiates *Mitchell v. Winslow,* 2 Story 630 (1843), in which Judge Story had anticipated the ruling in England.

The *Otis* case was followed in *Comstock v. Scales,* 7 Wis. 159 (1858), and the Supreme Court of that State has refused to reopen the question; *Case v. Fish,* 58 Wis. 56 (1883); see also *Hunter v. Bosworth,* 43 Wis. 583; *Reedy v. Converse,* 71 Wisc. 524 (1888).

Kentucky also followed the *Otis* case in *Ross v. Peter,* 7 Bush. 29 (1869), and *Nixon v. Hallwell,* 10 Bush. 538 (1874). *Zahring v. Cox,* 78 Ky. 527 (1880), which seems inconsistent, at least in *obiter dicta,* is criticized in *Loth v. Carty,* 85 Ky. 591 (1887).

41. The cases in America directly repudiating *Holroyd v. Marshall* are not numerous, though, of course, more than have been cited above. *Obiter dicta* inconsistent with that case or showing hostility to its doctrine are, however, plentiful. They are found chiefly in cases where the question is not directly between transferer and transferee, but involves some third person, creditor, prior vendor, subsequent purchaser, or the like. As to the unwritten law, our Courts frequently differ from the English view (*e. g.,* as to the rights of the transferrer's

judgment creditor) and, of even more practical importance, our various recording laws not only bear on the effect of mortgages of future property, but may make them impossible. Should, for instance, the statute declare an unrecorded chattel mortgage absolutely void, as seems to be the law in Oklahoma, and also require the mortgaged property to be specifically scheduled, that form of security would be valueless for most situations. Such cases are alluded to here mainly to call attention to the fact that they are not necessarily in logical conflict with *Holroyd v. Marshall.*

42. Though there is occasional repudiation or hostility, as above indicated, probably the majority of decisions of this country enforce the principles of *Holroyd v. Marshall,* where they do not hold that the duty of protecting third persons overrides the application of the doctrine.

In *Mitchell v. Winslow,* 2 Story 630, Judge Story developed the doctrine in 1843. But it was clearly *obiter,* for the mortgagee had taken possession of the future chattel in that case, and it was superfluous to assert that equitable title attached as the property comes into existence, which is the distinguishing feature of the equitable doctrine. In *Pennock v. Coe,* 23 How. (64 U. S.) 117 (1859), the doctrine was applied in a railroad mortgage. See also *Little Rock R. R. v. Page,* 35 Ark. 304 (1880). It may be said here that, in the case of railroad mortgages, the authorities are in accord in recognizing their validity as to future property on grounds peculiar to that class of investments. *Grand Forks Bank v. Elevator Co.,* 6 Dak. 357 (1889), upholds a mortgage as to future crops on equitable (not legal) grounds in a lengthy opinion, as is also done in *Richardson v. Washington,* 88 Tex. 339 (1895). In *Ludlum v. Rothschild,* 41 Minn. 218 (1889), a mortgage to a landlord by the tenant of fixtures to be put on the premises is upheld with reference to the *Holroyd* case. In Missouri, the doctrine is the same on similar facts. *Wright v. Bircher,* 72 Mo. 179; *Keating v. Hannenkamp,* 100 Mo. 161 (1889). In *Preston Bank v. Purifier Co.,* 84 Mich. 364 (1890), the subject matter was the assignment of accounts not existing at the date of transfer. In *Williams v. Winsor,* 12 R. I. 9 (1877), a mortgage of future additions to a stock in trade is held good in equity, as between the parties. In *Perry v. White,* 111 N. C. 198 (1892), the mortgage was of structures to be erected (personalty), and was upheld, relying on the *Holroyd* case. *Cooper v. Rouse,* 130 N. C. 202 (1902), a mortgage of future additions

to a stock in trade, follows *Perry v. White.* (The inconsistencies in judicial utterances are well illustrated by the fact that the same Judge who rendered these two North Carolina decisions speaks in *Loftin v. Hines,* 107 N. C. 360, of the mortgage of future crops as creating an equitable right, as distinguished from an equitable title.)

Apperson v. Moore, 30 Ark. 56 (1875), upholds the mortgage of an unplanted crop on equitable principles. The same doctrine is given in *Wheeler v. Becker,* 68 Iowa 723 (1886). In *Sandwich Mfg. Co. v. Robinson,* 83 Iowa 567 (1891), 14 L. R. A. 126, it was held that money to be earned by a threshing machine could be mortgaged. An assignment to an attorney of an interest in a tort claim in litigation (as contingent fee) was held to be good in equity in *Shubert v. Herzberg,* 65 M. A. 578 (1896). In *Sillers v. Lester,* 48 Miss. 513 (1873), a mortgage by lessee to lessor of such mules as might be subsequently acquired was upheld as against a subsequent claimant with notice. The mortgage by a landlord of the share of crops to come to him as rent is recognized on equitable grounds in *Riddle v. Damon,* 98 Iowa 7 (1895); *Howell v. Pugh,* 27 Kan. 702; *Potts v. Newell,* 22 Mich. 561. The New York ruling in *Kribbs v. Alford,* 120 N. Y. 519, has been above referred to.

43. Where the equity doctrine is recognized, it annihilates the common law restrictions and makes huge classes of transfers of future property possible. Thus the conveyance by a prospective heir or devisee is void at law. (See paragraph 22 of prior article.) In equity it is good, save so far as rules of public policy may affect the particular case (par. 9). An expectation, *e. g.,* of a catch of fish, cannot be transferred at law (par. 21). There is no objection to it in equity. Of future crops (par. 14), of unborn animals (par. 17), of future wages (par. 18), of other future earnings (par. 19), and of additions to and substitutions for existing property (par. 20), the conveyance at common law is possible only in few cases, resting on rather intricate technical rules that make little appeal to our sense of natural justice. In equity all these distinctions disappear. Indeed, there seems no limit to the power of such disposition in equity as between the original parties, whenever the future property can be so described as to be clearly identified on coming into existence.

44. But even as between the original parties, the distinction between the legal and equitable title of the transferee cannot be wholly overlooked. Thus in *Deeley v. Dwight,* 132 N. Y. 59 (1892), while the

mortgagee's equitable lien on future property was fully recognized, he was denied the remedy of conversion because his title was not a legal one. The same principle is enforced in *France v. Thomas*, 86 Mo. 80, and *Gregory v. Tavenner*, 38 M. A. 627. There is no occasion to do more than call attention to the topic. How far law and equity have been blended, how far legal remedies are available to enforce equitable rights, are matters independently settled in each jurisdiction.

VI. TRANSFERS AS AGAINST THIRD PARTIES.

45. When subsequent to the initial transaction between transferrer and transferee a third person acquires an interest in the future property (*e. g.*, as execution creditor of the transferrer), the conflict between the third person and the original transferee turns chiefly on regulations concerning record and change of possession.

It is clear, however, that if we put aside for a moment these regulations concerning record, which are wholly statutory, and concerning change of possession, which now have almost everywhere statutory form, there remains a question which must be determined by the nature of the title the transferee acquires, and by the time when that title accrues.

(a) Ignoring the limitations as to record and change of possession, when the transaction gives the transferee a title at common law, it is a legal title which cannot be affected by subsequent claims through or under the transferrer. But where the common law allows of the transaction, the transferee's interest attaches as soon as the transferrer's, *i. e.*, when the property comes into existence or into the transferrer's possession. So third parties' claims subsequently acquired cannot prevail against the transferee.

(b) But where the original transaction, so far as the common law is concerned, gives the transferee no right to the thing as it comes into existence, and his right at law results from a subsequent act, the full legal title remains in the transferrer until such act. A purchaser from the transferrer during that time, or an execution creditor levying on the property, will hold at law as against the transferee, who has not acted; for the transferee has no title.

(c) When the transferee never acquires a standing in law, but has acquired full equitable title under the doctrine of the *Holroyd* and *Tailby* cases, that equitable title is his as soon as the property comes into existence or is acquired by the transferrer, as is the case as to the legal title in transfers of future property recognized at law under the

doctrine of potential existence. But in the situation we are now discussing, it must be remembered the title is only equitable, not legal, and therefore cannot stand against a purchaser for value without notice of the equity, whereas the legal title under the doctrine of potential existence is good against the *bona fide* purchaser (ignoring record and change of possession for the time). The equitable title will prevail, however, against a purchaser with notice or one who gives no valuable consideration, *e. g.*, a donee, legatee, executor, or assignee in insolvency. This was also true of the assignee in Bankruptcy under the former law, but the law now in existence makes the trustee the representative of the bankrupt's creditors, and so a "purchaser for value." Under the English view as given above in the *Tailby* case, the levy of an execution by a creditor of the transferrer reaches the title of the transferrer subject to all equities against it. In this country, it is generally held that as far as personal property is concerned, the creditor who has levied an execution is a "purchaser," holding a lien superior to all equities not known to him, actually or constructively.

46. But, the conflict between transferee of future property and claimant under the transferrer is generally decided on considerations of public policy of far more importance than technical title, legal or equitable. Indeed there is a troublesome problem concerning the transfers of all personal property, present or future, whenever there is not actual change of possession. Whenever the owner of personalty, present or future, transfers it and retains possession, persons who subsequently acquire interests in that property for good consideration without notice of the prior transfer, on the strength of the transferrer's apparent ownership, have clearly a strong case against the transferee's title, even though the latter acted in actual good faith. Twyne's case, expanded and modified in numerous decisions, is the general starting point for the doctrine that at Common Law (or under the 13 and 27 Eliz.) a transfer of chattels without change of possession is constructively fraudulent as to the transferrer's creditors. Subsequent purchasers for value are also protected, in numerous cases. It is not attempted to follow the Common Law doctrines through the intricate and often conflicting holdings concerning them. In almost, if not quite every, state in the Union there are statutory regulations expressive of the policy of the state as to the requirements in chattel transfers. But the transferrer is entitled to consideration as well as the

creditor or subsequent transferee. While the creditor or subsequent purchaser from the transferrer requires protection, an inhibition of all transfers of personalty without actual change of possession is far too drastic, at least in modern times. Clearly there are many situations where an owner should be permitted to mortgage chattels without surrendering the possession which is essential in the business. So the farmer should be enabled to give a valid mortgage on the animals which he uses in raising his crops, the manufacturer on his machinery and fixtures, and even the merchant on his stock of goods. It clearly would not do to rely on the common law exclusively. Some legislation must regulate their conflicting interests.

47. We pass by the English method of adjusting the matter. It is quite intricate and has little affinity with the system in this country. A condensed statement of it can be found in 19 Harvard L. R., p. 573. In this country the characteristic device is the requirement for record of chattel mortgages. With such record the mortgage is good against the mortgagor's creditors even though there is no change of possession. On the other hand, the statute usually provides that the mortgagee holds as against the mortgagor's creditors, if there is actual change of possession without record.

48. Recording and change of possession are mentioned without any intention of discussing the topics generally. Nor are we concerned with the broader subject of conveyances actually or constructively fraudulent as to third persons. So far as such law applies indifferently to conveyance of present or future property, it is outside the scope of this article. There are, however, situations where the law as to conveyances in fraud of creditors or subsequent purchasers has specific bearing on future property as distinguished from present property, invalidating conveyances of future property that would be good as against the world but for such law. Some such cases are next taken up.

49. We have touched on the need of adequate description of the future property in the instrument of transfer (generally a mortgage) in order to create a valid equitable lien as between the parties (*ante*, 37). In that case it is enough if the property, when it comes into existence, clearly comes under the terms of the mortgage. But when recording acts require that the property shall be described in the recorded mortgage—and in some form the requirement is probably universal—there is good reason for more stringent application of such provision.

The purpose here is to give the world constructive notice at the time of record of the specific property covered, and not merely to condemn the vagueness of description which subsequent events will not satisfactorily remove. If the recording acts are interpreted by the Courts in this spirit, we have practically a prohibition of mortgages of future property which shall be binding on third persons; for the alternative for record, delivery at the time, is not possible, in the nature of things, as to future property. This reasoning is in some decisions carried to its full logical outcome. Thus in *Griffith v. Douglass*, 73 Me. 532 (1882) it is said: "The record is valid only to protect goods which at the giving of the mortgage could be delivered and retained. Consequently the mortgage cannot be held to secure after purchased goods, whatever may be its language." On the same reasoning the holder of a recorded mortgage on a future crop had to yield to the subsequent execution levied by a judgment creditor of the mortgagor in *Long v. Hines*, 40 Kan. 216 (1888). On the other hand the view may be taken that the mortgage which continues on record is operative as definite notice to the world as soon as future property accrues, provided the description in the mortgage is sufficiently definite to cover the future property as between the original parties to the contract. Thus third parties have notice as soon as the property comes into existence. See *Grand Forks Bank v. Minneapolis Elevator*, 6 Dak. 157 1889); *Wheeler v. Becker*, 68 Iowa 723 (1886). The holding must turn on the interpretation given to the statutes which vary in the different states. But in most states the provisions of recording acts as to description of property slightly hamper the power to mortgage future property; and in only few is such a mortgage practically impossible for this reason.

50. As a practical matter, the method of recording often proves inefficient to enable interested third parties to ascertain the status of title to such future property. When the inquirer finds that the title was good in the party from whom the mortgagor obtained title at the date of the transfer, it does not seem reasonable to require an investigation for an indefinite time back of that transfer for incumbrances by the transferee therein. In real estate dealings, the weight of authority is that recorded deeds out of the chain of title do not give constructive notice. It would seem the same holding might well be applied to personalty where recording is required.

51. Recording acts frequently, if not usually, provide for record

where the mortgaged property is situated. As to future goods, this is often impossible. If a lien is to be given on accounts to be created in the future, or on such personalty as may be thereafter bought, it often cannot be foreseen where such rights will accrue. Conflicts also arise when the mortgagor changes his domicile to some place where the mortgage is not of record, and also where the mortgaged property is subsequently removed to a place where there is no record of the mortgage. But these last mentioned difficulties exist equally as to present and as to future property; and so lie beyond our present topic.

52. As far as future property is concerned, a mortgage when made can be valid against the mortgagor's creditors only if recorded, the alternative, change of possession at the time of mortgage, being impossible. The fact that the mortgage attaches as between the parties at law or in equity as the property comes into existence is of no avail without change of possession against the mortgagor's creditors. On the other hand, as a general proposition, wherever possession taken by the mortgagee under an unrecorded mortgage would protect him against the mortgagor's creditors as to present property, it will also avail as to future property in existence when possession is taken. Of course, any mortgage may be fraudulent as to creditors, actually or constructively. But that law of fraudulent conveyances we are not discussing. If the validity of the mortgage as to future property is governed by law equally applicable to present property, it lies outside this topic.

53. One debated point in the law of fraudulent conveyances requires mention here as having special application in mortgaging future property. In very many states it is held that when the mortgage, though recorded, reserves to the mortgagor the power to sell the mortgaged property of which he retains possession, it is on that mere fact fraudulent as to creditors of the mortgagor and void as to them. The inevitable result, it is said in such states, whatever be the subjective intention of mortgagor and mortgagee, is to keep the property of the mortgagor where his creditors cannot reach it. In almost, if not quite, as many states, it is held that the reserved power of sale in the mortgagor is not, by itself, constructive fraud, but a fact to be considered with others on the issue of actual fraud. The question arises most frequently in the mortgage of a stock in trade, and often the power of sale in the mortgagor is coupled with a provision subjecting the goods thereafter bought with the proceeds of such sales to the mortgage.

The power of sale in the mortgagor is everywhere evidence tending to prove fraud on the mortgagor's creditors; but when it constitutes in itself constructive fraud, the result is that no mortgage, good as against the mortgagor's creditors, can be made with a provision intended to cover future goods. Though such a mortgage of future property be good as between the parties, a holding that a reserved power of sale in the mortgagor is constructive fraud involves the corollary that such a mortgage purporting to cover substituted property is void against the mortgagor's creditors.

54. Under the provisions of our present Bankruptcy Law concerning preferences, a question arises which has special application as to mortgages of future property. A mortgage given within four months prior to bankruptcy would, of course, be set aside. But suppose a mortgage had been given long before that, and the mortgagee's claim was defective in some respect. Suppose specifically that the mortgage, long prior in date, covered future property of which the mortgagee took possession for the first time within the four months. The U. S. Supreme Court has ruled that the provisions of the Bankruptcy Act do not determine whether possession so taken constitutes a preference; that its effect as to preference is to be determined by the law of the State; that if, under the rulings in that State, the act of taking possession relates back and fixes the title as of the date of the mortgage, merely perfecting legal and equitable title, then the transaction is not a preference within the meaning of the Bankruptcy Act. *Thompson v. Fairbanks,* 196 U. S. 576 (1904), affirming S. C. 75 Vt. 361; *Humphrey v. Tatman,* 198 U. S. 91 (1904), reversing S. C. 184, Mass. 361. If under the decisions in the particular state the mortgage has no standing in equity and as a legal mortgage is there valid against the mortgagor's creditors only when the mortgagee takes possession, since there can be no relation back, it would seem clear that possession taken within the four months would constitute a preference.

55. The outline in this article and its predecessor, meager in detail as it is, shows the confusion and clash of theories in the law concerning transfers of future property.

When it had become possible, in one way or the other, to make such transfers, the Courts found several classes of situations where considerations of public policy seemed to militate against the transfer. Can an official assign his unearned salary? Can a prospective heir assign his chance of inheritance from the living ancestor? Is an

option deal enforcible when its subject matter is acquired by the vendor? The matters of public policy as to these and other cases are independent of each other and have no bearing on the broad question of the possibility or advisability of transfers of future property in general. On these special matters the law is generally pretty well settled. Cases on such topics could be omitted from our consideration were it not for the fact that Courts have often in their opinions blended the particular question of public policy involved with expressions applicable to the broader problems.

56. The original theory of the law, that no contract as to future property could give the transferee an interest in that property as it came into existence, became unendurable with advancing civilization at so early a date that relief first came through scholastic refinements and fictions. Of these the most important was the doctrine of "potential existence." It is a theory based on fiction and bearing no logical relation to a proper solution of the difficulty. If liberally interpreted, it permits transfers that would seem against public policy; on narrow holding, it excludes transactions that modern business requires. The Courts of this country have all acknowledged that there is such a doctrine, but have failed to give the term precise definition. Indeed, where there is an approach to harmony as to certain situations, there is no attempt at logical consistency with the holding in other situations. Thus in transfers of future crops, it is pretty generally agreed that the interest of the transferror in the land must at least cover the period when the crop is to be raised. But, on the other hand, the mere relation of employer and employee, it may be terminable at will, is held to furnish the potential existence to support a legal assignment of wages to accrue in the indefinite future.

57. The confusion was much increased, when in comparatively modern times the doctrine of equitable transfers of future property received wide-spread recognition. That doctrine was felt to present a logical solution and do justice as far as the immediate parties to the transaction were concerned. But it was also felt that it went too far in making titles to personalty uncertain, and in endangering third persons in dealing with such property. In consequence, the equitable doctrine has been rejected in a few states; in many more it is held in dislike. In most states the common law tests exist side by side with the equitable ones. As to many decisions there is a nice question as to how far they rest on recognition of the legal or the equitable view;

and when the view is the legal one, as above suggested, there is neither certainty nor logical consistency as to the test.

58. We have this chaotic condition of the law when the issue lies between the original parties to the transfer or their privies. But in most cases, one of the parties is not the transferror or his privy in the legal sense, but some one claiming through or under him as creditor or subsequent *bona fide* purchaser. A consciousness as to the rights of such third claimants is apt to attend the judge in deciding cases where none but the original parties or their privies are before the Court, and thus to cast additional shadows over the question between the original parties, which is in itself sufficiently obscure.

59. The rights of such third parties are determined by the law as to conveyances in fraud of creditors, which law deals alike with conveyances of present and future property. The tendency of the Common Law was to consider all transfers not accompanied by change of possession as fraudulent against those who acquired the property from the transferror as creditors or otherwise without notice of the transfer. Business necessity for evading this strict rule has led to our recording acts, whereunder the record gives notice to the world, so that the transferee is protected. It would not be within the scope of a treatise on Future Property to discuss the general law for determining under what circumstances a transfer of future property is void as against creditor of the transferror. Such a treatise should precisely define the rights between the original parties and refer to the law as to fraudulent conveyances, dealing alike with transfers of present and future property, for adjudication as to the rights of such intervening third persons.

60. So far, however, as the holdings as to fraudulent conveyances in general affect transfers of future property, as distinguished from present property, in some special way, they can be mentioned under our topic. Thus the requirement for specific description of the property in the recorded mortgage may result in making a mortgage of future property practically valueless against the mortgagor's creditors; and so a holding that a reserved power of sale in the mortgagor makes the mortgage void as to his creditors may practically prohibit a mortgage on a stock in trade with substitutions and additions.

61. It is obvious that the law as to transfer of future property is in an unsatisfactory condition. Nor is this so merely because the questions involved have been approached from entirely different stand-

points, so that there is no one consistent theory. If the holdings were certain and net business needs, we could get along without perfect logical symmetry. But in fact the law, even in a single jurisdiction, is apt to be anything but certain, and rulings abound, which fail to meet business requirements, exceeding now on one side, now on the other. Suggestions as to reformation seem called for, but none are attempted in this article, which only seeks to give such an outline as may aid in simplified statement of the present law, with its uncertainties and inconsistencies, as the first essential step to requisite modifications.

FRED. WISLIZENUS.