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MORTGAGES TO SECURE FUTURE ADVANCES.

THAT a mortgage is valid though no money pass at the time and the whole purpose is to create a lien for future advances or a security against loss from liabilities to be subsequently incurred, has long been firmly settled: *Lyle* v. *Ducomb*, 5 Binn. 585; *Shirras* v. *Caig*, 7 Cranch 34; *Ladue* v. *D. & M. Railroad Co.*, 13 Mich. 380, and cases there cited.

How far the rights of such a mortgagee will be affected by a subsequent mortgage has been the subject of considerable discussion.

I. In the early English case of *Gordon* v. *Graham*, 7 Vin. Abr. 52, pl. 3; S. C. 2 Eq. Cases Abr. 598, it was held that the second mortgagee could not redeem the first mortgage without paying all that is due, as well the money lent after as that lent before the second mortgage was made, although according to the report of the case the first mortgagee had notice of the second mortgage; for, said Lord Chancellor COWPER, "it was the folly of the second mortgagee with notice to take such a security."

In *Hopkinson* v. *Rolt*, 7 Jurist N. S. 1209 (1861), however, this case came before the House of Lords, and the original entries in the registrar's book were most carefully and minutely examined by Lord Chancellor CAMPBELL, and the court came to the conclusion that the case had been misreported as to the fact that the first mortgagee had notice of the second mortgage, and after mature consideration it was held by Lords CAMPBELL and CHELMS-

FORD (Lord CRANWORTH dissenting), that the first mortgagee was not entitled to priority as to any advances made after notice of the second mortgage. This case has settled the law in England so far as relates to optional advances by a first mortgagee after notice of the second mortgage.

II. In this country it may be considered as settled, that where the mortgagee has bound himself to make advances or incur liabilities, such advances shall relate back and the mortgage when recorded is a valid lien for all the advances actually made, although they may have been made after notice of a subsequent mortgage or encumbrance of the same property: 3 Kent's Com. 175; *Lyle* v. *Ducomb*, 5 Binn. 585; *Moroney's Appeal*, 12 Harris 362; s. c. 3 Am. Law Reg. O. S. 169; *Crain* v. *Deming*, 7 Conn. 387; *Wilson* v. *Russell*, 13 Md. 495; *Griffin* v. *Burtnett*, 4 Edw. Ch. 673.

III. So also if the advances are made without notice, actual or constructive, of the second mortgage: *Ladue* v. *D. & M. Railroad Co.*, 13 Mich. 393.

IV. But where there is no obligation on the mortgagee and such advances are optional with him, and he has *actual notice* of the subsequent mortgage, such subsequent mortgage takes precedence of all advances made after notice: *Boswell* v. *Goodwin*, 31 Conn. 74; s. c. 3 Am. Law Reg. N. S. 79; *Nelson's Heirs* v. *Boyce*, 7 J. J. Marsh. 401; *Ladue* v. *D. & M. Railroad Co.*, 13 Mich. 380; *Ward* v. *Cooke*, 2 C. E. Green 93; *Frye* v. *Bank*, 11 Ills. 381; *Bank of Montgomery's Appeal*, 12 Casey 170; s. c. *sub. nom. Parker* v. *Jacoby*, 3 Grant 300; *TerHoven* v. *Kerns*, 2 Barr 96.

V. Whether under the various recording or registering acts of this country, the record of the second mortgage is such notice as to bring the mortgagee within the last rule, is still an unsettled point.

In Vermont in the case of *McDaniels* v. *Colvin*, 16 Vt. 300, decided in 1844, a mortgage for a specified sum "and also what I may owe on book account," was held as against a subsequent mortgage to be a valid lien for items of book account incurred subsequently to the recording of the second mortgage. It was indeed still further intimated in this case that the second mortgagee must not only give actual notice of his mortgage to the first mortgagee but must expressly notify the latter not to increase

his mortgage by future advances in derogation of the lien of the second. This extent of the rule, however, has not been followed, and we doubt if it would now be insisted upon even in Vermont. See remarks of REDFIELD, J., in 3 Am. Law Reg. N. S. 91–2.

In Connecticut in the case of *Rowan* v. *Sharp's Manufacturing Co.*, 29 Conn. 282, in January 1852 R. had entered into a written contract with S. to advance to the latter $40,000 for a specific purpose, and took the legal title to certain land as security. Subsequently, in 1854 S. made a mortgage of the same property to a third person, who had notice of the agreement between R. and S. This mortgage was put on record at once, but actual knowledge of it did not come to R. until December 1855. In October 1856 the advances amounted to $75,000, and S. failed. On a bill by the mortgagee to redeem, it was held that the legal title being in R. the recording of the mortgage was no notice to him, and all advances made prior to actual notice were a prior lien to the mortgage, and further that after actual notice R. still had a right to make all advances necessary to enable S. to carry out the original contract. The tendency of the court would appear to have been towards the rule adopted in *McDaniels* v. *Colvin*, but in a subsequent case in the same court where the point arose directly upon a mortgage, SANFORD, J., indicated his disapprobation of that rule, but the court not being unanimous on that point disposed of the case on other grounds, leaving the question still open in that state: *Boswell* v. *Goodwin*, 31 Conn. 74.

In New York it appears to have been thought at one time by Chancellor KENT that the mere execution of a second mortgage or deed would prevent the lien of advances after that: *Brinkerhoff* v. *Martin*, 5 Johns. Ch. 326–7; *Craig* v. *Tappin*, 2 Sandf. Ch. 90; but this eminent jurist in his Commentaries subsequently conceded that the advances might be made after the second mortgage if they were made as "a constituent part of the original agreement," 4 Kent 175; and the rules as laid down already (*supra*, II., III., and IV.) are now well settled in New York as in other states. In *Truscott* v. *King*, 6 Barb. 346, it was expressly held that under the recording acts the constructive notice of a recorded instrument is prospective only and not retrospective; and that the recording of a mortgage was not therefore notice to a prior mortgagee or holder of a judgment to secure advances, so as to affect in any way the lien of his advances subsequently made.

This case upon a review in the Court of Appeals was reversed, 2 Selden 166, but on the distinct ground that it was wrong on the facts, the security having been given for certain specified advances which had all been repaid prior to the second judgment, and therefore the mortgage having fulfilled the whole of the purpose in the contemplation of the parties when it was made, could not be afterwards revived as security for a different obligation, to the detriment of intervening rights of third persons. The ground of the decision below was therefore left untouched, EDMONDS, J., saying in his opinion that he was inclined to think the principle established was right but it was not decisive of the case. And in the subsequent case of *Robinson* v. *Williams*, 22 N. Y. 380, it appears to be assumed that actual notice of the second mortgage was necessary to affect advances subsequently made under a prior one: Opinion of DAVIES, J., p. 386. It may therefore be considered that the weight of authority in New York is against treating the recording of the second mortgage as equivalent to notice to the first mortgagee, though perhaps the law is not yet conclusively settled.

In New Jersey a very distinguished jurist, Chancellor GREEN, held that the recording of the second mortgage was not notice to the first mortgagee: *Ward* v. *Cooke*, 2 C. E. Green 93; and the law appears to be held in the same way in Kentucky: *Nelson's Heirs* v. *Boyce*, 7 J. J. Marshall 401; and in Maryland: *Wilson* v. *Russell*, 13 Md. 495; though in the latter case the decision is not expressly in point, as the first mortgagee was bound to make the advances.

On the other hand, in *Spader* v. *Lawler*, 17 Ohio 371 (decided in 1848), it was for the first time held expressly (though the Pennsylvania cases mentioned *infra* had previously tended the same way), that the first mortgagor was bound before making his (optional) advances to take notice of a junior mortgage recorded—in other words, that the record of the second mortgage was equivalent to actual notice to the first mortgagee. READ, J., who delivered the opinion of the court, appeared to entertain doubts whether, under the statutes of Ohio, a mortgage for future advances was valid at all, inasmuch as the statute "makes the recording a part of the execution," (p. 378), and stated that the court were "all agreed that the clause for future advances, if allowed any legal effect whatever, should be narrowly guarded and restricted.

Such clause can only be tolerated in any sense upon the ground that it advises subsequent mortgagees or purchasers that future advances were contemplated, and enables them by inquiry to ascertain the extent of the encumbrance."

AVERY, J., dissented, and BIRCHARD, C. J., and HITCHCOCK, J., concurred specially, on the ground that the record was notice because "the statute declares that all mortgages shall be recorded in the office of the county recorder, and shall take effect from the time when the same are recorded. Spader's mortgage (the second) took effect in 1836, and its effect was to hold and bind the precise interest which Bonsal (mortgagor) then had in the premises. So far as Lawler's (the first) mortgage was concerned, the estate was at that time bound only for the balance then due him."

In Pennsylvania, in *TerHoven* v. *Kerns*, 2 Barr 96 (1845), it was held by KENNEDY, J., in delivering the opinion of the court, that the first mortgagor was bound to look at the record before making his advances, but the case is hardly satisfactory as an authority, as SERGEANT, J., dissented, and the decision was plainly right on another ground, that the first judgment-creditor had furnished a statement of the amount due on his lien, on the faith of which the second creditor had advanced his money.

In 1860, however, this point was expressly decided, in accordance with the opinion of Judge KENNEDY, and it is now the settled law of that state: *Bank of Montgomery County's Appeal*, 12 Casey 170; S. C., *sub nomine Parker* v. *Jacoby*, 3 Grant 300.

In Michigan, in *Ladue* v. *D. & M. Railroad Co.*, 13 Mich. 380 (1865), the whole subject was most elaborately considered, and the cases reviewed by CHRISTIANCY, J. That was a bill to foreclose a mortgage given by John Ladue to Andrew Ladue & Co., to secure and indemnify them against endorsements which might be made, or liabilities which might be incurred by them as sureties of said John Ladue. The mortgagees were not bound to make endorsements or incur any liabilities. John Ladue conveyed the land by warranty-deed duly recorded, and the only liabilities claimed (though it appeared that others had been incurred but discharged), were for endorsements made subsequent to the recording of this deed, which had been paid by Ladue & Co., the mortgagees. There was no proof of notice to the mortgagees

of the conveyance other than the recording of the deed. The court held the record to be sufficient notice.

From the foregoing review of the decisions it will be seen that they are in direct antagonism, and that there cannot be said to be any settled American rule on the subject. The leading case in favor of holding the record to be notice is *Spader* v. *Lawler*, decided by the Supreme Court of Ohio, in 1848, and in that case it is to be observed that the argument of READ, J., concedes the ground on which the point has been ruled differently in the cases already cited. "Such clause can only be tolerated in any sense upon the ground that it advises subsequent mortgagees or purchasers that future advances were contemplated, and *enables them by inquiry to ascertain the extent of the encumbrance.*" It being thus conceded that the second mortgagee is put on his guard and furnished with the means of ascertaining the real extent of the encumbrance, he is to be treated as possessed of all the information that diligent inquiry would have afforded him; the burden of inquiry is put upon him, and we are unable to stop short of the conclusion that the first mortgagee is relieved from all obligation of inquiry, and bound only to good faith, including a refusal to make further advances to the prejudice of the second mortgage after actual knowledge of it.

Besides this, the general scope of the recording laws is undoubtedly prospective, and not retrospective. The mortgagee having examined the mortgagor's title down to the making of his mortgage, and having then a clear, legal and valid security, may rest upon it until such information is brought home to him in fact as ought properly to impose upon him the burden of a re-examination. As to the supposed hardship of this rule upon the second mortgagee, we think that is effectually disposed of by the pithy argument of TRUMBULL, J., in *Collins* v. *Carlisle*, 13 Ills. 259, that defendants "had notice by the record of the mortgage previous to the time of their purchase, of a lien on the premises to the extent of $500, and surely they cannot complain when, upon full disclosure, it turns out that the amount of the lien is less than that sum."

So far as we may venture a personal opinion, therefore, we think the rule that the recording of the second mortgage is not notice to the first mortgagor, is supported by the better reasons, and that the weight of authority is still in its favor, though we