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MORTGAGES.

THE NECESSITY OF DESCRIBING THE SECURITY UPON THE REGISTRY. MORTGAGES TO SECURE FUTURE ADVANCES, AND WHERE THE SECURITIES HAVE BEEN CHANGED.

I. WHAT FORM OF CONDITION AND REGISTRY IS VALID; HOW FAR THE SECURITIES MAY BE CHANGED, WITHOUT AFFECTING THE VALIDITY OF THE LIEN.

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1. The question how far securities described in a registered mortgage may be changed, without affecting the lien of the mortgagee, is one of great interest and, in some cases, of a good deal of nicety. The same difficulty might not always occur, where no registry existed. For in such cases there would not be the same opportunity to impose upon new parties, by representing the debt as paid, by producing the securities described in the registry.

2. Some of the early cases seem to require that the security shall be correctly and intelligibly described upon the registry. As in *Frost* vs. *Beekman*, 1 Johns. Ch. R. 288, S. C. 18 Johns. R. 544, where it is held that the registry of a mortgage to secure a promissory note of $3000, as for one of $300, is good only for the $300. This is upon the principle that the registry is not for the purpose of putting one upon inquiry merely, but to give full knowledge of the contents of the deed and of the security. It therefore does not come within the principle, it was said, that the

recital of a deed is notice of the contents of such deed, since it puts the party upon his inquiry, and he must be supposed to pursue it till he find the recited deed, unless something is shown to have occurred short of that to satisfy the mind of the party; and naturally calculated to divert him from further inquiry. *Taylor* vs. *Stibbert*, 2 Vesey Jr. 437; *Hiern* vs. *Mill*, 13 Vesey 114; *Hall* vs. *Smith*, 14 Vesey 426; *Jackson* vs. *Meeley*, 10 Johns. R. 374. But it was urged that the registry must go further, and show the precise state of the security. Accordingly:

3. In *Pettibone* vs. *Griswold*, 4 Conn. R. 158, it was decided, that, where the condition of a mortgage deed was, that the mortgagor should pay all notes, which the mortgagee might indorse or give for the mortgagor, and all receipts which the mortgagee might hold against him, the deed was void as against the other creditors of the mortgagor. This was put, or attempted to be put, upon the same ground assumed by the New York courts in *Frost* vs. *Beekman*, that those interested in the registry were not bound to look beyond it, and must be able to determine from that, the precise state of the title. The learned judge here did not seem to have adverted to the difference between the two cases. When the registry, on its face, seems to be perfect, but is not so, it necessarily misleads the party, who will naturally rely upon it. On the other hand, where the notice upon the registry is general, as by reference to other deeds, or instruments, whether to define the estate conveyed, or the extent of the condition of a mortgage, it has no such tendency to mislead, any more than such a recital in the deed itself would have that effect upon one seeing the deed. And if such a recital in the deed is valid notice of its contents as between the parties, there is no reason, why the registry of the deed should not be as good notice to creditors and purchasers, as the production of the deed itself, or full notice of its contents, which it has never been doubted made the deed as good, as to other parties, having such notice, as it was between the grantor and grantee. And it is no more requisite that those interested in knowing the state of land titles should be able to determine it from an inspection of the registry than that they should be able to do it

without looking beyond the deeds, provided these had been shown them. And it would scarcely be contended that any deed, in such form as to be valid between the parties, would not be equally valid, as to creditors and purchasers, unless it was fraudulent, in fact, or calculated to mislead others, nothing of which is relied upon in *Griswold* vs. *Pettibone, supra.* The truth is that this case was early understood to have been put upon ground not maintainable, and has consequently been abandoned in that state, as their reports show, in numerous cases. All that is now required, in that state, is, that the contracts secured by a mortgage should be described with such convenient certainty as the case admits of. *Stoughton* vs. *Pasco*, 5 Conn. R. 442; *Hart* vs. *Chalker*, 14 Conn. 79; *Merrills* vs. *Swift*, 18 Id. 257; *Sanford* vs. *Wheeler*, 13 Id. 165; *Lewis* vs. *De Forest*, 20 Id. 427; *Mix* vs. *Cowles*, Id. 420. See also, to the same purport, *Skilman* vs. *Teeple*, Saxton's R. 232; 1 Hilliard on Mort. 285–297.

4. And in some of the states it has been held, that the mortgage will be valid as against future incumbrances, where the debt is either so described in the condition of the deed, that its identity can be traced, or such information given that those interested may be able, upon proper inquiry, to trace it out. *Garber* vs. *Henry*, 6 Watts 57; *Gardner* vs. *Webber*, 17 Pick. R. 414; *Commercial Bank* vs. *Cunningham*, 24 Pick. R. 274. And all that is at present required, in the way of describing the debt secured, or intended to be secured, by a mortgage, is that it should be capable of clear identification, either by matter upon the record, or else by that, in connection with facts proved *aliunde*, and which may be regarded as pointed at by the registry.

5. Under this rule great looseness and indefiniteness of description has been admitted, both as to present and future indebtedness intended to be secured, where it is clearly made to appear that it was the *bonâ fide* purpose of the parties to secure the debt in question, and that there was no fraudulent purpose as to others. As in the case of *The Commercial Bank* vs. *Cunningham*, 24 Pick. R. 270, where a copartnership executed a mortgage to secure a promissory note, and took from the creditor an instrument,

not recorded, which set forth that such note was held as collateral security for the payment or discharge of certain other notes and liabilities of the mortgagor, and that the note and mortgage were to be held as long as the mortgagors should be under any liability of any sort to the creditor: It was held that the mortgage was not fraudulent as against other creditors or *bonâ fide* purchasers; and that new notes given to the creditor, whether in renewal of the new notes, or not, were covered by the mortgage, notwithstanding the members of the firm had changed and the new notes were made or indorsed in the name of the new firm. And notes, secured by mortgage, given for a round sum, where nothing was due that was intended to be secured, but the object was merely to indemnify the mortgagee against future liabilities expected to be incurred, and where this was evidenced by a writing between the parties, not recorded, have been held valid securities, as against all debts and securities accruing after the mortgagee had assumed responsibilities. *Gardner* vs. *Webber*, 17 Pick. R. 407; *James* vs. *Johnson*, 6 Johns. Ch. R. 417, 429.

6. It seems now perfectly well settled that a mortgage to secure future advances, may be in the form of a gross sum expressed on the face of the instrument as present indebtedness. *The Bank of Utica* vs. *Finch*, 3 Barb. Ch. R. 294. And so may a mortgage be taken in this general form to secure present indebtedness arising out of complicated transactions where it may be difficult to describe the securities, or the debts, except in this general way. *Bank of Utica* vs. *Finch*, *supra*.

7. But this must be a constituent part of the original agreement. And where such debts have been all once paid, it has been held not competent to keep the security on foot, and to apply it to other indebtedness, by virtue of a parol contract to that effect. *Bank of Utica* vs. *Finch*, *supra*; *Truscott* vs. *King*, 2 Selden R. 147; *Mead* vs. *York*, Id. 449; 4 Kent Comm. 176; *Ex parte Hooper*, 19 Vesey 477; *Meland* vs. *Gray*, 2 Y. & C. 199.

8. The forms of these conditions have been very much varied, but since the general principle is now firmly established, that a general description of the indebtedness in the condition of a mort-

gage is sufficient, as against creditors and *bonâ fide* future incumbrancers and purchasers, the courts have manifested a laudable disposition not to exclude any security, which was relied upon in good faith, at the time the advances were made and subsequently. Hence mortgages to secure blank indorsements by the mortgagee have been held valid, as against creditors whose securities accrued after the date of such indorsements, but before any payment upon them, or even before the bills are put in circulation. *Burdett* vs. *Clay*, 8 B. Mon. 287. And it will be equally valid if given to secure future indorsements. *Kramer* vs. *The Bank*, 15 Ohio 253; or even to secure one for signing the bond of an executor, as surety. *Hawkins* vs. *May*, 12 Alabama R. 673. And a mortgage to secure the mortgagee "what I may owe him on book," was not only held valid, to secure any existing indebtedness, but it appearing that no such indebtedness existed, at the date of the mortgage, to which it could have been intended to apply, it was held that it should be construed to apply to any future indebtedness on book. *McDaniels* vs. *Colvin*, 16 Verm. R. 300. So also a mortgage to secure all debts due and all suretyships of the mortgagor for the mortgagee was held a valid security for all existing liabilities. *Vanneter* vs. *Vanneter*, 3 Gratt. 148. And in a late case in Vermont it was decided that a mortgage to secure the mortgagee "all the notes and agreements I now owe or have with him," was a valid security to cover all payments made as surety upon any indorsements made by the mortgagee on behalf of the mortgagor, after the date of the mortgage, and before knowledge of any intervening incumbrance, such indorsements being made in pursuance of a contract in the form of a promissory note for $1000, expressed upon its face to be collateral to and as "security for any demand or liability he then had or might thereafter have against or on account" of the mortgagor, such collateral note existing at the date of the mortgage. *Seymour* vs. *Darrow*, 31 Vt. R. 122. And the leading case, in this country, upon the subject, *Shirras* vs. *Craig*, 7 Cranch 34, was a mortgage expressed to be for the security of thirty thousand pounds sterling, when the real object of the deed was to secure "different sums,

due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount." But the security was nevertheless held valid, as against future incumbrancers and creditors, even as to future advances made before notice of any intervening equity.

9. We have not been able to perceive any valid objection to this relaxation from the former cases, which will not equally go to destroy all registered mortgages wherever the securities are changed. And it cannot be denied that such an indulgence as that last named does open a wide door for the practice of fraud. Very few persons would hesitate to treat a mortgage, as probably paid, upon being shown all the securities described in the condition, and especially where they were overdue at the time. The idea of substituting a new security, for one already overdue, would not commonly occur to business men, unless in the case of banks, or moneyed institutions, with whom such practice is more usual, than to suffer the overdue paper to remain unpaid.

10. But notwithstanding this liability to fraud and imposition, and the notoriety of the fact, that some cases of considerable severity do, from time to time, occur in this way, the law is nevertheless settled, beyond all question, or cavil, that no change of the securities will release the title of the mortgagee, so long as the original indebtedness, or any portion of it, remains uncancelled, unless there is clear and satisfactory evidence, that the substituted securities were intended to supersede the mortgage security. *Tripp* vs. *Vincent*, 3 Barb. Ch. R. 614. And where the personal obligation of the debtor is relinquished, or avoided, the mortgage is nevertheless held as a binding security for the debt. Id.; *Buswell* vs. *Davis*, 10 N. H. 424. The same was held also where the bond secured by the mortgage was avoided for a fraudulent alteration. *Gillett* vs. *Powell*, Spear's Ch. R. 142. But this last decision may be regarded as questionable perhaps. And where the creditor gives his debtor a general release from the debt, or from all debts and liabilities, this will be *primâ facie* a release of the mortgage. *Armitage* vs. *Wickliffe*, 12 B. Mon. 488.

11. But no presumptive payment will be allowed to operate

unless it is apparent this was the intention of the parties. As where one promissory note is given for another. *Watkins* vs. *Hill*, 8 Pick. 522; *Bank* vs. *Rose*, 1 Strob. Eq. 257; *Demshee* vs. *Parmlee*, 19 Vt. R. 172; *McDonald* vs. *McDonald*, 16 Vt. R. 630; *Bolles* vs. *Chauncey*, 8 Conn. R. 389; *Pomroy* vs. *Rice*, 16 Pick. R. 22.

12. The same rule has been repeatedly applied to banking paper, where it is the custom to renew from time to time. *Enston* vs. *Friday*, 2 Rich. R. 427; *Handy* vs. *Commercial Bank*, 10 B. Mon. 98; *Smith* vs. *Prince*, 14 Conn. R. 472. The change and substitution of the parties by others will not affect the mortgage security. *N. H. Bank* vs. *Willard*, 10 N. H. R. 210; *Pond* vs. *Clark*, 14 Conn. R. 334. And the last case overruled the case of *Peters* vs. *Goodrich*, 3 Conn. R. 146, which held, in accordance with the principle of *Griswold* vs. *Pettibone*, *supra*, and the earlier cases, that as the registry must show the true state of the debt secured by the mortgage, it could not be changed by renewal or otherwise, without releasing the mortgage security.

13. And where a general security of $1500 was given to secure the mortgagee for indorsing the note of the mortgagor for that sum at the bank, and the note was renewed at the bank from time to time, being one time reduced as low as $600, and was finally protested for $720, upon the mortgagor becoming insolvent, it was held to be a portion of the original debt secured by the mortgage. And where the mortgagee gave the mortgagor his check to take up the note secured by the mortgage to save it being protested, it was held no extinguishment of the security. *Rogers* vs. *The Traders' Insurance Company*, 6 Paige R. 583.

14. In some late cases this allowance of substituted securities has been carried so far as seemingly to disregard the proper distinction between the creation of a new debt and the renewal of an existing one. In the case of *Hubbard* vs. *Converse*, 34 Vt. R., it was held that where the mortgagor gave security by way of mortgage to the amount of $25,000, expressed in a bill of exchange or draft for that sum, whereupon he was allowed to draw from time to time upon the bank for sums not exceeding $25,000

in the aggregate; and in taking up that draft was in every instance required to pay money before any subsequent draft would be honored; it was held that the mortgage security continued to maintain its priority notwithstanding a subsequent mortgage, of which the mortgagees had due notice long before the date of the drafts in existence at the time of the failure of the mortgagor. And in *Rowan* vs. *Sharp's Rifle Company*, 29 Conn. R. 282, it is decided that where the legal title of land was conveyed to the plaintiffs as security for the performance of a certain contract undertaken by the mortgagor to the mortgagee, viz. the manufacturing of twenty thousand rifles, on condition of having an advance of $40,000; and the possession being in the mortgagor and he having made erections and put machinery upon it to the value of more than $100,000 and given a subsequent mortgage for the security of the debts incurred by the purchase of some of this machinery, which had been duly registered; and the mortgagee having advanced $75,000 beyond the $40,000 stipulated to be advanced, and the mortgagee having received actual notice of the junior mortgage at some period after the date of the registry, it was held the first mortgagee was not affected by the registry of the subsequent mortgage, but that after actual notice of such subsequent mortgage, he was not justified in making further advances upon the faith of his security, except so far as was requisite to complete, or to enable the mortgagor to complete the contract. These illustrations might be carried much further, but enough has been shown to exhibit the extreme limit to which it has been carried.

15. We feel justified in saying that the fair result of the American cases upon this subject, which are quite numerous, many of which will be found digested 1 Hilliard on Mort. 449 *et seq.*, is, that where no actual release of the mortgage securities was intended, as between the parties, and no actual payment of the same has been made by the money of the debtor, although there may have been an actual payment by the money of some other party, without any express agreement to subrogate such party to the rights of the mortgagee, the mortgage will still be held as a

valid security. *Kinley* vs. *Hill*, 4 Watts & Serg. 426. This last case is where the mortgage debt had been paid with funds of which the debtor was the *cestui que trust*, and it was held to have satisfied the security. 1 Hilliard on Mort. 460, and cases cited.

16. There is no doubt some difficulty in reducing all the facts in the different cases reported upon this point to the same principle. In some cases the same fact has been regarded as evidence of an intention to release the mortgage security, and in others not. In *Fowler* vs. *Bush*, 21 Pick. R. 230, where the mortgagee demanded payment of the first instalment upon the mortgage to enable him to sell the mortgage, and the mortgagor gave a negotiable promissory note for the amount payable in four months to enable the creditor to raise the money by having the note discounted at the bank, and the first instalment was accordingly indorsed as satisfied, it was held that this clearly evidenced an intention to treat the substituted note as payment of the mortgage note, the mortgage having been assigned, and the suit brought by the assignee, the debtor having in the mean time become insolvent, and the note for the first instalment having been paid by the indorsee, who now claimed the right to a lien upon the mortgage security for his indemnity. The case is put by SHAW, Ch. J., expressly upon the ground of the intention of the parties at the time the note was given; distinguishing it from other cases, of a similar character, where no such intention was manifested, viz. *Davis* vs. *Maynard*, 9 Mass. R. 242; *Crane* vs. *March*, 4 Pick. R. 131; *Watkins* vs. *Hill*, 8 Pick. R. 522; *Pomroy* vs. *Rice*, 16 Pick. R. 22. And in *Bonham* vs. *Galloway*, 13 Illinois R. 68, it seems to have been considered that a mortgage to secure one for indorsing the note of the mortgagee, conditioned to be void if the mortgagor should satisfy his note, by renewal or otherwise, which he did by renewing his note with other indorsers, to whom the mortgagee assigned the mortgage, could not be held as a subsisting security for such purpose. This case seems to have turned upon the import of the condition. And where the mortgagee takes the note of the assignee of the mortgage for the amount due upon the note of the mortgagor

and surrenders the latter, it will, *primâ facie*, be regarded as payment. And where the securities described in the condition of a mortgage are exchanged, without the consent of others jointly interested in the security, it has been held payment, as to them. *Van Rensselaer* vs. *Akin*, 22 Wendell 549.

17. But as we have before said, this whole class of cases turns upon the intention of the parties as evidenced by the attending circumstances, to be determined as matter of fact, and the attending equities of others incidentally interested in having the incumbrance paid off or kept on foot, as the case may be, and will scarcely justify a more extended citation of cases or discussion here. It must be obvious to all, from what we have already shown, that the registry of the mortgage can only be relied upon to the extent of furnishing facts, sufficient to put the parties interested in learning the state of the title, upon inquiry in the proper direction, and giving such a clue to the ultimate facts desired, as will enable them by proper diligence to ascertain them. And some of the states have gone so far as to hold an absolute deed in fee simple given to secure a debt, as a valid security, as to third parties, even, as it unquestionably is in regard to the parties. *Marks* vs. *Pell*, 1 Johns. Ch. R. 594; 2 Greenleaf's Cruise 67 and note. In this note the subject of parol defeasances is considerably discussed and many of the cases referred to. Most of the cases hold such deeds fraudulent as against existing creditors, upon the ground that the transaction, as defined in the deed, is not the same which actually occurred, and that the deed is therefore colorable, and calculated to mislead. But in some of the states such a conveyance is held valid even as to creditors. *Wright* vs. *Bates*, 13 Vt. R. 341; *Gibson* vs. *Seymour*, 4 Vt. R. 518. And since it is now firmly established, in most of the American states, where the practice of registration generally exists, that there is no necessity of having the registry present the true state of the indebtedness, as it existed at the date of the mortgage, and subsequently, there seems no valid reason why a security for debt, created by way of an absolute conveyance, may not be held equally valid, as to creditors, that it is between the parties.

II. The far more important question is now to be considered, as to the nature and validity of mortgages to secure future advances.

1. The idea of giving security in advance for future credits, is one of very early origin in the commercial transactions of men. The principle of retaining the thing pledged or mortgaged, not only until the payment of the specific debt created at the time of the transaction, but until all subsequent indebtedness was cancelled, is distinctly recognised in the Roman Civil Law. JACKSON, J., in *Jarvis* vs. *Rogers*, 15 Mass. R. 406, 407, and cases cited. Chancellor KENT, 4 Comm. 136, n. (a.) thus defines the Roman Civil Law in regard to this point: "The mortgage could be held as security for further advances. (Code 8, 27, 1.)" "The mortgagee was allowed to tack subsequent debts, in case of redemption, though this was not permitted to the extent of impairing the rights of intermediate incumbrances. Dig. 20, 4, 3, 20, 4, 20; Code 8, 27, 1." Hence, it may fairly be presumed, originated the English law of tacking subsequent indebtedness to an existing mortgage, notwithstanding any intervening lien. Mr. Justice STORY denies that being the origin of the English law upon that subject. 1 Eq. J. § 415, and note and cases, and authorities cited. But see Powell on Mort. (by Coventry) vol. 2, p. 454.

2. It must be confessed that an inspection of the authorities referred to, which have fallen in our way without much effort, rather tend to raise the doubt insisted upon by Mr. Justice STORY, in regard to the English law of tacking existing in the civil law, notwithstanding the preponderance of modern opinion, that by the civil law the creditor was allowed to retain both the pignus and the hypotheca until paid all the debtor owed him, even after other liens had expired, without notice to the first mortgagee, until he had given further credit. And Domat, B. III. Part I. Tit. I. Sect. I. Art. IV., lays down the rule in distinct terms: "If a person, foreseeing that in a short time he may have occasion to borrow money, obliges himself, beforehand, for the sum which he shall afterwards borrow, and mortgages his estate for this loan that is to be contracted, the mortgage stipulated on such account will be without effect." This would seem to

favor the view, that by the civil law all securities expressed to be for future advances were held invalid. But a careful examination of the authorities quoted by Domat, upon this point, renders it quite evident that this declaration had reference only to the time intervening between the execution of the mortgage and the making of the advances, and that the rule will not probably apply to that period even, where the creditor obliges himself, at the date of the mortgage, to make the advance at some future time named; and this does not vary essentially from the present rule of equity jurisprudence upon the subject to which we shall have occasion to refer hereafter.

3. But, waiving all inquiry further into the origin of the rule, there can be no question the right does exist, in the English law, for a third mortgagee, whose debt was contracted in ignorance of the second mortgage, by purchasing in the first mortgage, to insist upon the payment of the whole sum then due him, before the second mortgagee can derive any benefit from the mortgaged estate. 1 Story's Eq. J. § 412; *Spencer* vs. *Pearson*, 24 Beavan 266. This is allowed upon the familiar rule of equity jurisprudence, that one whose equity is equal may stand upon his superior legal right, without any interference on the part of the courts of equity, under which maxim *bonâ fide* purchasers of an estate, without notice of any defect in the title, may defend themselves against any such defect, when discovered, by purchasing in any statute, mortgage, or other outstanding incumbrance upon the estate; and equity, it is said, will act upon the wise policy of the common law of protecting and guarding lawful possessions, and strengthening such titles.

4. But it has been seriously questioned, and, as it seems to us, not without reason, whether the equities are entirely equal between a second and third mortgagee, both of whom have contracted their debt and taken their security, supposing there was no incumbrance on the estate beyond the first mortgage. After the fact of the second mortgage is made known to the third mortgagee, it seems scarcely fair and just to say they are in equal position, in an equitable point of light. It may be true that they gave

credit equally to the same property; but one gave such credit rightfully, and the other not. It would be deemed a very unjust statement of the equities of two persons, one of whom had purchased goods of one who took them feloniously, and the other of the true owner, to say they stood precisely equal in an equitable point of view. The most which can fairly be said in favor of tacking is, that any party having given credit in good faith to one professing to have title to property, and upon the faith of such property, must be said to stand in so much more favorable light than if he had known of the defect of title, that he may be allowed to protect himself by purchasing in the legal title. This shows that Lord HALE'S term of *tabula in naufragio*, a plank in a shipwreck, which he applied to the right of the third mortgagee to protect himself by purchasing in the first mortgage, *Marsh* vs. *Lee*, 2 Ventris 337, was not without some significance. The rule must have originated more in the disproportionate deference paid to legal estates above mere equitable ones, than in any belief of the equities being equal.

5. It seems to be well settled that if the third mortgagee knew of the second mortgage, at the time he gave credit, he cannot be allowed to tack his mortgage to the first; for in such case there is no pretence for saying that the equities are equal. *Toulmin* vs. *Steere*, 3 Mer. R. 211; *Lacey* vs. *Ingle*, 2 Phillips' Ch. R. 413. Nor can a judgment-creditor, or any other not having given credit expressly to the land, at the time of contracting his debt, be allowed to tack his lien to a prior legal estate, so as to exclude an intervening incumbrance. *Brace* vs. *The Duchess of Marlborough*, 2 P. Wms. 491, 495; Lord ELDON, Chancellor, in *Ex parte Knott*, 11 Vesey 617. The cases are numerous, and the discussions almost endless, in the English Equity Reports, in regard to the different circumstances under which a creditor may be said to have such degree of equity as to be permitted to tack his debt to an outstanding legal estate. But as the law has never prevailed in the United States, and is in no just sense allowable where a law for the registration of land titles exists, it will not be important to consider the subject further, it having been examined

thus far chiefly on account of its analogy to, and its bearing upon mortgages for securing future advances. *Grant* vs. *U. S. Bank*, 1 Caine's Cas. in Error 112; *Parkist* vs. *Alexander*, 1 Johns. Ch. R. 399; Story's Eq. Jur. § 419, and note and cases cited.

6. Contracts for future advances are sometimes made part of the security given for their payment; and in such cases the mortgages are the same, to all intents, as if the consideration of the indebtedness had been paid at the time the contract for their payment was given. No future incumbrance upon the same estate can interpose, so as to postpone the security of the first mortgage, and the mortgagee may make the advances stipulated even after notice of a later mortgage. *Crane* vs. *Deming*, 7 Conn. R. 387; *Moroney's Appeal*, 3 Am. Law Reg. 169; *Ter Hoven* vs. *Kerns*, 2 Barr 86; *Parmentier* vs. *Gillespie*, 9 Barr R. 86. It seems to be requisite that such contract to make future advances to enable the mortgagee to persist in making them, after an intervening incumbrance, should form a constituent part of the original contract, and bind both parties, the one to make and the other to accept such advances. But it is not requisite that it should all be expressed in one instrument. It will have the same force if the covenant to make such future advances be contained in a separate instrument. Brightly Eq. Jur. 289; *Moroney's Appeal*, 3 Am. Law Reg. 169.

7. The most important class of mortgages to secure future advances, is where the future advances contemplated, at the time of giving the security, and expected by both parties to be made, provided there is no change of circumstances or of credit; but, where nevertheless it is optional with both parties, to put an end to the dealings at any moment, sometimes by definite notice to that effect, and sometimes by simple refusal to continue the dealings. This class embraces by far the greater number of cases coming under this general denomination of mortgages to secure future advances, and partially covers the entire ground which is practically important, in a commercial point of view. For contracts, where the mortgagee binds himself absolutely to make future advances, are not common in practice, and not different in principle,

from those where the advance is made at the date of the mortgage. And these few contracts, where the mortgagee, not contemplating at the time any further transactions with the mortgagor, inserts a clause, to save all possible contingencies, to cover any accidental future advances, is not very different from a second mortgage, and, there is, perhaps, no unreasonableness in treating this class of contracts, in the same way we do those which are wholly independent, making the registry of any intervening incumbrance notice to the first mortgagee. But we shall again advert to the question of notice.

8. But the numerous class of cases of dealings with banks and bankers, and guarantors and indorsers, and the like, where extensive and hazardous credits are being constantly given, from day to day and hour to hour, where it is just and equitable that security should be given, to cover future transactions, are of great interest to business, and especially commercial men, and they are not entirely free from difficulty. Hence, within the last two years, in England especially, questions connected with transactions of this character have been more discussed, than for many years preceding. Many of the cases connected with these questions have not been republished in this country, indeed very few of them have been, in any such form as to be accessible to the profession generally. We shall therefore, make no apology, for giving a somewhat detailed analysis of the recent English decisions, and of the American cases bearing upon the points discussed, being persuaded that it cannot fail to be of more practical use to the profession, than anything else we could give them, just at this time.

9. The case of *Gordon* vs. *Graham*, 2 Eq. Cas. Ab. 598, pl. 16, S. C. 7 Viner's Ab. 52 E, was the leading case in the English books, in regard to the right of the first mortgagee who had taken his mortgage to secure future advances, to continue to make such advances with safety, notwithstanding he might make them after full notice of an intervening incumbrance. There can be no question the reports of the case declare that Lord COWPER, the Chancellor, distinctly decided in that case, that if the second mortgagee, at the time of taking his mortgage, had notice of the prior mort-

gage being taken to secure future advances, he was acting in bad faith towards the first mortgagee, in attempting to defeat the full effect of his security, by taking another mortgage; and that he should therefore be postponed. But where the second mortgagee took his security, without knowledge of the prior mortgage, and gave notice to the first mortgagee of the existence of his mortgage, the first mortgagee would be bound to respect such security thereafter. This was in accordance with the literal import of the first mortgage, and in analogy to the decisions of the English Equity Courts, in regard to the right of taking subordinate incumbrances. And it is generally laid down in the English treatises upon the subject, as the settled rule of law. But it had been questioned by Mr. Coventry, in his edition of Powell on Mortgages, 1822, and by Lord St. Leonards, Chancellor of Ireland, in *Blunden* vs. *Desart*, 2 Dru. & W. 431, and by others, and especially by the American Courts. But it maintained its ground in England until a very late period.

10. But when the principle of the decision came to be critically examined by counsel and by the Master of the Rolls, in *Shaw* vs. *Neal*, 20 Beavan 157; S. C. on appeal, 6 H. of Lds. Cas. 581, the rule was pointedly dissented from by Sir JOHN ROMILLY, M. R., but the case was finally disposed of without distinctly overruling the case of *Gordon* vs. *Graham*, although it has sometimes been asserted, that the case of *Gordon* vs. *Graham* was distinctly overruled in *Shaw* vs. *Neal* by the House of Lords. See Lord CAMPBELL, Chancellor, in House of Lords; *Hopkinson* vs. *Rolt*, 7 Jur. N. S. 1212, May 1861.

11. But the case of *Gordon* vs. *Graham*, came again under review in the case of *Rolt* vs. *Hopkinson*, 25 Beavan 461, and was distinctly dissented from by the learned judge Sir JOHN ROMILLY, M. R., although not formally overruled. But when this case came before the Lord Chancellor, on appeal, that learned judge (Lord CHELMSFORD), deemed it necessary to examine the foundation of its authority, and it was distinctly overruled: 4 Jur. N. S. 1119; S. C. 3 De Gex & Jones 177, as far as any case can be said to be overruled, by any court not of the last resort. This case was

carried by appeal before the House of Lords, and after a labored examination of the Registrar's office, that court came to the conclusion, that *Gordon* vs. *Graham* was not correctly reported, and that if it was, it could not be maintained as sound law, and was, therefore, formally overruled by the court of final jurisdiction. Lord CRANWORTH dissenting.

12. It is not important now to inquire into the grounds of this last decision, since it conforms substantially, to what had long been the American rule upon the subject. It goes mainly upon the ground, that where there is no binding contract, in regard to such future advances on the part of the mortgagee, the whole matter rests merely in negotiation, and continues optional with both parties, until the advances are actually made. The security as to such future advances, consequently has no binding force, and no vitality or validity, until the advances are made. It is very obvious, therefore, that as the debtor has the election whether he will accept any further advances, there can be no obligation on his part not to negotiate with other parties for such advances upon the further credit of a mortgage upon the same estate. He must do this if the first mortgagee declines to make them, and he may do it, if for any reason he prefers to transfer his account to another house. And if the mortgagor has this election, there can be no wrong in a party, to whom he applies to make such further advances, upon the credit of the mortgagor's remaining interest in the estate doing so. The application to the second mortgagee is a virtual election on the part of the mortgagor, to nullify the optional portion of the first mortgage, as to further advances.

13. But after this is done, and the estate, in good faith, pledged to a subsequent mortgagee for such further advances, and all this is made known to the first mortgagee, it can be nothing short of bad faith, for him then to allow a further credit to the mortgagor, if he does it with the purpose of compelling payment out of the estate, at the expense of the second mortgagee: *M'Daniels* vs. *Colvin*, 16 Vert. R. 300.

14. The most important remaining inquiry is in regard to the extent, and kind of notice of the subsequent mortgage, which it is

requisite the first mortgagee should have, in order to postpone his further advances to such intervening security. As a general rule, it has been considered that the registry of the second mortgage, will only be notice of its contents to *future* purchasers and incumbrancers, and not to *prior* incumbrancers, thus operating forward and not backward. This is highly reasonable, if we apply it only to such past transactions as are not likely to direct the attention of the party to the registry. And that is the case where the future advances are contemplated to be made, from day to day, and hour to hour, and involve a continuous dealing, as with bankers and brokers, where the balance is constantly changing. The requirement that one should, under such circumstances, constantly watch the registry, or act at his peril, would tend to render such continuing security of little avail. But where the clause for securing future advances is inserted, as a mere safeguard, and with no present expectation of the parties that it will be acted upon, and the parties do subsequently negotiate a further distinct loan, there seems no hardship, in requiring the first mortgagee to examine the registry, before he make such further loan. Accordingly, we find the law established in some of the states, that the registry is full notice to the first mortgagee, not to make further advances under his mortgage: *Spader* vs. *Lawler*, 17 Ohio R. 371; *Ter Hoven* vs. *Kerns*, 2 Barr 96; *Parmentier* vs. *Gillespie*, 9 Barr 86.

15. But the general view of the American courts, and the uniform declaration of the English courts, as far as we know, is, that nothing short of notice in fact will have this effect. It is expressed under various forms of language, but the result of the whole is, that if the first mortgagee have knowledge of the existence of a second mortgage upon the estate, he cannot give further credit upon his prior mortgage, provided it is entirely optional with him, whether to make further advances or not. This has been often declared by judges and text writers, and may now be regarded as settled law, notwithstanding an occasional case seems to require something more. In *McDaniels* vs. *Colvin*, 16 Vt. R. 300, it seems to be required that the second mortgagee should give express

and formal notice of his incumbrance, by way of admonition to the first mortgagee not to deal further upon the credit of his security. But this subject was a good deal examined, and considered by that court, when the late case of *Hubbard's Estate* vs. *Converse*, *supra*, was before them, and although the court decided that case upon the ground that the successive discounts were mere renewals of the original gross sum of $25,000 named in the mortgage as a standing security, and although it is intimated in the rescript filed by the court, at the time of entering up judgment, that a majority of the court were not prepared to depart from the rule laid down in *McDaniels* vs. *Colvin*, as the law of that state, it having been so long received and acted upon as the settled law of the state, it is nevertheless clearly shown in the same rescript, by the judge delivering the opinion of the court, that all which the law requires in such cases is, that the first mortgagee, before he gives the credit, should have had a distinct knowledge of the existence of the intervening incumbrance; and that it is not material how this knowledge is acquired, provided it be in such a way as to gain confidence with the first mortgagee, as being authentic.

16. It scarcely seems necessary to occupy much space upon this point. With the exception of the case of *McDaniels* vs. *Colvin*, *supra*, the current of authority seems to be all one way. Mr. Chief Justice MARSHALL, in *Shirras* vs. *Craig*, *supra*, uses the language "actual notice brought home to the party." In *Truscott* vs. *King*, 6 Barb. S. C. 346, the form of language is, "actual notice of the second mortgage." In *Frye* vs. *The Bank of Illinois*, 11 Illinois R. 381, the notice to the first mortgagee was from the accident of his being the public officer, or his assistant, who made the registry of the second mortgage. In *Craig* vs. *Tappin*, 2 Sanf. Ch. R. 78, the first mortgagee was apprised of the mortgagor's intention soon to execute a mortgage to the second mortgagee, and the court held that sufficient notice, as to all advances made after the actual execution of the second mortgage. In *Stuyvesant* vs. *Hall*, 2 Barb. Ch. R. 159, the requisite notice to affect one with fraud in equity is thus defined: "His conscience is not affected unless he is informed of the existence of the facts

upon which the equitable right depended, or had sufficient notice to put him on inquiry." And in *Montefiore* vs. *Browne*, 7 House Lds. Cas. 269, the matter is thus defined: "One is affected with notice of a fact which he might have learned on such inquiry as all prudent men would naturally make in a question where they were personally interested." And in New York, where equitable rights take precedence from their date, if notified before action brought, Chancellor KENT uses this language, in regard to the present question, *Brinkerhoff* vs. *Marvin*, 5 Johns. Ch. R. 326, 327: "Where a subsequent judgment or mortgage intervened, further advances, *after that period*, could not be covered." The italics are in the original, and would seem to indicate an opinion that such an equity must operate from its date. The learned Chancellor uses similar language in 4 Comm. 175, 176; *James* vs. *Johnson*, 6 Johns. Ch. R. 417, 432. We prefer to say, that in all cases, and this is no exception, third parties are bound to respect an equity from the moment they have such knowledge of its existence as to create belief. See Sir JOHN ROMILLY'S opinion in *Rolt* vs. *Hopkinson*, 25 Beavan 461. The text writers have adopted similar forms of expression. The case of *McDaniels* vs. *Colvin* stands quite alone in its requirements in regard to notice, and was influenced, no doubt, mainly, at the time the decision was made, by a consideration of the rule laid down in *Gordon* vs. *Graham*, and the extreme caution of Chief Justice WILLIAMS, in defining the requisite notice, unquestionably resulted from his desire to lay down an unexceptionable qualification of that case. But since that case has been abandoned in England, there seems no necessity, and no propriety, in following those extreme safeguards laid down to bridge that case over.

We trust we have been able to make ourselves understood in the foregoing exposition of the principles and authorities connected with the registry of mortgages and the true limit of securities for future advances. And if we have been able to accomplish that, it is all which we purposed in the outset. I. F. R.