CHATTEL MORTGAGES: NOTICE: Chattel mortgages on unplanted crops are equitable liens. If mortgagee is in possession, his rights are superior to third parties. (Cases distinguished.)

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Mr. Tyson Nichols,
Brunswick, Missouri.

Dear Sir:

We acknowledge receipt of your inquiry which is as follows:

> "I am writing to your office for information concerning a Chattel Mortgage given on a growing crop. This is what I want to know. Is a Chattel Mortgage given on a crop before the crop is even planted good, or does the grain have to be up so one can see it or is it good if the seed is just germinated? The Harvester Companies take mortgages on crops three or four months before the crops are to be planted, for instance, they would take a mortgage on a wheat crop today said chattel reading for wheat to be planted in the Fall of 1936 and harvested in the year 1937. I have been told by attorneys that these chattels are not good if some one comes inwith one after the crop is planted and up and growing.
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> "I am very anxious to get this above information and will very much appreciate your answer. I hope I have made my question plain enough for you to understand what I want to know."

In the case of Keating v. Hannenkamp, 100 Mo. 161, the court discusses the rights of the partieswhere they had agreed by chattel mortgage that certain properties which were not yet purchased were included in the mortgage, and says, l. c. 167:

"Though the property described in the mortgage was not in the building at that date, still the mortgage was good in equity, and the property became subject to the equitable lien as soon as it was placed in the building. This doctrine has been so often declared by this court that it is only necessary to refer to the following cases: Wright v. Bircher, 72 Mo. 179; Frank v. Playter, 73 Mo. 672; Rutherford v. Stewart, 79 Mo. 216. Such equitable lien is valid as against the mortgagor and also as against Keating who had both actual and constructive notice of the mortgage."

And further says, l. c. 168:

"'Though a grant of a future interest is invalid, yet a declaration precedent may be made which will take effect on the intervention of some act.' Under this maxim of Lord Bacon it is held that 'possession taken by a mortgagee of after-acquired property, under authority given in the mortgage, before rights had been acquired by others, makes it a valid lien upon such property.' Jones on Chattel Mortgages (3 Ed.) sec. 164. The rule just stated is, of course, one at law. But it must follow that possession acquired by a mortgagee under the terms of the mortgage will also vest the legal title in him in those cases where the mortgage of after-acquired property creates an equitable lien. The circumstance that it creates an equitable lien, good against creditors and subsequent purchasers with notice, cannot affect the legal consequences arising from taking possession. Hannenkamp had the right given to him in the mortgage to take possession upon default, and when he took possession he stood in the same position as if his mortgage had been one good and valid at law from the beginning. He had the right to sell and to execute the powers contained in the mortgage without the aid of a court of equity, and his sale passed a valid title both at law and in equity."

In the case of Steckel v. Swift & Co., (St. Louis Ct. of Apps., 1933), 56 S. W. (2d) 806, 808, the court says:

> "Briefly stated, and in so far as it affects the controversy between Steckel and Swift & Co., the rule is that, where the mortgagee does not take possession of the after-acquired property upon its acquisition by the mortgagor and before the rights of an innocent third party have attached, the provision in question will be held void as to such innocent third party, nor will the constructive knowledge furnished by the recording of the instrument be regarded as sufficient notice." (Citing a number of Missouri cases.)

In the case of Page v. Riggins, (Springfield Ct. of Apps., 1929), 20 S. W. (2d) 164, the tenant had agreed to give the landlord a chattel mortgage on his work stock, tools, implements and crops to secure his landlord for furnishing the money. Thereafter the tenant actually executed a mortgage on his crops to a third person who had no knowledge of the prior agreement between the tenant and the landlord. The court holds that as between the tenant and the landlord, the landlord was entitled to an equitable mortgage on the property, but finds that the person to whom the mortgage was given after the execution of the agreement between the landlord and the tenant had no knowledge of the agreement between the landlord and tenant, and that therefore the mortgage which was thereafter actually executed to the third party, Stokes Bros. Store Company, was a valid lien and superior to the equitable lien in favor of the landlord.

In the case of Clayton v. Gentle, (Springfield Ct. of Apps., 1929), 14 S. W. (2d) 672, the court says:

> "No mortgage on after-acquired property conveys title to such property. All it does do is to convey an equitable lien, which attaches when the property is acquired."

In the case of First National Bank v. Johnson, (Springfield Ct. of Apps., 1927), 221 Mo. App. 31, Guthrie gave his note and chattel mortgage to plaintiff bank on March 14, 1924, due October 29, 1924, on his half interest in forty acres of cotton to be thereafter planted on a certain farm. This mortgage was filed March 22, 1924. On April 12, 1924, defendant Johnson gave

a note to the plaintiff bank due December 12, 1924, to secure which, on the same date, he executed to the plaintiff bank a chattel mortgage on his half interest in the same cotton described in the Guthrie mortgage. The cotton was not planted when the Johnson mortgage was given, the mortgage being filed April 21, 1924. On May 29, 1924, after the cotton was planted and growing, Johnson gave to the defendant Lazalier another mortgage on a three-fourths interest in the cotton on the land described in the two previous mortgages. This mortgage to Lazalier was filed June 4, 1924.

The controversy is between the plaintiff bank and the defendant Lazalier. The bank relied on the two mortgages given to it prior to the time the cotton was planted, and defendant Lazalier relied upon the mortgage given to him by Johnson after the cotton crop was planted and growing.

By agreement of the parties the cotton crop was gathered and the net proceeds deposited in the defendant bank to be turned over to the rightful claimant. Thereafter the defendant bank filed a bill in the nature of a bill of interpleader praying that it be allowed to bring said fund into court, and offering to do so, and asking that the plaintiff First National Bank of Corning, Arkansas, and the co-defendants, R. W. Johnson and Ed Lazalier be required to litigate and cause to be determined which of them is entitled to receive said amount, and that upon payment of said fund into court, "this answering defendant prays to be relieved and discharged of any and all liability to the plaintiff or its co-defendants, and that it be discharged with its costs."

The Court of Appeals holds that this was an equitable proceeding, and further holds that the mortgage on the unplanted crops is a valid and superior encumbrance to the mortgage executed thereafter and after the crops were planted. The trial court so found, stating:

> "We cannot hold that plaintiff's mortgages were nothing more than agreements for a lien of some undefined nature and thereby destroy a very common form of security.
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> "Therefore we find the issues for the plaintiff herein and that the mortgages held by the plaintiff take precedence and have priority over the mortgage held by defendant, Lazalier, he having had constructive notice thereof."

The court further says, l. c. 36:

> "In 11 C. J. 443, it is said: 'Where a mortgage is given on crops, the seeds to produce which have not been sown, it is held in some jurisdictions, in the absence of statutory provisions to the contrary, that the mortgage is void at law as being a mortgage on future property, although it may confer a lien on the crop, on its coming into existence, which a court of equity will enforce against persons other than bona-fide purchasers without notice; but in most jurisdictions such mortgages are upheld either by force of express legislative enactment, or on the theory that the crop has a potential existence sufficient to give the mortgage validity.'
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> "The interested may find in the Corpus Juris notes authority pro and contra on the proposition that constructive notice of a mortgage on unplanted crops is sufficient to protect the mortgagee as against subsequent purchasers, mortgagees and creditors without actual notice. The general rule seems to be that in those jurisdictions without validating statutes a mortgage on unplanted crops is void at law, but valid in equity and that record notice is sufficient to protect the mortgagee when he is seeking to establish his lien in a court of equity. It was so held in Apperson v. Moore, 30 Ark. 56, 21 Am. R. 170, and this ruling was prior to the Arkansas Act of February 11, 1875, making valid mortgages on unplanted crops. (See Kirby & Castle's Arkansas Digest (1916), sec. 6407.) Prior to the validating statute the Supreme Court of Arkansas held that such mortgages could not be enforced in actions at law. (See Apperson v. Moore, supra, and Tomlinson v. Greenfield, 31 Ark. 557.) In L. R. A. 1917C, page 11, will be found a somewhat exhaustive note on the validity of mortgages on unplanted crops. To attempt to analyze the cases cited in the note would extend this opinion beyond reasonable limits, hence we merely refer to the note so that the interested may examine if desired.

> "We have no statute validating mortgages on unplanted crops, but our courts have uniformly and from an early date recognized the equities attaching to such mortgages. If such mortgage is given in contemplation of planting and cultivating the crops within the crop season of the year the mortgage is given our courts have uniformly recognized that the mortgagee has an equitable lien upon the crop when it comes into existence, and if such mortgage is duly filed or recorded in accordance with our recording laws we rule that the constructive notice given by the record is sufficient to protect the mortgagee as against subsequent purchasers, creditors or mortgagees in an action in equity to enforce the equitable lien created by such mortgage."

It would seem that an equitable lien is created as between the parties and those having notice thereof on the execution of an agreement between two parties that the one would execute to the other a mortgage on property, even though the property so agreed to be mortgaged was not then in existence or was not then owned by the mortgagor; that having so agreed, the lien attaches at the time the crop is planted by him in the one instance and purchased by him in the other. Such is the holding of the cases cited hereabove prior to the last case hereabove cited.

The last case hereabove cited holds that where the chattel mortgage is actually executed instead of a mere agreement to execute the chattel mortgage, that such chattel mortgage, when recorded, notwithstanding the property so mortgaged is after-acquired or afterward planted, gives constructive notice to the world of its existence, and the chattel mortgage so executed prior to the acquisition of the property is a superior lien to a mortgage executed subsequent thereto and after said crop is planted or said property actually acquired.

For the purposes of this discussion, we assume that there is the proper certainty of description and designation of the crops in question, and that there is no other irregularity.

It will be observed that the above cases announce different rules. The case of First National Bank v. Johnson (decided by the Springfield Court of Appeals in 1937) holds that the recording of the chattel mortgage covering unplanted crops affords constructive notice to the world, and that such mortgage is superior to a mortgage executed after the crop is planted. The holding of that court in that case appears to be contrary to the expressions of other Court of Appeals cases.

The case of Steckel v. Swift & Co., (decided by the St. Louis Court of Appeals in 1933) announces the rule that where the mortgagee does not take possession of the after-acquired property upon its acquisition by the mortgagor, and before the rights of an innocent third party have attached, the provision as to mortgaging after-acquired property is void as to such innocent third party.

The case of Clayton v. Gentle (decided by the Springfield Court of Appeals in 1929) supports the view of the case of Steckel v. Swift & Co.

We do not find where the Supreme Court of this state has passed on this question, and we believe the Court of Appeals of a given district will follow its last previous decision on the question rather than going contrary to a decision of its own court and following the decision of one of the other Courts of Appeals, and the decision of a Court of Appeals deciding a case is final as to such case unless it is certified to the Supreme Court.

The cases seem to be in harmony in announcing that an equitable lien is created on after-acquired property, but as to whether constructive notice is afforded so that there could be no innocent purchaser for value when the mortgage is filed for record and covers after-acquired property, the decisions are in apparent conflict.

CONCLUSION

We are of the opinion that when the Harvester Company takes a mortgage on a corn crop (for illustration) three or four months before the crop is planted, and the mortgage reads so that it clearly covers and defines the corn crop that is to be planted in a certain year on a certain farm, and is to be gathered in a certain year, that an equitable lien is thereupon and thereby created in favor of the mortgagee, and that the

same may be enforced as between the mortgagor and mortgagee and those with actual notice, and that if the mortgagee is in possession of the property at the time the crop is planted, his rights would be superior to those of third parties.

The case of First National Bank v. Johnson, supra, has never been in terms overruled, and if that decision were followed, and if such mortgage is duly placed of record, not only an equitable lien is created, but there is constructive notice to the world of its existence, and the rights thereto are superior to those of a third person, though he be an innocent purchaser for value.

If the decision in the case of Steckel v. Swift & Co., is followed, then it would seem that the mortgage, even though recorded, does not afford constructive notice as against innocent purchasers for value, that is innocent mortgagees, but it would only be good (absent the mortgagee being in possession) as between the parties thereto and those having actual knowledge of their rights.

We are inclined to the view that if this question were presented to the Supreme Court, that court would hold that the mortgage of unplanted crops, where the mortgagee is not in possession, would not be constructive notice to innocent purchasers for value, even though the mortgage was duly filed or recorded, and that it would be held that the rights of the mortgagee only extended to the creation of an equitable lien on such crops which would be good only as between the parties and those having actual notice of their rights.

Yours very truly,

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Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN,
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