Ward & Tichenor, Law Case Printers, 832 and 834 Broad Street, Newark, N. J.

Court of Errors and Appeals of N. J.

On Writ of Error to New Jersey Supreme Court.

Between

ALEXANDER T. LOOKER,
Appellant,

and

JAMES PECKWELL, SHERIFF, &c.
Appellee.

On Appeal.

On the second day of January, 1872, one John M. Mackenzie, then, and at the time of the taking of the goods and chattels in the plaintiff's declaration mentioned, carrying on in the city of Newark a bakery, for the manufacture and sale of bread, cake, and other goods generally made therein, and, in the prosecution of the business of said bakery, requiring and making use of certain materials, namely, flour, sugar, butter, &c., which were necessary to the carrying on of the said business, being indebted to the plaintiff, made and delivered to him a mortgage, to secure the payment of his said debt, upon the fixtures, stock, materials, &c., of said bakery, therein stated and described as follows:

"All the bake house fixtures and utensils now being in and about my bakery, No. 413 Broad street, also all flour, butter, lard, eggs, sugar, and all other stock, manufactured and unmanufactured, and all materials whatsoever being in and about said bakery, or that may at any time during the continuance of this mortgage be purchased and obtained to replenish and replace the same, or any part thereof, together with," &c.

That said mortgage was duly registered on the day of its date as required by law, and duly renewed from year to year, and at the time of the taking of said goods was so renewed and kept alive.

That on the 28th day of May, 1874, said John M. Mackenzie had purchased, to replenish some of the materials mentioned in said mortgage, certain goods—namely, the twenty barrels of flour in the declaration mentioned, which were delivered to him on the sidewalk in front of his said bakery, where they were taken by the defendant as Sheriff of the county of Essex, by virtue of an execution in his hands issued out of the Circuit Court for the county of Essex, upon a judgment in favor of Samuel Totten and John O. Totten against said John M. Mackenzie, for goods sold by them to him after the making and registering of said mortgage, and before the purchase of said twenty barrels of flour, which were purchased of other parties than said Totten, *et al.*, which said twenty barrels of flour were then and there replevied by said Alexander T. Looker. The case was tried at the April term, 1875, at the Essex County Circuit Court, before the Honorable David A. Depue, by consent of counsel, without a jury, on the above statement of facts which was admitted, and judgment rendered for the defendant on the ground that the plaintiff by reason of said mortgage had no lien upon said twenty barrels of flour, and no remedy in said Court.

Plaintiff took exception and brought writ of error to Supreme Court, where judgment below was affirmed and appeal taken by plaintiff, who relies on the following points:

1. Plaintiff has an equitable right to recover, on the principle that if the goods are procured for the simple purpose of replenishing the establishment mortgaged by supplying the place of articles lost, worn out or consumed belonging to it, and they become attached to and incorporated with it, they by right of accession follow its title.

Holly vs. *Brown, et als.*, 14 Com., 255. *Morrill* vs. *Noyes*, Sup. Ct., Maine. Reported in Am. Law, Reg. 3 vol., N. S. 22, &c., and notes by Judge Redfield.

A bakery is a manufactory, and, in that regard, of the same nature as a printing establishment or a railroad, the materials requisite for its continuance being necessarily protected to secure its existence, otherwise, upon the exhaustion of the original stock and materials, the security would be worth-

less, as the continuance of the business would be rendered impossible.

It is also detrimental to public policy, in that it would prevent the carrying on of business by many persons of ability, the exercise of which would be a public benefit, by reason of their being unable by lack of capital to sustain such business, and being able to give no other security for borrowed capital except such as given in present case.

In *Smithurst* vs. *Edwards*, reported in 1 McCarter, N. J. Equity Reports, it is held that goods subsequently purchased, not to supply the place of articles consumed, &c., but to be added thereto as an increase, are held by mortgage containing provision of that nature.

This is true as to creditors as well as between mortgagor and mortgagee, when the mortgage is registered, as required by the registry act, the object of which, as was said by Justice Blackburn in *Briggs* vs. *Boss*, L. R. 3, Q. B. 268–270, being to afford creditors and parties interested a true idea of the position in life of the vendor, and to give such a description of the residence and occupation of the vendor and witnesses as would enable persons interested in the matter to trace out who is the person giving the bill of sale, and who the witnesses are, so as to ascertain the *bona fides* of the transaction.

The objection to conveyances of such nature before the registry act, being the lack of notice and the opportunity for fraud thereby given. Such conveyance being good between the parties thereto, but not as to others without notice. Registering, being notice, places all parties on the same footing.

2. If such mortgage is valid in equity, it is also in law, and the same rule should apply.

It is an executory agreement which becomes executed as soon as the vendor acquires title.

Benj. on Sales, 2d Ed., 263–287.

All that is required by any of the authorities being that some act should be done by which the newly acquired goods should be devoted to the objects of the mortgage.

Under the provisions of this mortgage, the mortgagor was

the bailee of the mortgagee, and, as such, did appropriate the goods to that object.

In *Morrill* vs. *Noyes* above cited, it is said, "some of the Courts have denied that any difference exists in the decisions as to the lien of such a mortgage upon property afterwards acquired, and have attempted to reconcile the cases on the ground that such a mortgage, though void, at law, is valid in equity.

"But this is a loose use of language that tends more to confuse than to reconcile. If such a mortgage is absolutely void for want of any subject matter to support it, then it should be so held in equity as well as at law."

And Judge Redfield in the notes upon said decision well says: "The question of the capacity of the mortgagor of future acquired personal estate, to create a valid present property therein, is here examined with thoroughness, and discussed with great clearness and precision. The point is every day becoming more and more important, not to use any stronger impression; and we are sorry to feel that the American Courts do not seem, as yet, to have fully waked up to the magnitude of the interests involved in that and kindred questions. The public interest, and the necessities of business men under the pressure of commercial exigencies, generally outrun and take the lead of the courts of justice in moulding present means and appliances to the multiplying emergencies which an advancing civilization is constantly presenting. This is indeed the natural order of things, and when the Courts attempt to take the lead in law reforms of that character, it is not, as a general thing, so judiciously accomplished as when chiefly matured by the practical experience of business men."

Holly vs. *Brown*, above cited, holds such a mortgage good.

The remedy provided by Court of Equity in this State is inadequate, being cumbersome and protracted in its operation; and in such case as this, were frequent levies to be made on goods mortgaged, mortgagee would be burdened with the necessity of foreclosing his mortgage on every occasion, which would render it practically worthless as security.

WALTER M. LYON,
Sol'r for and of Counsel with Appellant.

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NEW JERSEY

Court of Errors and Appeals.

JAMES PECKWELL, *ads.* ALEXANDER T. LOOKER.	*On Error* *to* *Supreme Court.*

POINTS FOR DEFENDANT IN ERROR.

The case is to be decided according to the principles of the common law.

The question is, What are the *legal* rights of the respective parties to the property seized by the Sheriff?

It is not whether the title of the mortgagee to the flour, which he claims under the mortgage, is an equitable one, which the Court of Chancery would enforce and protect as against the execution creditors of the mortgagor, for whom the Sheriff made this seizure.

The decisions in equity proceedings have no bearing on the question involved.

Courts of equity hold many assignments to be valid and effectual not only between the parties, but also as to third parties, which are not so held by Courts of law.

And equity frequently disregards the distinction between contracts executed and those simply executory.

It is not necessary now to discuss the question whether the plaintiff might not, by bill and injunction in Chancery, have protected the property which he claims. He has chosen the common law proceeding, and it is upon common law principles and decisions that he must stand or fall.

Nor is it necessary to consider what would be the effect of a delivery by the mortgagor to the mortgagee, of this after-acquired property, before the seizure by the Sheriff, because the case shows that the flour was delivered to Mackenzie, the mortgagor, on his sidewalk.

The simple and only question in the case is whether, at law, the security by this chattel mortgage can be made effectual by the making and filing of the instrument, without any further act of the parties, with no delivery by the mortgagor, no act on the part of the mortgagee taking possession of, or exercising any rights of property in, the after-acquired articles by virtue of this clause of the chattel mortgage, *as to such property*.

The attention of the Court is called to the clause of the mortgage by virtue of which this flour is claimed. It is, "all materials whatsoever, being in and about said bakery, or that may at any time during the continuance of this mortgage be purchased or obtained to replenish and replace the same, or any part thereof."

It is not the materials which may be obtained with the proceeds of the materials or manufactures of the materials on the premises at the time the mortgage was made, but *any* materials which the mortgagor might obtain from *any source*, paid for with *any* money, even of the execution creditors. If such a mortgage can be upheld, this result follows: the mortgagor borrows money, and with that money buys flour, which at once upon delivery to the mortgagor becomes the property of the mortgagee, and the money lender loses his money.

Or, as this very case serves to illustrate, the mortgagor purchases flour or other materials from the execution creditor, manufactures these materials into bread, sells the bread, and with the proceeds of sales buys other flour, which at once becomes the property of the mortgagee, and the execution creditor loses his money.

Such an idea is too absurd for consideration.

No one can grant or mortgage property to which he has, at the time, no title. There must be either *actual* or *potential* ownership.

The flour which is the subject of this controversy was not

at the making of the mortgage the property of the mortgagor, either actually or potentially, and there was never any act of authority or ownership exercised over it by the mortgagee.

It is not necessary to further reason on the subject. The conclusion of the Supreme Court rests upon principle and authority.

Lunn vs. *Thornton*, 5 E. C. L. R., 379.
Holroyd vs. *Marshall*, 9 Jur., N. S., 213. 10 H. L. Cas. 191-210-216
Mogg vs. *Baker*, 3 M. & W., 195.
Jones vs. *Richardson*, 10 Met., 481.
Moody vs. *Wright*, 13 Met., 17–29–30.
Barnard vs. *Eaton*, 2 Cush., 294.
Pettis vs. *Kellog*, 7 Cush., 456.

The cases cited on the other side establish the very principle we contend for.

Smithurst vs. *Edmunds* declares such a mortgage invalid *at law*, and so does *Morrill* vs. *Noyes*.

All the other cases show some act of authority over or ownership in the after-acquired chattels by the mortgagee.

The judgment should be affirmed.

WM. H. MORROW,
Of Counsel with Defendant.

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CHATTEL MORTGAGE EXECUTION.

PRESENT PROPERTY. LIEN. LEVY.

Supreme Court of New Jersey.

LOOKER,
v.
PECKWELL, *Sheriff.*

February Term, 1876.

To constitute a valid sale or mortgage at law, *the vendor or mortgagor must have a present property either actual or potential in the thing sold.*

Where there is a mortgage of goods to be thereafter acquired by the mortgagor, an execution levied upon the goods after they are so acquired will, in a court of law, prevail over the mortgage.

Error to Essex Circuit.

In Replevin.

This case was tried at the Essex County Circuit Court by consent of parties before the court, without a jury, upon admitted facts. A brief statement will present the point in issue. One John M. Mackenzie, to secure his debt to the plaintiff, executed a mortgage upon the fixtures, stock, materials, etc., of his bakery in Newark, described therein as follows:

"All the bakehouse fixtures and utensils now being in and about my bakery, No. 413 Broad street, also all flour, etc., and all other stock manufactured and unmanufactured,

and all materials whatsoever being in and about said bakery, or that may at any time during the continuance of this mortgage be purchased and obtained to replenish and replace the same or any part thereof, together with, etc."

The mortgage was duly registered as required by law. After the delivery of the mortgage, Mackenzie, in order to replenish his stock, purchased twenty barrels of flour, which were delivered to him on the sidewalk in front of his bakery, where they were seized by the defendant, as sheriff, by virtue of an execution in his hands, upon a judgment in favor of Totten against said Mackenzie, for goods sold to him after the making and registry of the mortgage, and before the purchase of said twenty barrels of flour, which were purchased of other parties. The question submitted is whether the twenty barrels of flour were subject to the liens of the mortgage.

Held. 1. To constitute a valid sale or mortgage *at law*, the vendor or mortgagor must have a present property either actual or potential in the thing sold.

2. Where there is a mortgage of goods to be thereafter acquired by the mortgagor, an execution levied upon the goods after they are so acquired will, in a court of law, prevail over the mortgage.

Opinion by VAN SYCKEL, *J.*

Judyment below affirmed.