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CONTRACTS—CLAIM FOR DAMAGES AND FOR RESCISSION NO LONGER INCONSISTENT. —By Chapter 315 of the Laws of 1941, a new section 112-e has been added to the Civil Practice Act.[1] The enactment, which became effective on September 1, 1941, makes yet another inroad into the doctrine of election of remedies.[2] It provides, in substance, that claims, arising out of fraud or misrepresentation in the inducement of a transaction, for rescission and restitution of benefits on the one hand and for damages on the other shall not hereafter be deemed inconsistent, so long as there is no duplication of items of recovery.

Adopted at the instance of the Law Revision Commission,[3] the statute is directed at the rule laid down in this jurisdiction in *Weigel v. Cook*.[4] In that case defendant, by fraudulent representations as to the existence and capacity of mineral springs on certain land, had induced the plaintiff to purchase the land. The purchase price was $15,000. Of this, $5,000 was paid in cash and security given for the balance of $10,000. Prior to discovery of the fraud, plaintiff had expended an additional $4,000 for improvements. In an action for rescission, the lower courts had directed repayment of the $5,000 and cancellation of the security. In addition, plaintiff had recovered a judgment for the $4,000 he had expended for improvements. This latter item was stricken out by the Court of Appeals. Plaintiff, having elected to rescind the transaction, was, the court concluded, barred from recovering damages based on an affirmance of it.

The avowed purpose of rescission is to restore the injured party to the *status quo ante*. The rule of election of remedies, as applied in the *Weigel* case, frustrated this purpose. Plaintiff, to be sure, could have recovered the $4,000 had he elected to bring an action at law in deceit. But such an election would have compelled

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1. "Claim for damages and rescission not inconsistent; complete relief in one action. A claim for damages sustained as a result of fraud or misrepresentation in the inducement of a contract or other transaction, shall not be deemed inconsistent with a claim for rescission or based upon rescission. In an action for rescission or based upon rescission the aggrieved party shall be allowed to obtain complete relief in one action, including rescission, restitution of the benefits, if any, conferred by him as a result of the transaction, and damages to which he is entitled because of such fraud or misrepresentation; but such complete relief shall not include duplication of items of recovery." N. Y. CIV. PRAC. ACT § 112-e.

2. Previous enactments in New York limiting the application of the doctrine are: N. Y. CIV. PRAC. ACT § 112-a (prior action against one of several wrongdoers or recovery of unsatisfied judgment therein no bar to subsequent action against another such wrongdoer); N. Y. CIV. PRAC. ACT § 112-b (prior action against either agent or undisclosed principal, after disclosure of such principal, or recovery of unsatisfied judgment therein no bar to subsequent action against other); N. Y. CIV. PRAC. ACT § 112-d (prior action, either in conversion or contract, against one of several persons liable, or recovery of unsatisfied judgment therein no bar to subsequent action against others, either in conversion or contract); N. Y. CIV. PRAC. ACT § 112-d (judgment denying recovery in action on written agreement no bar to action for reformation of such agreement).

3. N. Y. LAW REVISION COMMISSION LEGIS. DOC. (1941) No. 65(L).

4. 237 N. Y. 136, 142 N. E. 444 (1923); N. Y. LAW REVISION COMMISSION LEGIS. DOC. (1941) No. 65(L) p. 3.

him to retain land he did not want, and to pay the balance of the purchase price as it became due.

As the study of the Law Revision Commission points out, other jurisdictions have not felt constrained to press the doctrine of election of remedies to this extreme.[5] A distinction has been made in some cases between the effect of rescission on the right of the injured party to recover the contract measure of damages on the one hand and his right to the tort measure of damages on the other.[6] An injured party, who has repudiated a contract, should not be allowed a recovery based on the contractual measure of damages, *i.e.*, one which would put him in as good a position as he would have been had the contract been performed. But there is no reason why he should not be compensated for losses actually sustained so as to put him in as good a position as he was in prior to the misrepresentation.

The same conclusion has been defended on another ground. Rescission has properly been held to preclude recovery of items of general damage, since such items would be duplicative of the relief already granted. But no such argument can be advanced for refusal of special damages, such as the $4,000 expenditure in *Weigel v. Cook*.

The phrase "fraud *or* misrepresentation" employed in the new statute suggests certain questions. For example, are claims arising out of careless, as distinct from deliberate, misrepresentations within its purview? It is not clear whether the use of "or" is explanatory or alternative. The discussion of the Law Revision Commission, confined almost exclusively as it is to the classic action of deceit, would seem to indicate the former. But the term, misrepresentation, is commonly given a broader meaning. It is frequently applied to any assertion which is contrary to fact, whether made honestly and with due care or with scienter or negligently.[7]

Rescission will lie even for an innocent, non-negligent misrepresentation.[8] No problem of election arises in such a case, however, since an action for damages would not be maintainable.[9] But liability in damages as between the immediate parties for bona fide but negligent misrepresentations is now well established,[10] although its exact limits remain to be defined.[11] The doctrine of election of remedies would probably be applicable in such cases.[12] There is every reason why a liberal

5. See authorities *pro* and *contra* as collected and discussed in N. Y. LAW REVISION COMMISSION LEGIS. DOC. (1941) No. 65(L) pp. 40-53.

6. American Pure Food Company v. Elliot, 151 N. C. 393, 66 S. E. 451 (1909); Phares v. Jaynes Lumber Co., 118 Mo. App. 546, 94 S. W. 585 (1906); Rogge, *Damages Upon Rescission for Breach of Warranty* (1929) 28 MICH. L. REV. 26, 5 WILLISTON, CONTRACTS (rev. ed. 1937) § 1464.

7. 3 RESTATEMENT, TORTS (1938) 56-59; HARPER, THE LAW OF TORTS (1933) §§ 219, 222; BOHLEN, *Misrepresentation as Deceit, Negligence or Warranty* (1927) 42 HARV. L. REV. 773; RESTATEMENT, RESTITUTION (1936) §§ 8, 28.

8. Hammond v. Pennock, 61 N. Y. 145 (1874); Blomquist v. Farson, 222 N. Y. 375, 118 N. E. 855 (1918); Seneca Wire & Mfg. Co. v. Leach & Co., 247 N. Y. 1, 159 N. E. 700 (1928).

9. Reno v. Bull, 226 N. Y. 546, 124 N. E. 144 (1919).

10. Glanzer v. Shepard, 233 N. Y. 236, 135 N. E. 275 (1922); International Products Co. v. Erie R. R. Co., 244 N. Y. 331, 155 N. E. 662 (1927).

11. Ultramares Corp. v. Touche, 255 N. Y. 170, 174 N. E. 441 (1931).

12. N. Y. LAW REVISION COMMISSION, LEGIS. DOC. (1941) No. 65(L) p. 60.

construction of the new section 112-e of the Civil Practice Act should make it applicable as well.

Section 69 of the Uniform Sales Act[13] makes the doctrine of election of remedies applicable to claims for rescission and for damages arising out of a breach of warranty. In the broad sense a false express warranty is undoubtedly a misrepresentation[14] and the two statutes would therefore seem to be in conflict. The report of the Law Revision Commission offers no light on the problem.[15]

A purchaser of chattels, who sues upon a breach of express warranty, need prove no more about the representation than that it is false. Where such a representation is, in addition, intentional or careless, a plaintiff in New York who now seeks both rescission of the sale and special damages arising out of it may be confronted with this problem: if he states a cause of action in deceit or negligence he must sustain an additional burden of proof as to scienter or lack of care; if, on the other hand, he relies in his rescission suit on a cause of action for breach of warranty he runs the risk that section 112-e of the Civil Practice Act will be held inapplicable and thereby of forfeiting his claim for special damages. He will, therefore, have to plead both. But such a pleading would merely pose the problem not resolve it.

It has been held that the Uniform Sales Act will be construed so as to make for uniformity. "Doubts, if there are any, may well be resolved in favor of the ruling that will make for the larger uniformity."[16] Likewise it has been held that a general statute will not be construed as repealing one covering a particular subject matter, unless they are irreconcilably in conflict.[17] But neither of these rules is helpful here since there is radical disagreement as to the scope of the doctrine of election under section 69 both between other jurisdictions[18] and between the authorities in New York.

In *Waldman Produce, Inc. v. Frigidaire Corporation*[19] the Appellate Term in the Second Department, criticizing *Weigel v. Cook,* held that an action for the price based on rescission for breach of warranty did not under section 69 bar recovery of damages for loss of produce stored in a refrigerator which did not conform to the warranty. But there is authority squarely to the contrary in New York.[20] The

13. N. Y. PERS. PROP. LAW § 150. Cf. Introductory *Comment to the Further Remedy Sections* § 60 *ff.,* SECOND DRAFT OF REVISED SALES ACT (on proposed abolition of election of remedies in sales cases).

14. N. Y. LAW REVISION COMMISSION, LEGIS. DOC. (1941) No. 65(L) p. 61.

15. Cf. N. Y. LAW REVISION COMMISSION, LEGIS. DOC. (1941) No. 65(L) p. 33.

16. Cardozo, J., in Standard Casing Co. v. California Casing Co., 233 N. Y. 413, 418, 135 N. E. 834, 835 (1922).

17. Chew Heong v. U. S., 112 U. S. 536 (1884); Crosby v. Patch, 18 Cal. 438 (1864); State *ex rel.* Gates v. Commissioners of Public Lands *et al.,* 106 Wis. 584, 82 N. W. 549 (1900).

18. Rogge, *Damages Upon Rescission for Breach of Warranty* (1929) 28 MICH. L. REV. 26 and N. Y. LAW REVISION COMMISSION, LEGIS. DOC. (1941) No. 65(L) contain reviews of the authorities.

19. 157 Misc. 438, 284 N. Y. Supp. 167 (Sup. Ct. 1935); Note (1936) 45 YALE L. J. 1313.

20. Bennett v. Piscitello, 170 Misc. 177, 9 N. Y. S. (2d) 69 (City Ct. Rochester, 1938), *rev'd* on other grounds, 259 App. Div. 964, 19 N. Y. S. (2d) 777 (4th Dep't 1940), *aff'd* without opinion, 285 N. Y. 584, 33 N. E. (2d) 251 (1941).

question awaits authoritative decision in the light of the new enactment by the appellate courts.

MORTGAGES—EFFECT OF MORTGAGE STATEMENT FILED BY MORTGAGEE OF USED CARS.—Prior to the enactment of Section 230-b of the Lien Law,[1] motor vehicle dealers in New York had no practical method of financing used cars. In many sales of new automobiles, a used car is accepted by the dealer in part payment of the purchase price. Since few dealers have sufficient capital to carry these used cars until they are resold, there is a need for outside financing. The same need existed formerly, with respect to the financing of new cars purchased by the dealer from manufacturers. It was solved by the adoption of The Uniform Trusts Receipts Act.[2] Trust-receipt financing is ineffective, however, as a method of financing used cars for the reason that the dealer is already the owner and is in possession of the cars.[3]

The procedure generally resorted to by most dealers is to give a chattel mortgage on the used cars to a financing agency. Mortgagees of motor vehicle dealers are usually finance companies. As an incident to its activity, in order to induce a dealer to place his business of financing new cars for retail purchasers with it, a finance company is ordinarily obliged to aid the dealer in financing used cars taken in on the sale of new vehicles. Prior to the enactment of 230-b, it was, in most cases, necessary for motor vehicle dealers to comply with Section 230-a of the Lien Law in order to execute a valid chattel mortgage. Section 230-a of the Lien Law requires the mortgagee to obtain from the mortgagor, a written list of the creditors of the mortgagor. He must then notify each of these creditors of the proposed mortgage and the terms and conditions thereof, when the mortgage is intended to operate as a mortgage upon a stock of merchandise in bulk, or any part thereof. Corporate mortgagors were also required to comply with Section 16 of the Stock Corporation Law. In effect this section provides that a stock corporation must first have consent to the execution of a mortgage from two-thirds of the holders of the outstanding voting stock, in writing, or by vote at a Stockholders' meeting called for that purpose. A certificate that such consent was given must also be filed in each county in which the mortgage is filed. To satisfy these requirements each time a used car was financed proved not only cumbersome but expensive. As a practical matter, therefore, frequently the motor vehicle dealers failed to

1. N. Y. Laws 1941, c. 94 relating to chattel mortgages on agricultural crops was numbered N. Y. LIEN LAW § 230-b. Inadvertently N. Y. Laws 1941, c. 842 was likewise called N. Y. LIEN LAW § 230-b. This latter section concerns mortgage statements and is the subject of this discussion. Discussion of the other 230-b appears *infra*.

2. N. Y. PERS. PROP. LAW §§ 50-58.

3. See Bacon, *A Trust Receipt Transaction II.* (1936) 5 FORDHAM L. REV. 240.

4. "The purpose of the bill is two-fold (1) To provide an effective and safe method by which used motor vehicles owned and possessed by a motor vehicle dealer may be financed *for the dealer.* No such method now exists. The bill does not involve in any way financing of retail purchases of automobiles. (2) That buyers of automobiles in the ordinary course of business from dealers may be protected against any liens represented by chattel mortgages upon the cars so purchased." *Summary of Salient Features of Senate Introductory Bill,* 1071 (1941) PAMPHLET OF THE AUTOMOBILE MERCHANTS ASSOCIATION OF NEW YORK, INC.

comply with the requirements of these sections, and more often did not file a chattel mortgage. Obviously, under such conditions, the mortgagee had no protection, whatsoever, not even against creditors of the motor vehicle dealer, to say nothing of the buyer in the ordinary course of trade.

The main purpose behind the passage of this statute, therefore, seems to be to aid the financiers of used car dealers by providing a cheap, expeditious method of filing. At the same time the statute is also designed to protect bona fide purchasers for value in the regular course of business. Subdivision 6 of the statute provides: "A buyer in the ordinary course of trade, purchasing from a dealer any motor vehicle or motor vehicles covered by any such chattel mortgage or mortgages shall acquire such motor vehicle or vehicles free and clear of the lien or encumbrance of said chattel mortgage or mortgages."[5] Before this statute, the New York Courts, although in the minority,[6] held that if a mortgage was filed under the old method, a bona fide purchaser was not protected, even though the mortgagee allowed the mortgagor to display his cars at his place of business.[7]

Financing companies acting as mortgagees thus seem willing to sacrifice their rights against buyers, in the ordinary course of trade, to procure a practical financing procedure for used car dealers. It is common knowledge that a purchaser of a used car from a dealer rarely makes any investigation to see whether or not the car is encumbered. It seems unfair, that he should take subject to a mortgage, even though recorded, when the mortgaged vehicle is in the possession of the dealer, ostensibly for sale. Therefore, this part of the statute is commendable.

It should be remembered that a financing company's chief concern is not to be protected against the buyer in ordinary course of trade. If a dealer sells mortgaged vehicles without accounting to the mortgagee, he will soon find great difficulty in procuring willing mortgagees. Protection against creditors of the dealer is more necessary. Section 230-b gives such protection. The creditors of the dealer are not treated unfairly. They may readily ascertain from the mortgagees whether or not a particular vehicle or vehicles are the subject of the chattel mortgage statements. The statute is a distinct advance. The parties to the financing plan have an inexpensive and effective method of financing used cars, and the buyer, in the ordinary course of trade takes the vehicle free and clear of any filed chattel "Mortgage Statement."

Under the terms of the statute, mortgagees who contemplate receiving a series of chattel mortgages to be executed by motor vehicle dealers may file a "Mortgage Statement"[8] upon payment of a nominal filing fee.[9] Such "Mortgage Statement"

5. N. Y. LIEN LAW § 230-b, (6).

6. See Winakur v. Sapourn, 156 Md. 662, 145 Atl. 342 (1929); American Aggregates Corporation v. Wente, 100 Ind. App. 59, 190 N. E. 552 (1934).

7. In Utica Trust & Deposit Company v. Decker, 244 N. Y. 340, 155 N. E. 665 (1927), the defendants, although innocent purchasers, were held to take subject to the recorded mortgages. The mortgagees were not estopped from claiming title to the mortgaged automobiles, although possession was accorded the mortgagors who were motor vehicle dealers.

8. "Any person who contemplates receiving as mortgagee a series of chattel mortgages to be executed by a motor vehicle dealer, covering motor vehicles of which the dealer at the time of execution of said chattel mortgages shall have ownership and possession, may cause a mortgage statement to be filed and indexed in the same manner and place as

is filed in the same place and manner as other chattel mortgages. When so filed, this statement is operative for a term of three years—an appreciable relaxation of the more burdensome requirements of Section 235 of the Lien Law.[10]

After the "Mortgage Statement" is filed, any interested person may, by a written demand, inquire of the mortgagee, whether or not any specified motor vehicle is subject to the lien of the "Mortgage Statement". Neglect on the part of the mortgagee to furnish this information defeats his lien against the demanding person. If he does give such information his lien is effective. Likewise if the statement is filed, the creditors of the mortgagor are subject to the mortgage when they make no inquiry of the mortgagee.

As already stated the statute expressly protects the buyer of such a mortgaged vehicle, who purchases in the ordinary course of trade, from the lien or encumbrance of such mortgage.[11] The wording of the statute, however, suggests the possibility of different interpretations.

One construction might be that even though a chattel mortgage is filed in the former customary manner, under the Lien Law, a purchase in the regular course of trade would not be held to have constructive notice and would take free of the mortgage because of subdivision 6.

This, indeed, would be an anomalous situation. A second, more probable construction, is that subdivision 6 applies, when only a "Mortgage Statement" has been filed, and not otherwise. A purchaser in the regular course of trade takes free of the encumbrance, when only a "Mortgage Statement" is filed, as provided for in Section 230-b. In other words, a court might say, that Section 230-b in no way affects a chattel mortgage when it is filed under the old method, because the provisions of 230-b are merely supplementary. Thus, it would hold that with respect to chattel mortgages filed under the old method the law remains the same, and the filing would be constructive notice to purchasers. They would take subject to the mortgage.

Then there is a third construction. In view of the purpose and general legislative intent, a court might decide that in the case of an isolated chattel mortgage on a used car, where the mortgage is filed under the old customary manner of filing,

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chattel mortgages are required to be filed and indexed under this article." N. Y. LIEN LAW § 230-b (1).

9. One dollar for each mortgage statement filed in counties outside the City of New York and two dollars in counties within the City of New York. N. Y. LIEN LAW § 230-b (3).

10. N. Y. LIEN LAW § 235 requires the mortgagee to file a renewal statement within thirty days preceding the expiration of the first of any succeeding term of one year, calculated from the time when the mortgage was first filed. A mortgage not so renewed ceases to be valid, and the mortgagee loses the protection of his lien as against subsequent creditors, purchasers or mortgagees.

11. The statute defines the term "buyer in the ordinary course of trade" within the meaning of this Section to be "a person to whom a motor vehicle or vehicles is or are sold and delivered for new value, and who acts in good faith, including one who takes by conditional sale. It does not include a pledgee, mortgagee, lienor, transferee in bulk, or another dealer in motor vehicles. 'New Value' as used in this section means a new consideration in money or other property actually paid or agreed to be paid or delivered, or new obligation incurred; . . ." N. Y. LIEN LAW § 230-b (6).

the purchaser would not be protected, and would be held to have constructive notice of the mortgage. But if chattel mortgages, in a series, are executed by a motor vehicle dealer, regardless of whether they are individually filed in accordance with the old method, the purchaser in the regular course of trade will take free of the lien of the mortgage. This interpretation is most logical taking cognizance of the words "such chattel mortgage or mortgages" in subdivision 6, and then referring back to the wording of subdivision 1.

MORTGAGES—RIGHTS OF SUBSEQUENT CREDITORS AS AGAINST CHATTEL MORTGAGEES OF AFTER ACQUIRED PROPERTY.—By reason of a recent amendment to the Lien Law,[1] it is now possible in New York, in some situations, for a prior mortgagee of a chattel mortgage on after-acquired property to obtain a right superior to a subsequent execution creditor of the same property. The amendment is extremely limited in its application. It only covers the situation where a chattel mortgage on crops[2] to be grown within one year is given by a farmer in order to secure the purchase price of seeds, fertilizer, feed and other such materials which are to be used in growing the crops which are the subject of the mortgage.[3] When such a mortgage is duly filed, the mortgagee will be free from the danger of levy by a judgment creditor on the chattels.

There was need for the alteration in the law, since some confusion has arisen in New York with regard to chattel mortgages of after-acquired property. While a mortgage on property not in existence at the time of the mortgage is void at law, equity takes the view that when the property is acquired by the mortgagor, an equitable mortgage attaches to that property.[4] In arriving at this conclusion, the courts of equity do not require an express agreement by the mortgagor to give a formal mortgage when he later acquires the property.[5] Rather the basis of the equitable encumbrance is the advance of credit by the mortgagee in reliance on an understanding that when the property comes into the hands of the mortgagor, it will be posted as security for the debt so incurred—a situation for which there is no adequate remedy at law. However, when the question has arisen as to the priority of this equitable lien as against a subsequent purchaser without actual

1. N. Y. Laws 1941, c. 94, effective March 14, 1941, amending the Lien Law by inserting § 230-b. The Legislature has, apparently by inadvertence, added two sections 230-b to the Lien Law. The one herein considered is the section dealing with the effect of a chattel mortgage on after-acquired property.

2. "As used in this section, the terms 'crop' and 'agricultural crops' mean all crops of the soil, whether annual or perennial, and shall include fruits and berries; it shall also include poultry, other domesticated birds and fowl and any increase or accretions thereof." N. Y. LIEN LAW § 230-b (1).

3. "Any mortgage executed under . . . this section may provide that the mortgagor shall have the right to sell any part of the mortgaged crop under the conditions stated in the mortgage, if the proceeds of such sale are applied upon the mortgage debt or subject to the lien of said mortgage, or are permitted to be used for the purpose of paying the expense of cultivating, . . . the remaining portion of the crop covered by the mortgage, . . ." N. Y. LIEN LAW § 230-b (3).

4. Holroyd v. Marshall, 10 H. L. Cas. 191, 11 Eng. Rep. R. 999 (1861).

5. Williston, *Transfer of After-Acquired Personal Property* (1906) 19 HARV. L. REV. 558, 560.

notice or a levying creditor, the courts of New York have not been consistent.

Until this amendment, the law as to intervening third parties was established by two leading cases, *Kribbs v. Alford*[6] and *Rochester Distilling Co. v. Rasey*.[7] In the former a mortgage was given designed to cover after-acquired property which was properly filed according to the statutory provisions.[8] Subsequently the property included in the mortgage was acquired by the mortgagor and transferred to a purchaser for value without actual notice. The Court of Appeals held that there was a good equitable mortgage as against the purchaser inasmuch as the filing constituted constructive notice to him. In *Rochester Distilling Co. v. Rasey* the facts were quite analogous, with a similar chattel mortgage, duly filed,[9] but instead of a purchaser of the mortgaged property intervening a subsequent creditor levied on the property covered by the mortgage. The court took the view that irrespective of filing, the creditor acquired rights superior to those of the holder of the equitable mortgage.[10] That this was an unusual decision is clear from the fact that an innocent purchaser for value has always been favored by the courts in a controversy with the holder of an equitable interest in the same property. Yet, by the holding of the *Rasey* case, not only was the execution creditor placed on a level above a purchaser, but he stepped into a position better than that of his debtor in that he took free of the equitable mortgage, which, of course, was valid as between the original parties to it.[11]

To arrive at its conclusion in the *Rasey* case, the court reasoned that an equitable defense could not be interposed in a strictly legal action,[12] and that the recording provisions for chattel mortgages were not intended to give effect to a mortgage on goods not then in existence. The latter ground for the decision, however, was not observed in the *Kribbs* case where the rights of an innocent subsequent purchaser were subordinated to this type of mortgage. If in one case filing and indexing a

6. 120 N. Y. 519, 24 N. E. 811 (1890).

7. 142 N. Y. 570, 37 N. E. 632 (1894).

8. N. Y. LIEN LAW § 230.

9. While the fact of filing did not definitely appear in the Court of Appeals Opinion, the lower court pointed out that the mortgage had been filed in accordance with the statutory provisions. Rochester Distilling Co. v. Rasey, 65 Hun. 512, 20 N. Y. Supp. 583 (1892).

10. "The statute provides for the filing as a substitute for 'an immediate delivery,' or 'an actual and continued change of possession of the things mortgaged.' Such provisions seem to me to exclude the idea of a chattel mortgage upon non-existent things; or that such an instrument could operate to defeat the lien of an attaching, or an execution creditor upon subsequently acquired property." Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 579, 37 N. E. 632, 634 (1894).

11. "That the purchaser who has bought in good faith should be chargeable with notice of the record of the mortgage of future chattels and should be subject to the mortgage, but that such a mortgage should not be valid and enforceable against an attaching creditor is a curious legal incongruity." Stone, *The "Equitable Mortgage" in New York* (1920) 20 COL. L. REV. 519, 528. See also JONES, CHATTEL MORTGAGES (5th ed. 1908) § 173.

12. The court so held despite the fact that there was express statutory provision for the use of an equitable defense in an action at law. N. Y. CODE OF CIV. PROC. §§ 257, 258, now N. Y. CIV. PRAC. ACT § 262. Furthermore, the merger of law and equity was recognized not only in the Code, but in several cases, including Chase v. Peck, 21 N. Y. 581 (1860).

chattel mortgage provides constructive notice, it would seem it should be binding notice to all subsequent persons dealing with the property equitably encumbered.[13] However, the court decided that such a mortgage was not within the terms of the filing provisions of the Lien Law, although in the earlier *Kribbs* case a subsequent purchaser for value without actual notice was bound by such filing.[14] The two irreconcilable cases were each reenforced by later decisions.[15]

On equitable principles it would seem that the rule of the *Kribbs* case is sound and should be extended to cover chattel mortgages on all later-acquired property.[16] Most states agree with the rule of this decision and hold *contra* to the principles set forth in the *Rasey* case,[17] which has been considered illogical.[18] Hence, in whittling down the effect of this decision, the new amendment is good as far as it goes; however, it must be regarded as an extremely feeble effort by the Legislature.

The present amendment deals only with crops. It will be remembered that the *Rasey* case also dealt with agricultural produce. It would seem to suggest that the Legislature overlooked the fact that the *Rasey* case set up the law with respect to all chattels and was not limited to the subject-matter involved in that suit. However, subsequent cases have sustained the principle of that case with reference to other chattels.[19]

So narrow is the new section that a mortgage on resulting crops to secure articles other than seed, fertilizer, feed, or other such materials is not within the meaning of the amendment.[20] With the New York law on mortgages of later-acquired personal property undeniably in need of revision it is difficult to see why the Legislature did not do a complete job.

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13. BOWERS, CHATTEL MORTGAGES (1933) §§ 140, 141, 143.

14. In both cases the chattel mortgage was duly filed.

15. Following the Kribbs case: Duffus v. Bangs, 122 N. Y. 423, 25 N. E. 980 (1890); Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387 (1901). Following the *Rasey* case: Titusville Iron Co. v. New York, 207 N. Y. 203, 100 N E. 806 (1912) (involved a forfeiture under a breach of contract, not a mortgage); Zartman v. First National Bank, 189 N. Y. 267, 82 N. E. 127 (1907).

16. "That there should be any distinction in the policy of the recording act or in principle between the rights of the *de facto* innocent purchaser and the creditor in the case of a recorded mortgage of future goods does not seem open to question. One who in good faith has advanced his money in the purchase of chattels in the possession of the mortgagor certainly should not be in any worse position than the levying creditor who has made no advance on the faith of them." Stone, *The "Equitable Mortgage" in New York* (1920) 20 COL. L. REV. 519, 528.

17. Andrews Mercantile Co. v. Rice, 187 Ala. 468, 65 So. 388 (1914); Wheeler v. Becker, 68 Iowa 723, 28 N. W. 40 (1886); Thompson v. Fairbanks, 75 Vt. 361, 56 Atl. 11 (1903); Hudson v. Kootenai Fox Farms Co., 47 Idaho 58, 272 Pac. 704 (1928); Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 281, 63 S. E. 1048 (1909); Creech v. Long, 72 S. C. 25, 51 S. E. 614 (1905); Richardson v. Washington, 88 Tex. 339, 31 S. W. 614 (1895).

18. "In any event the curious inconsistencies and complications of the law relating to such security call for comprehensive reform and unification." Stone, *The "Equitable Mortgage" in New York* (1920) 20 COL. L. REV. 519, 535.

19. See note 15, *supra*.

20. So limited is the new amendment that the purchase by a farmer of a household utensil would not be within the section. Indeed, the purchase of an insecticide to eliminate the destruction of the crops would probably not be covered by it.