

MORTGAGES ON UNPLANTED CROPS.

it may be necessary to have the *novus actus*; in equity, when the property comes into the possession of the mortgagor, it is at once operated upon by the instrument and is effectually charged as against a subsequent assignee or a judgment creditor. But there remains the further question whether the goods in dispute were of a specific character so as to bring them within the rule laid down in *Holroyd v. Marshall*."

In *Belding v. Read*, 3 H. & C. 955, the after-acquired property had not been specifically ascertained within the principle of *Holroyd v. Marshall*, and in *Holroyd v. Marshall* there was apparently a *novus actus*, but yet the assignment was one of that character wherein the court would grant specific performance.

The case of *Lazarus v. Andrade*,¹ I. R. 5 C. P. D. 318. (see also *Leatham v. Amor*, 47 L. J. Q. B. 581.) following long after *Re Thirkell*, *Perrin v. Wood*, in our courts presents the self same features and furnishes the self same legal results. Lopes J., in his judgment, said: "The principle deducible from decisions, is, that property to be after-acquired if described so as to be identified, may be, not only in equity, but also at law, the subject matter of a valid assignment for value. The contract must be one which a Court of Equity would specifically enforce * * * In this case the property is to be brought into the premises or to be appropriated to the use thereof, either in addition to, or in substitution for the property then on the premises. I think the assignment sufficiently specific, the property in question having become specific by being brought on to the premises in addition to or in substitution for property mentioned in the schedule. *

* It has been argued that *Re Thirkell*, *Perrin v. Wood* is not an authority in support of a grant of after-acquired property, unless the after-acquired property was brought on to the locus in substitution of other goods. As to this, Crowder, J. says in *Chiddell v. Galesworthy*, 6 C.B.N. S. 479: "It has been attempted to distinguish this case on the ground that the goods here seized were not substituted property but after-acquired. I do not see that that makes any difference. The authority given by the instrument is precisely the same as to both. The sub-

In *Howell v. Coupland*, (L. R. 1 Q. B. D. 258: (see also *Taylor v. Caldwell*, 3 B. & S. 826: *Appleby v. Meyers*, L. R. 2 C. P. 651) the defendant in March agreed to sell to plaintiff "200 tons of regent potatoes, grown on land belonging to defendant in W., at £3 10s. per ton, to be delivered in September or October, and paid for as taken away." In March defendant had sixty-eight acres ready for potatoes, which were afterwards sown, and were amply sufficient to have grown more than 200 tons in an ordinary season; but in August, without any default on the part of the defendant, the disease attacked the crop, and the defendant was able to deliver only about 80 tons. It was held, that the contract was for potatoes off specific land, and was therefore a contract for part of a specific crop, although *not sown at the time*.

A study of the respective judgments in this case will satisfy the mind that an assignment or mortgage of crops, not sown at the time, can be brought, by a proper description, within the rule of equity.

Assuming, of course, the property assigned to be properly and specifically described, then the law seems settled, particularly by *Howell v. Coupland* that a Court of Equity would decree the specific performance of an assignment of crops to be thereafter sown.

In that case the defendant was relieved from a performance of his contract, because through no default of his own, the specific crop bargained for was destroyed. The potatoes were not in existence when the contract was made, but that made no real difference in principle. If a contract, because specific, is relieved against, the converse is fair that, if specific, it will be enforced. If specific, so as to be relieved against, because the crop was of specific kind and off specific land, so, when of specific kind and off specific land, it must be specific, so as to be enforced. If performance is excused because the con-

ject has been under the consideration of all the Courts, and nobody has ever suggested a distinction between substituted and after-acquired property."