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AFTER-ACQUIRED PROPERTY AS MORTGAGE SECURITY IN MARYLAND†

By BRIDGEWATER M. ARNOLD*

The problem as to when a mortgage containing a provision that property, real or personal, to be acquired by the mortgagor subsequent to the execution of a mortgage will be recognized by the Courts as part of the mortgage security is one that has greatly confounded students of this subject, including the writer. One who undertakes to navigate in this area of the law by such guiding stars as reason and logic usually finds his confidence, and perhaps his naivete, battered to pieces between the Scylla of the common law and the Charybdis of equity.

We are all familiar with the old common law rule that a man cannot make a present grant of what he does not have. I cannot presently give you a title I do not have.

The leading case in Maryland and, apparently the earliest, to deal with this situation is Hamilton v. Rogers.1 The earlier case of Hudson v. Warner2 did not find it necessary to consider the validity of an after-acquired property clause as there was no evidence to show there was any after-acquired property involved in the litigation. In Hamilton v. Rogers one W, the mortgagor, purchased a stock of goods from R, the mortgagee, for $5,314 on June 6, 1851 and the same day executed a mortgage bill of sale on said stock to secure the purchase money. The mortgage in addition to the usual provisions contained the additional provision "together with all renewals and substitutions for the same, or any part thereof; the object of this conveyance being to include, not only the articles at present in said stores, but whatever may be at any time therein, in the course of said W's business." W remained in possession until July, 1853, when he applied for the benefit of the insolvent laws, the mortgage debt to R being still due and unpaid. In July, 1854, H, a judgment creditor of W, caused a writ of fi. fa. to be levied and the stock of W was seized by the constable. Evidence indicated that of the original stock only some buckles for trunks remained on the premises when the constable seized the goods. R, the

† This article grew out of talks delivered in the fall of 1959 at the Barristers' Club and at the Wranglers.

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1 28 Md. 301 (1855).

2 2 H. & G. 415 (Md. 1828).
mortgagee, then sued H, the judgment creditor, and the constable for trespass vi et armis to recover damages for their seizure of the goods. The trustee in insolvency did not appear in the case because apparently the mortgagee had released the trustee and the mortgagor from liability. The lower court held that the after-acquired goods were subject to the mortgage and was reversed on appeal. Chief Judge Le Grand said "does such a clause, in a mortgage of goods and chattels, as that recited, give, at law, a right of action to the mortgagee against anyone interfering with the goods acquired by the mortgagor subsequently to the execution of the mortgage?"

The Court quoted Justice Story, as follows: 3 "to make an assignment valid at law, the thing which is the subject of it, must have an actual or potential existence at the time of the grant or assignment." It was mentioned that Justice Story was of the opinion that the cases do not apply this principle to property acquired by the mortgagor with the consent of the mortgagee, and in conformity with the original agreement by a reinvestment of the proceeds of the original property. The court stated that there was not any evidence in the record that the proceeds of the property in the store at the date of the mortgage were invested in the goods levied upon by the mortgagor with the avowed object of benefiting the mortgagees. "This fact, in a certain aspect of the case in view of some of the decisions, might have some influence. The rights of the appellee (mortgagee) depend entirely upon the language of his deed." The fact that proceeds from the sale of mortgaged goods are reinvested in future goods it was decided, less than two years later, in a suit in equity by the same judge, 4 did not make the future goods subject to the earlier mortgage when an execution creditor filed a creditor's bill to satisfy his judgment after the judgment creditor had a writ of fi. fa. issued and levied.

In the Hamilton v. Rogers case, the Court also held that if the mortgagee left the present goods in the possession of the mortgagor and these goods became commingled with after-acquired goods, the mortgagee had the burden of proving which of the goods were the present goods and if the goods could not be separated or identified, the rights of third parties ought not to be affected thereby, whatever might be the influence of such commingling as between the original parties to the mortgage.

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3 Supra, n. 1, 315.
4 Rose v. Bevan, 10 Md. 466 (1857).
In *Crocker v. Hopps*, we again have a case where an individual executed a mortgage on certain chattels with an agreement that the mortgagor could sell or exchange the mortgaged chattels and that they should be replaced by others of like character and value and the latter should be subject to the mortgage. After the mortgagor was adjudged insolvent under the state insolvency law the mortgagee, claiming title under the mortgage, took possession of some of the subsequently acquired chattels and sold them. The trustee in insolvency sued the mortgagee for conversion. The Court referred to *Hamilton v. Rogers* and stated that no title or right of possession of such after-acquired chattels passed to the mortgagee. The Court also said that the mortgagee's plea of ownership of such chattels would seem to be in direct conflict with the express language of Article 21, Section 40 that "no personal property of any description whatever, whereof the vendor, mortgagor or donor shall remain in possession shall pass."

To the mortgagee's plea that the after-acquired property became subject to a lien enforceable in equity and that by reason of Article 83, Section 75 of the Code allowing defenses on equitable grounds this equitable lien could be asserted in this case at law as a defense, the Court stated that assuming without admitting that defendant has such a lien he cannot enforce it or rely on it in this case because whatever lien he might have he must enforce such lien, if at all, in the insolvency court.

The United States District Court for Maryland sitting in bankruptcy, in reliance on Maryland decisions, held that a mortgage of after-acquired stock in trade executed by an individual mortgagor was void. In this decision Judge Rose also said:

"In Maryland, the mortgage is powerless to create a lien upon after-acquired property. Furthermore in the latter state a mortgage in which the mortgagor reserves the right to sell for his own benefit the property mortgaged is void, as tending to delay, hinder, or defraud creditors. There is no such a covenant in the

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878 Md. 260, 28 A. 99 (1893).


mortgage before the court but for years the parties acted as if there had been. What they did is at least as important as what they said."

When this case went up to the Circuit Court of Appeals Judge Knapp wrote the opinion and in the course of it said:

"Nor on the whole are we persuaded that the equities of Grimes (mortgagee) are superior to those of other creditors. He was bound to know that under Maryland law his mortgage would not be a lien upon or give him any right to seize the goods afterwards purchased by Baker; and dealers who sold to Baker on credit were presumably aware that the supplies they furnished would not be subject to Grimes' mortgage."

It is to be noted that this mortgage was recorded. The court ruled that the mortgagee by taking possession of the after-acquired stock on which he had no lien had received a voidable preference. An exception to the common law rule that one could not make a present transfer of future acquired property developed with variations in the case of future crops. This is frequently referred to as the doctrine of potential existence. It would appear to stem from the old English case of Grantham v. Hawley where, in discussing a grant of corn to be grown in the future upon land owned by the grantor, the Court is reported to have said:

"And 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, . . . ."

Although the writer has found no case of the Maryland Court of Appeals that refers to or directly applies the doctrine of potential existence, the United States District Court for Maryland sitting in bankruptcy seems to have made application of this doctrine. In this case the

10 Grimes v. Clark, 234 F. 604 (4th Cir. 1916).
11 For a recent case to the same effect, see Weiprecht v. Rupple, 217 Md. 337, 143 A. 2d 62 (1958).
bankrupt, to secure the purchase price of some fertilizer, gave the creditor a bill of sale of "one-half of his wheat then being, standing and growing or to be planted during the year 1931" upon the farm. The referee denied the creditor a lien on the future crop, largely relying on *Grimes v. Clark* referred to above. The District Court in overruling the referee distinguished the *Grimes* case because it dealt with future goods but not future crops, and said:

"We do not, however, consider that this decision is conclusive of the precise point here at issue any more than are the Maryland decisions above referred to . . . because in *Grimes v. Clark* future crops were not in issue, but stock in trade. In short, we do not find any decision of the Circuit Court of Appeals for the circuit or of the Court of Appeals of Maryland, or of this court, which purports to classify future crops with after-acquired property which, unlike future crops, is not the natural product or the expected increase of something already belonging to the vendor or the mortgagor. On the contrary, we believe that this distinction is intended to be made in the case of *Ober v. Keating*, 77 Md. 100 . . . ."

It is true that *Ober v. Keating* involved a mortgage of future crops, but the court set up an equitable lien superior to creditors on purely equitable principles with no mention and presumably without any consideration of the doctrine of potential existence.

There is probably no branch of the law in which the common law has talked and gone in one direction and at the same time equity has blissfully talked and gone in the other direction more than in the development of mortgage law. And this observation certainly applies to mortgages of after-acquired property. As early as 1855, Maryland's leading case on this problem, *Hamilton v. Rogers*, while refusing at law to recognize a mortgage on after-acquired property in a contest between the mortgagee and an execution creditor of the mortgagor, made reference to Justice Story and the landmark case of *Mitchell v. Winslow*. The Court pointed out that this case was in equity and said that the whole reasoning of Judge Story was to show that whatever might be the rule at law, nevertheless

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15 8 Md. 301, 319 (1855).
16 2 Sto. 630 (1843, Story's United States Circuit Court Reports).
equity will attach its jurisdiction whenever the parties by their contract, intend to create a positive lien or charge, either upon real or personal property, whether it is in esse or not; that it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him. But, said the Court of Appeals, with this doctrine we have nothing to do in the present instance.

*Rose v. Bevan* involved the situation where one G, mortgagor, executed a mortgage to R, mortgagee, of all the stock in trade and household and kitchen furniture in the house and store occupied by the mortgagor "and also other property and effects which may hereafter be brought into said building by the mortgagor, or may be substituted by him in lieu of that hereby mortgaged." Complainant, a judgment creditor of the mortgagor, had writs of fi. fa. issued and levy made and then filed a creditor's bill in equity to subject the debtor's property to the satisfaction of his judgment. The case was decided on bill and answer. The Court in upholding the judgment creditor's right to have the property sold to satisfy his judgment said the bill denies that the property levied upon is the same as that covered by the mortgage. If it be not the same, then to the extent of the difference, the mortgagee has no right to interfere, or, if any portion be the result of the purchases made out of the proceeds of sale of the goods mortgaged, he has no right, as to such portion to interfere, he having no interest in, or lien on, the same, and cited *Hamilton v. Rogers*. It is to be noted here that this decision grew out of a case in equity and yet the Court relied on a previous case that grew out of a case at law in denying that the after-acquired property was subject to the mortgage lien.

In *First National Bank v. Lindenstruth* an individual executed a mortgage on his present and after-to-be-acquired stock of goods to a brewing company as mortgagee. Complainant was a judgment creditor of the mortgagor who had a fi. fa. issued and returned nulla bona and then filed a creditor's bill in equity to set aside the mortgage as a fraudulent conveyance. The lower court dismissed the bill and the Court of Appeals affirmed. The Court held there was no evidence of fraud and then said

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17 10 Md. 466 (1857).
18 Supra, n. 15.
19 79 Md. 136, 28 A. 807 (1894).
the clause in the mortgage undertook to make provision for subjecting after-acquired stock in trade to the lien of the mortgage. It continued:

“But such a provision, whilst not of itself rendering the mortgage void, as fraudulent, is at law simply a nullity. It is the settled doctrine of the Maryland courts that a provision such as this in an ordinary mortgage creates no lien at law on after-acquired property . . . . There are conditions under which a covenant like this would be held valid in equity, but they are not presented here.”

There being no impediment to execution by fl. fa. at law, the Court held the bill was properly dismissed.

Again in Solter v. MacMillan in a foreclosure proceeding the Court of Appeals affirmed the lower court in holding that although the mortgage purported to cover all other property, real, personal and mixed, which the mortgagor company may hereafter acquire, that only such after-acquired property as became fixtures was subject to the mortgage and other after-acquired property such as furniture and office equipment was not subject to the mortgage. It is to be noted that the foreclosure must necessarily have been a proceeding in equity.

Apparently the first Maryland case to uphold a mortgage of after-acquired property was Butler v. Rahm. In October, 1871, the Worcester and Somerset Railroad Co., mortgagor, as authorized by its charter issued $50,000 in bonds secured by a mortgage, apparently in the form of a deed of trust. The charter authorized the company to pledge “its property and profits.” The court felt that the deed by a reasonable construction did no more. It conveyed “all the present and future to be acquired property of the company and all its estate and franchises, that is to say,” and then follows an enumeration of the property and rights intended to be conveyed. The Court said this enumeration limits and explains the previous words, and brings the terms of the deed within the limits of the legislative authority. The deed contained the following provision:

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20 Ibid., 140.
21 147 Md. 590, 128 A. 356 (1925).
22 46 Md. 541 (1877).
23 Md. Laws 1867, Ch. 322, § 15.
24 Supra, n. 22, 547.
25 Supra, n. 22, 547.
"... but nothing herein contained shall prevent the
said company, before default in the payment of any
of the said bonds, or the interest due thereon, from
selling, hypothecating, or otherwise disposing of any
of their said property, real or personal, not necessary
in their judgment for the use of the said road, nor
from collecting or applying any money due to the said
company from any source whatever, provided said
application shall not be to the prejudice of any holder
of any of the said bonds."  

Complainant, a bondholder, filed a bill in equity to en-
join a judgment creditor from enforcing an execution on
the railroad property. The lower court granted the in-
junction and the judgment creditor appealed. In an opinion
written by Chief Judge Bartol the lower court was
affirmed. To the contention that the proviso in the mort-
gage permitting the mortgagor to sell the mortgaged prop-
erty was fraudulent and invalidated the deed, the Court
said:

"In answer to this objection we fully concur in the
opinion of the learned Judge of the Circuit Court, and
cannot do better than to repeat what has been so well
said by him: 'However suspicious the power here
given might be in the case of a mortgage of ordinary
goods, the very nature of this corporation, its busi-
ness, the means and power necessary to keep it up, the
wear and tear of its iron, ties and rolling stock, the
constant necessity of replacing injured or worn-out
appurtenances with new, forbids the inference of a
fraudulent purpose, which might arise from such a
provision under other circumstances. The power re-
tained is manifestly in the interest of the mortgagees,
and is restricted by express language to be exercised
in such manner as not to prejudice in any manner the
rights of the bondholders. If the provision is in the in-
terest of the bondholders, as it transparently is, it is
also for the same reasons in the interest of the other
creditors, and cannot be regarded as fraudulent'."  

The Court then went on:

"It is next objected that the mortgage attempts to
convey 'future to be acquired property', but this objec-
tion is not tenable.

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Supra, n. 22, 547.

Supra, n. 22, 547.
"While it is well settled that a party cannot convey subsequently to be acquired goods, so as to give the mortgagee a legal title thereto, or a legal right of action against a party seizing them, as was decided in Hamilton v. Rogers, 8 Md. 301, yet it has frequently been decided that such a conveyance creates in equity a valid lien upon property subsequently acquired (citing out of state cases). The mortgage is, in our judgment, free from objection in its terms and provisions; it was made with the legislative sanction, and appears to be in all respects such a contract as was contemplated and authorized by the charter of the company."

It is to be noticed in this case that the case was brought into equity by a bondholder (mortgagee) to enjoin an effort by a judgment creditor to execute on the mortgagor's property, whereas in the Lindenstruth case, the case came into equity by a judgment creditor filing a creditor's bill after he had already had issued a fl. fa. and had it returned nulla bona. In both cases the equity case followed the execution at law. In the Rahm case the court said that the mortgage on after-acquired property created a lien in equity and held there was a lien, whereas in the Lindenstruth case the common law rule was applied that a party cannot create at law a mortgage on after-acquired property, although the court mentioned that such a lien might be created in equity and cited the Rahm case. On the facts, the mortgagor in the Lindenstruth case was an individual and in the Rahm case was a railroad corporation. There was no statutory authority for such a mortgage in the Lindenstruth case and the after-acquired property was stock in trade acquired for the purpose of resale whereas the Court particularly pointed out that the after-acquired property in the Rahm case was not stock in trade acquired for the purpose of resale even though the mortgagor was permitted to sell the mortgaged property. Is the key to the decision in the Rahm case the legislative authority, the fact that the mortgagor was a railroad corporation, or the nature of the property which was the subject of the after-acquired property clause?

Another case upholding a mortgage on after-acquired property was Brady v. Johnson. Here the property of a

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28 Supra, n. 22, 548.
29 79 Md. 136, 28 A. 807 (1894).
30 75 Md. 445, 26 A. 49 (1892).
Canal Company was under the control of the equity court to sell the property to satisfy mortgage bonds, and receivers were appointed. Judgment creditors then caused executions to be levied on certain real property in Cumberland owned and used by the Canal Company. A petition was then filed by the trustees in court for an injunction to restrain the executions. It appears that under the Act of 1834, chapter 241, the State loaned the Canal Company the sum of $2,000,000 to be used in the construction of the canal upon the pledge as security for the loan, of “the whole of the net revenues of said company, and the whole of the water rights, lands, and other property at any time acquired by the said company, or the rents or other avails thereof.” Pursuant thereto the mortgage was made of “all and singular the lands and tenements, capital stock, estates and securities, goods and chattels, property and rights, now or at any time hereafter to be acquired. . . .”

It was argued that part of the property levied upon was not embraced by the mortgages as it was acquired by the Canal Company in 1878 under a purchase money mortgage. Chief Judge Alvey sitting in the lower court upheld the mortgage on the after-acquired property and enjoined the execution creditors. To the creditors’ argument the court said:

“. . . such position is wholly untenable. The purchase of the property, though not fully paid for, and though the legal estate was and is still vested by the mortgage in the vendors, or their assignee, placed the property in the possession of the Canal Co., and vested the equitable estate and right of redemption in the company; and that interest was at once covered by

Because of the provisions of the Maryland Code (Vol. 2), unless proper recording steps are taken it is most doubtful that any force would be given to an after-acquired property clause as regards land subsequently acquired outside of the jurisdiction where the original mortgage is recorded. Art. 21, Sec. 1, in part provides:

“No estate of inheritance or freehold, or any declaration or limitation of use, or any estate above seven years, shall pass or take effect unless the deed conveying the same shall be executed, acknowledged and recorded as herein provided; . . . .”

Art. 21, Sec. 10, in part provides:

“Every deed of any of the interests or estates mentioned in § 1 of this Article shall be recorded within six months from its date, in the county or city in which the land affected by such deed lies; and where it lies in more than one county, or in the City of Baltimore and a county, it shall be recorded in all the counties and the said city in which such land lies.”

Art. 21, Sec. 29, provides:

“Deeds of mortgage conveying any use, estate, or interest in land shall be executed, acknowledged and recorded as absolute deeds of the same.”
the previous mortgages to the State. For it is now well settled that a mortgage with the 'after-acquired property' clause in it, embraces a charge upon all the property subsequently acquired by the corporation mortgagor which comes within the description in the mortgage; and this, not only as to property to which the mortgagor acquires the legal title, but also as to that to which it acquires only an equitable title. The mortgage lien, however, upon the subsequently acquired property only attaches from the time of the acquisition by the mortgagor, and subject to all pre-existing liens thereon. It is clear, therefore, that the State's liens embrace all the property levied on by the sheriff.

On appeal, a per curiam opinion stated that Chief Judge Alvey had so fully considered and discussed the case that it need not be restated and affirmed the lower court. It is to be again noted that in this case the mortgagor was a corporation and supposedly a public utility and that there was statutory authority for the mortgage. Also in this case the after-acquired property clause was held to cover the mortgagor's equitable interest in after-acquired real property.

In Diggs v. Fidelity & Deposit Co., the Gas Company in 1904 executed a mortgage to a trustee by which it conveyed all the property it then owned and all that it might thereafter acquire to secure the payment of bonds. Concerning the mortgage of after-acquired property, the Court in the course of its opinion said:

"The recent cases generally hold that railroad and other corporations have the power to mortgage future acquired property and that in such cases as soon as the property is acquired by the mortgagor company the lien of the mortgage will be regarded in equity as fastening upon it."34

Here again it is to be noted that we have a corporate mortgagor that is a public utility, as in the two previous cases of Butler v. Rahm, and Brady v. Johnson. However, the Court's actual language does not confine the power to only

3 Supra, n. 30, 454.
35 112 Md. 50, 75 A. 517 (1910).
36 Ibid., 72.
37 46 Md. 541 (1877).
38 75 Md. 445, 26 A. 49 (1892).
public utility corporations but says "railroad and other corporations." Although the opinion does not cite any special legislative enactment authorizing mortgaging of after-acquired property such as was present in the previous two cases, undoubtedly the mortgage was executed pursuant to authority in the corporate charter which should serve the same purpose.

In *R. E. Duvall Co. v. Washington B.&A. Electric R. Co.* it was claimed that certain after-acquired property was subject to the mortgage executed by the Railway Company to secure certain bonds. It was decided on a construction of the language in the mortgage that some after-acquired real estate was subject to the mortgage and it was said:

"It is obvious that the language of this concluding paragraph, taken by itself, is sufficiently broad to include shares of stock which the trustee now claims. And it may be conceded for the purposes of this case that a railroad may mortgage after-acquired property . . . and that there is no reason for applying to securities any other or different rule as to after-acquired property than is applied to other kinds of property. *United States Mtge. & Trust Co. v. Chicago & A. R.R. Co.*"

However, on a construction of the mortgage agreement and other matters the Court decided that the shares of stock were not intended to be included in the mortgage.

Are we to conclude then, that if the mortgagor be a corporation, whether a public utility or not, it can execute a mortgage of after-acquired property that will be recognized by the Courts? Let us look at a federal case, *Mallory v. Maryland Glass Co.*, which involved a private corporation engaged in the business of manufacturing glass bottles. B held a mortgage that covered the plant, fixtures, etc., and also provided:

"And also all the property, real, personal, and mixed, of the said Maryland Glass Company, now owned by said company, or hereafter to be acquired by it, together with all improvements thereon, and all rights and appurtenances appertaining thereto."
The Glass Company went into a consent receivership and the question was whether about $2000 worth of glass bottles manufactured after the mortgage was executed were subject to the mortgage lien as against general creditors claiming in the receivership. Judge Morris held that the glass bottles were not subject to the mortgage, and, among other things said:

"The ground upon which a recorded mortgage of after-acquired property is held effective in equity, although a nullity at law, has been stated to be:

"'That whenever the parties by their contract intend to create a positive lien or charge either upon real or upon personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and against all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy.' Mitchell v. Winslow, 2 Story 630, 644, Fed. Cas. No. 9,673.

"This doctrine has been applied in numberless cases in equity, but most frequently in cases of mortgages to secure bonds issued by railroad and canal companies and similar quasi public corporations, where the dismemberment of the enterprise by seizing and separating any part of the after-acquired property which has been added to the original equipment in order to make it more efficient would interfere with the performance of its quasi public functions. Such added chattels and augmentation of the plant might almost be presumed to be included in the words of the general grant. The present case is that of a private manufacturing corporation. The glassware manufactured by it must have been intended to have been sold. The object of the company and its plant, and the enterprise which the mortgagee assisted by his loan of money, was to produce glassware as a commercial article for immediate sale in the regular course of business. In considering the language of the clause of the mortgage now under consideration, so far as the after-acquired glassware is concerned, we start with the fact that the glassware was intended to be sold as produced, and was not intended to be added to the
plant, either in augmentation of its efficiency, or in substitution of machinery or implements worn out and necessary to be kept up, or to in any way increase the permanent value of the plant. With this idea in mind as to the supposed subject-matter of this clause of the mortgage as indicating the intention of the parties, we are to consider whether the language used indicates an intention that the glassware was to be subject to the lien of the mortgage.

"It is only because, as between the parties, their clear intention and express contract is permitted to govern, notwithstanding its invalidity at law, that in equity the lien on after-acquired property is upheld. It is in the nature of compelling specific performance of a contract, and, to be entitled to favorable consideration, its terms should be free from ambiguity.

"... it is only equitable that if a mortgage which asserts a right expressly denied at law, and the effect of which, as to the goods produced for immediate sale would be so contrary to the intended and actual dealings under it, and which is so markedly in derogation of the rights of creditors, who give credit to the factory on the expectation of its paying its current bills for supplies out of the unrestricted current sales of its product, is to be upheld in equity because of the intention of the parties to the mortgage, the language in which the mortgage lien on such goods is attempted to be given should be unmistakable."41

The opinion of Judge Morris is interesting because it reflects the view that mortgages of after-acquired property are upheld in equity when the mortgagor is a quasi public utility corporation and yet it does not close the door to such mortgages being upheld if the corporate-mortgagor is not a public utility. The opinion seems to finally make the test — what did the parties intend to contract for? If the intent is clear to subject after-acquired property to the mortgage then equity will enforce such intent if clearly expressed. Here the Court refused to find such intent, hinting, it seems to the writer, that to subject to the mortgage after-acquired property which is to be the merchandise which will be held out for sale, would in effect be a fraud on creditors. One wonders, if the language in the mortgage had specifically named the bottles to be manu-

41 Supra, n. 39, 113-114.
factured in the future, whether or not the Court would have upheld such a provision against the claims of competing creditors?

Up to this point it looks as if the only mortgages on after-acquired property which have been upheld have been those executed by corporations and particularly public utility corporations. However, Ober v. Keating,\(^4\) would seem to explode this theory. In this case L, a landlady, and T, L's tenant, purchased $500 worth of phosphate from X and agreed to give X a chattel mortgage on a wheat crop about to be seeded to secure payment of the $500. The mortgage was executed by T, but not by L, and was never recorded. Subsequently L made a general assignment for the benefit of creditors to T of all her property including her interest in the wheat. X filed a bill claiming an equitable lien on the wheat crop. The Court held that X would have a lien as against the assignee for the benefit of creditors, saying:

"It is a familiar principle, that an agreement to give a mortgage, founded on a valuable consideration, will be treated in equity as a mortgage. It will be so treated, for the reason that equity will regard that as done which the parties themselves have agreed shall be done. And, if so, then his assignees stand in no better position."

It is to be noted here that the mortgagor was not a corporation but an individual and also that the mortgagor had never actually executed a mortgage on the future crop but only agreed to do so. Also the Court in this case did not refer to the doctrine of potential existence as its basis for creating the lien. A subsequent case in a bankruptcy proceeding, In re Cook,\(^5\) also involved an individual executing a mortgage of a future wheat crop by the vehicle of a bill of sale. The court in this latter case, relying on Ober v. Keating, upheld such a mortgage unless it could be shown that creditors claiming in bankruptcy had extended credit to the mortgagor in the interval between the execution of the bill of sale and its recording. In upholding such a mortgage the court distinguished this case from other cases which struck down mortgages on a future stock of goods.

\(^4\) 77 Md. 100, 26 A. 501 (1893).
To the rule prohibiting mortgages of after-acquired property at law, there are what might possibly be considered exceptions. These possible exceptions grow out, however, not of principles of mortgage law, but other principles of law and should not be confused with the general problem we are discussing. When a thing is added to another thing by way of accession, natural or artificial, so as to become a part thereof, in the view of the law, it is subject to the previous mortgage upon the thing to which it is added. This occurs when a house is built upon mortgaged land, or articles of machinery are attached to a mortgaged building, so as to become a part thereof, these being applications of the principles of fixtures. In *Solter v. MacMillan,* a mortgage conveyed all the real estate of the mortgagor and also all the machinery, equipment and fixtures in said buildings and structures which it may hereafter acquire. Foreclosure proceedings were instituted and among the property sold were items that were acquired by the mortgagor after the execution of the mortgage. These items were classified as (1) fixtures and (2) furniture and office equipment. The Court held the fixtures subject to the mortgage but not the furniture and office equipment, saying:

"It remains to consider the objection that these articles were installed after the date of the mortgage, and were not intended to be substituted for worn out or broken original parts. That would be a valid objection if the appellee's (trustee in bankruptcy for the mortgagor) rights depended upon the attempt in the mortgage to convey future acquired chattels. Such provision has no validity and no effect, except as it may have a bearing upon the intent as to the permanent use of such articles in connection with the work of the factory.

"So that, having decided that the articles in controversy were fixtures, it makes no difference whether they were installed before or after the execution of the mortgage, any more than would the time of the erection of a building on mortgaged property."

It is to be noted here, that, although the mortgage by its express terms intended to cover future-acquired equip-
ment, the court refused to hold that the pieces of equipment which were not fixtures were covered by the mortgage. Also, that the after-acquired pieces of equipment were apparently not chattels or merchandise held by the mortgagor for purposes of resale.

Again in Credit Co. v. Bldg. & Loan Ass'n, the owners of a parcel of land, which was subject to a mortgage, had a garage erected on the land. The contractor who built the garage, in order to secure payment to himself, took a mortgage on the property, and it was further agreed that title to the garage, regardless of in what degree it was annexed to the realty, should not pass to the landowners until the mortgage notes were paid. A paper purporting to be a memorandum of the contract was filed under the conditional sale recording statute. In a contest over the garage between the original mortgagee, who incidentally had no after-acquired property clause in his mortgage, and the conditional vendor-contractor, the court upheld the claim of the original mortgagee of the realty on the ground that the garage had become so incorporated as a fixture in the realty as to become a part of it and that it could not be removed without material injury to the real estate. The Court said that the provision in the conditional sale contract was not binding on the original mortgagee unless he consented to it.

Another possible exception to the rule prohibiting mortgages of after-acquired property which grows out, not of principles of mortgage law, but another principle of law, involves the natural increase of a mortgaged chattel.

In a case decided in 1836 there was a mortgage of several female slaves and other property to secure a debt of $794. Nothing was said in the instrument about the issue of the female slaves. After default but while the mortgagor was still in possession of the parents, issue was born and the mortgagor sold and delivered possession of the issue to a purchaser for a valuable consideration. On foreclosure the mortgagee claimed the issue was subject to the mortgage. The lower court held for the purchaser but was reversed on appeal. The appellate court decided that the issue was subject to the mortgage. In the course of its opinion the Court said:

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47 160 Md. 230, 153 A. 64 (1931).
48 Arnold, Conditional Sales of Chattels in Maryland, 1 Md. L. Rev. 187, 207-211 (1837).
"...right and justice require, that the issue so born should be liable, and that neither the principles of law or equity forbid it. * * *

"... the title of the mortgagee had become absolute at law when the issue was born. In a Court of law therefore, his title to the mother had then become absolute and indefeasible, and he must of course be entitled at law to her offspring born during such his title, subject to the equitable right of the mortgagor to redeem in equity on the payment of the mortgage debt."

Happy with its decision the court continued:

"We will only remark in conclusion, that we are happy to find that in this instance, the law of the land, and the law of nature, so far from being at variance, are in perfect harmony; and that whilst on the one hand, full and ample justice will be administered to the honest creditor, the claims and feelings of nature will not be violated on the other."

It has been said of this case that it "... was argued before a very full Court".

Another case involving natural increase, but this time of animals, was decided in 1887. In 1877 a tenant on a farm executed a chattel mortgage including "fifteen shoats" to secure payment of a debt due January, 1879, to his landlord as mortgagee, which was duly recorded, and the mortgagor remained in possession of the mortgaged property. While the debt was still unpaid, a judgment creditor of the mortgagor had the sheriff levy, among other things, upon seven large shoats. Before the sheriff's sale the mortgagee gave notice to the sheriff and the bidders that he claimed these shoats under the mortgage as the increase of the originally mortgaged shoats. The shoats were the increase of the original shoats but not the immediate increase. The sheriff sold these shoats to the judgment creditor who then brought an action of replevin against the mortgagee. The creditor as plaintiff asked the lower court to instruct the jury that he was entitled to recover, if the jury found these hogs were the increase of the immediate offspring of the fifteen shoats, which immediate offspring were littered in

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60 Ibid., 48.
61 Supra, n. 49, p. 49.
62 Cahoon v. Miers, 67 Md. 573, 577, 11 A. 278 (1887).
63 Ibid.
1878, before default in the mortgage. This instruction was rejected by the lower court and defendant mortgagee had judgment below. In affirming the lower court in holding that the offspring of the originally mortgaged shoats were subject to the mortgage, the Court of Appeals, among other things, quoted from Domat's Civil Law by Strahan, section 1663:

"'Although the mortgage be restricted to certain things, yet it will nevertheless extend to all that shall arise or proceed from that thing which is mortgaged, or that shall augment it or make part of it. Thus when a stud of horses, a herd of cattle, or a flock of sheep is put in pawn into the creditor's hands, the foals, the lambs and other beasts which they bring forth, and which augment their number, are likewise engaged for the creditor's security. And if the whole herd or flock be entirely changed, the heads which have renewed it are engaged in the same manner as the old stock'."

This case would seem to be authority for the fact that not only the original animals are subject to the mortgage but the immediate and not-immediate offspring are likewise subject to the lien. Whether or not there is any limitation as to how many generations this may be carried is not mentioned. If there is no limitation, it would be fascinating to see what would happen if there was a debt payable in fifty years secured by a mortgage on a pair of rabbits.

Up to this point can we, on the basis of the above discussion, show any definite criteria as to when mortgages of after-acquired property will be upheld? Let us see.

Will such a mortgage be upheld if the mortgage shows a clear intent to subject certain after-acquired property to the mortgage as suggested in Mallory v. Maryland Glass Co. Not necessarily, as is evidenced by Solter v. MacMillan, and other cases where such an intent seemed clear.

Will mortgages of after-acquired property only be upheld if the mortgagor is a public utility corporation? Not necessarily, as is indicated in Mallory v. Maryland Glass Co., and also Diggs v. Fidelity & Deposit Co.

Will such a mortgage only be upheld if the mortgagor is a corporation and not an individual? Not necessarily;

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55 Supra, n. 52, 579.
56 131 F. 111 (D.C. Md. 1904) ; see supra, circa n. 38.
57 147 Md. 580, 128 A. 356 (1925) ; see supra, circa n. 45.
58 112 Md. 50, 75 A. 517 (1910) ; see supra, circa n. 33.
the mortgagor in *Ober v. Keating*, was an individual and the court upheld a mortgage on future crops on equitable principles.

Will such a mortgage on after-acquired goods only be held invalid if such goods are expected and intended to be resold by the mortgagor? Not necessarily; in *Solter v. MacMillan* the Court refused to hold that after-acquired furniture and office equipment which was not acquired for purpose of resale was subject to the mortgage.

If the mortgage provides that the proceeds of a sale of the mortgaged goods will be invested in after-acquired goods to be subject to the mortgage, will this type of mortgage be upheld? Not necessarily. Although the Court in *Hamilton v. Rogers* mentioned that Justice Story was of the opinion that the principle invalidating a mortgage of after-acquired property did not apply to property acquired by the mortgagor with the consent of the mortgagee, in conformity with the original agreement, by a reinvestment of the proceeds of the original property, the Court in this case did not find it necessary to apply this principle, as there was no evidence that any of the after-acquired property had been purchased by such proceeds. Shortly after this case in *Rose v. Bevan* the Court decided that the fact that the proceeds from the sale of the mortgaged goods are reinvested in future goods did not make the future goods subject to the earlier mortgage.

Have the courts in Maryland ever upheld a provision in a mortgage which purports to cover after-acquired goods that are to be part of the mortgagor’s stock in trade for resale? Although there are cases invalidating such provisions, the writer has been unable to find any written opinion upholding such a provision.

Does the Maryland recording statute by its express language prohibit a mortgage on after-acquired personal property? In *Crocker v. Hopps* it was said that such a provision is in direct conflict with the express language of Article 21, Section 40 that “no personal property of any

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68 77 Md. 100, 26 A. 501 (1893); see supra, circa n. 42.
69 147 Md. 580, 128 A. 356 (1925); see supra, circa n. 45.
70 8 Md. 301 (1855); see supra, circa ns. 3 and 8.
71 10 Md. 466 (1857); see supra, circa n. 4.
74 78 Md. 260, 28 A. 99 (1893); see supra, circa n. 5.
75 Now, with certain amendments, 2 Md. Code (1957) Art. 21, § 41.
description whatever, whereof the vendor, mortgagor or donor shall remain in possession shall pass ....” However, a mortgage on future crops was recognized in *Ober v. Keating* on equitable principles, but stricken down only because of failure to record.

Are mortgages of after-acquired property against public policy? Apparently not, because sometimes such mortgages have been upheld by the courts and also occasionally have been given legislative sanction.

Are there any reasons why the law should be timid in upholding mortgages of after-acquired property? Possibly a feeling that a necessitous debtor might mortgage himself into what might amount to almost a state of refined peonage. Also, possibly a feeling that the matter could get out of hand and cause considerable confusion as to the ownership of property and in effect be a fraud on third persons, such as creditors, who dealt with the mortgagor in possession.

The curious thing to the writer is, that as far as case law goes, although it is perhaps difficult from the decisions to set down a more or less infallible test as to when the courts will uphold or invalidate an attempt to mortgage after-acquired property, no particular decision in its end result seems conspicuously wrong.

At the moment, if the writer were a judge and had the privilege of establishing a pattern, unbound by precedent, he might try something like this as the test to be used, possibly calling it the “seriatim” test:

Today A executes a mortgage on his present property, real or personal to secure B, which is properly recorded. Tomorrow A executes another mortgage on property which he has acquired since yesterday to secure further the same debt he owes B, which is also properly recorded. Six months from this last mortgage, A once again executes a mortgage on property which he has acquired since the last mortgage to still secure further the same debt he owes B, which is also properly recorded.

In the litigation that comes before him, would he uphold these three mortgages against the claims of third persons such as creditors of A? Perhaps if these mortgages

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66 77 Md. 100, 26 A. 501 (1893).
67 Butler v. Rahm, 46 Md. 541 (1877); Brady v. Johnson, 75 Md. 445, 26 A. 49 (1892), and also 2 Md. Code (1957) Art. 21, § 60, discussed infra, n. 74.
69 *Vold, Sales* (1931) 103.
were on a stock in trade which he knew that A was going to sell and use the proceeds for his own purposes and not to liquidate the mortgage debt, he would hold these mortgages invalid as to other creditors of A even though each mortgage when executed was on property owned by A when the respective mortgage was executed. On the other hand, if the property subject to these mortgages were not merchandise intended for resale with A exercising dominion and control over the proceeds, then perhaps he would hold that these mortgages created a valid lien. It will be noted here that by using the series of mortgages to secure the same debt test, the problem of after-acquired property has not been involved and the validity or invalidity of the mortgages has been decided on other factors, such as, perhaps, fraud on creditors.

Now let us take the same parties. Today A wishes to borrow money or obtain credit from B. Instead of planning to give a series of mortgages with the repetitive paper work and recording, they undertake to accomplish the same result by executing only one mortgage but to provide an after-acquired property clause in the mortgage, and the instrument is properly recorded. This mortgage is now before the writer in litigation to decide the validity or invalidity of the after-acquired property clause. The result should be the same as if there were a series of mortgages as set out above. If the series of mortgages would be upheld, then the after-acquired property clause would be upheld; if the series would be held invalid, then the after-acquired property clause would be held invalid.

Another way, apparently, to clarify the problem of after-acquired property as security is by statute. In the leading Maryland case, *Hamilton v. Rogers*, in the course of its opinion, the Court said:

"Looking to the maxims of the common law and the decisions of courts, both in this country and in England, we are clearly of the opinion, that this action cannot be maintained for the taking of subsequently acquired goods. If, for the convenience of the community, or the benefit of trade and commerce, it be deemed important that the rules of law in this particular should be altered, the legislature is the proper branch of the government to which the application should be made for that purpose. As the law now is, there can scarcely be a doubt that in some instances loss and injury are suffered by those who are least..."
deserving of it. Courts cannot prevent it, for the rules of law are, and have been from the earliest times, inexorable.\footnote{Ibid., 320. Although Maryland has not enacted the Uniform Commercial Code proposed by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, it might be of interest to note that Article 9 of the said Code (Secured Transactions) makes provisions for after-acquired chattel property as security with certain limitations. Note particularly Section 9-204 and the Comment thereunder.}

And in \textit{Butler v. Rahm}\footnote{Ibid., 548. 2 Md. Code (1957) Art. 21, § 52-65.} to the objection that the mortgage attempted to convey future-to-be-acquired property, the Court said:

"... the mortgage is, in our judgment, free from objection in its terms and provisions; it was made with the legislative sanction, and appears to be in all respects such a contract as was contemplated and authorized by the charter of the company.\footnote{2 Md. Code (1957) Art. 21, §§ 52-65.}

In 1935, in legislation, which apparently grew out of the great economic depression of the late 1920's and the early 1930's, the General Assembly of Maryland enacted Chapter 281 of the 1935 Laws\footnote{Ibid., 320. Although Maryland has not enacted the Uniform Commercial Code proposed by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, it might be of interest to note that Article 9 of the said Code (Secured Transactions) makes provisions for after-acquired chattel property as security with certain limitations. Note particularly Section 9-204 and the Comment thereunder.} sanctioning the creation of chattel and crop mortgages by any person, association, partnership, or corporation with a Production Credit Association or a Bank for Cooperatives organized under the Farm Credit Act of 1933, a Regional Agricultural Credit Corporation, the Reconstruction Finance Corporation, or the Government of the United States or any Institution which has made arrangements to discount therewith, or to procure funds therefrom on the security of the obligations of the Borrower, and may secure the repayment of the funds so borrowed, and/or any of them existing or future indebtedness to such institution by chattel mortgage upon
personal property of any kind, character or description owned at the time of the execution of the mortgage, or property of the same class as is covered by the mortgagor subsequent to the execution of the mortgage and prior to its extinguishment, and/or upon crop or crops, annual or perennial, including fruit crops, grown or growing, either already planted or to be planted and/or maturing within one year from the execution of such mortgage. Such mortgage shall be a lien upon the property therein described from the time of the docketing of such mortgage as provided for herein, etc.

The Act made provision for docketing in the clerks office of the Circuit Courts for the counties and the Superior Court of Baltimore City in a book to be known as “Federal Farm Credit Lien Book”.

It will be noted here that the statute authorized mortgages to include after-acquired chattel property and future crops. It is to be noted at this point that the statute was apparently limited in scope to mortgages in which some Federal agency was to be the mortgagee and that the book in which the mortgages were to be recorded indicated further by its title a limited scope.

In correspondence dated December 31, 1934, addressed to the General Counsel of the Farm Credit Administration in Washington, D.C., it was stated:

“We are particularly desirous of having special chattel and crop mortgage laws enacted in the States of West Virginia and Maryland, in order to accomplish the following purposes:

(1) To provide that such mortgages executed to the governmental agencies may extend to future as well as existing debts.

(2) To provide for the covering of after-acquired property of the same class as is covered by the chattel deed of trust or mortgage.

(3) To provide for the mortgage of perennial crops including fruit crops.

(4) To specifically provide that for the purposes of the act crops shall be deemed personal property and that the liens on crops obtained under the act shall be superior to judgments or other liens on the real estate. The purpose of this provision is to eliminate the necessity of obtaining waivers from the holders of such
liens on real estate and thus expedite and facilitate the closing of loans.

(5) To provide that although the making of future advances may be optional, the lien of the chattel mortgage or deed of trust shall date from the time of recording the instrument, so that title search will be unnecessary at the time of making of future advances.

(6) To provide that the lien of the chattel mortgage or deed of trust shall extend to replacements of the encumbered property.

(7) To provide for coverage of all increase of animals and livestock of all kinds.

(8) To provide for docketing instead of recording of instruments in order that it will be necessary to execute only one instrument, even though crops and other chattels constitute the security and in order to reduce the work of the clerks of the court and the fees payable to them.

(9) To provide for marginal assignments and releases at a small cost. Under the law, as drafted for West Virginia, there will be a minimum saving of $1.25 in the cost of obtaining the lien and in Maryland, a saving of as high as $5.00.

(10) To provide for preservation of the lien even though the encumbered property is removed from the county in which the deed of trust or mortgage is docketed.

(11) To provide that upon default the beneficiary or trustee shall have the right of possession without process of law.

(12) To provide for a more speedy method of foreclosure."75

This legislation was enacted to make possible the extension of credit to farmers and the model draft was prepared by the Farm Credit Administration for enactment

75 The writer is indebted to Clarence A. Patterson, Esq., General Counsel for the Farm Credit Banks of Baltimore and also Joseph Patti, Esq., of the same office for their courtesy and cooperation in making available to the writer the files from which the above information was obtained.
by the state legislatures if the latter cared to use such drafts as a model. However, subsequently, by Chapter 381 of the Laws of 1945, the statute was amended to broaden the organizations which could be the mortgagee to include also any National Bank, State Bank, Savings Bank or Trust Company, and the name of the recording book was changed to be known as "Credit Lien Book".

On the face of these statutes it would now appear that a debtor may, if he select one of the enumerated organizations as a mortgagee create a valid mortgage on after-acquired personal property of the same type as that presently owned. And it is to be noted that there is nothing on the face of the statutes to limit the mortgagors to being farmers. It is probably true that as long as government agencies are the mortgagees under the laws and regulations governing these agencies only farmers could avail themselves of these statutes. However, since the amendment of 1945 also includes any National Bank, State Bank and Savings Bank or Trust Company as mortgagees, are these statutes any longer confined only to mortgagors who are engaged in farming? Cannot now, the merchant, manufacturer or any non-farmer, avail himself of the benefits of this statute and obtain loans or credit on the security of after-acquired property? Granting that the statute was originally intended only for farm mortgages, is it not significant that, at the same time the class of mortgagees was broadened, the legislature changed the name of the recording book from "Federal Farm Credit Lien Book" to the less limited title of merely "Credit Lien Book"?

If these statutes are now available to everybody and not confined merely to farmers, then in this State it seems we are presently operating under a dual system of mortgage law where if the mortgagee and mortgagor select the historical system the mortgage on after-acquired property may be invalidated but if they elect to execute under the statutory system it apparently will not generally be invalidated. In fact, the decision may turn on the question as to whether the mortgage is recorded in the "Chattel Records" book as provided in Article 17, Section 50, or the "Credit Lien Book" as provided in Article 21, Section 58. As the Court of Appeals stated in a recent opinion:76

"Thus it appears that the law on this question is not as clear and settled in Maryland as might be desired."