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THE MORTGAGE FOR FUTURE ADVANCES IN WEST VIRGINIA

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In late years the mortgage or deed of trust to secure indebtedness that may not be created until after the execution and recordation of the security instrument has assumed a new importance in real estate financing. Formerly confined largely to the construction loan, such financing now often contemplates a possible future loan equal to any amount which may have been repaid on the original loan, or the use of the security instrument as general collateral for future advances, which may vary in amount from time to time.

Such transactions are subject not only to the usual hazards of mortgage lending, but the present state of the law indicates other possible pitfalls. The two general legal problems involved are, first, the validity of future advances under such instruments as between the parties and, second, whether the advances have priority over liens which may attach to the real estate between the time of recordation of the security instrument and the actual creation of the subsequent indebtedness by the making of later advances. This discussion assumes that there are no other liens as of the time of recordation which might take priority, so that the sole question is with respect to such intervening liens.

Before discussing these legal problems, it should be helpful to present an outline of some of the more usual forms which such an arrangement may assume, as the problems involved are not always the same in each. The legal questions common to all will then be discussed, and then those peculiar to certain situations only. The terms "mortgage" and "deed of trust" are use synonymously and interchangeably herein, and "mortgagee" means also a beneficiary under, or creditor secured by, a deed of trust.

1. The construction loan is the most common form of a mortgage to secure future advances. It is possible, of course, for the entire loan to be advanced prior to construction, but the more usual practice is to advance funds in installments as building progresses. A basic assumption is, necessarily, that the securing instrument is recorded before any work is done or materials furnished in connection with the construction. If not, it is subject to all mechanics' or materialmen's liens which may be perfected, and no question as to priority arises.

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2. The mortgage for future advances, not for construction purposes, where the advancements are optional, is becoming more common. This may take more than one form:

(a) The so-called open-end mortgage, in which the full amount is advanced contemporaneously, but which provides that it shall secure future loans or advances not to exceed, at any time, the original amount.

(b) The mortgage to secure any advances, present, or future, or to secure any future indebtedness. A maximum limit may or may not be fixed.

3. The mortgage for future advances where the mortgagee is obligated, or has the right, to make the advances irrespective of concurrent consent of the mortgagor. The construction loan, of course, can be of this type.

The use of intangible collateral, *i.e.*, stocks, bonds, notes, etc., which are assigned on a collateral agreement empowering the creditor to sell upon certain specified contingencies, to secure future advances has long been common and most lenders are familiar with and understand the more common problems associated with it. Except for construction loans, however, real estate has been little used by lending institutions to secure future advances.

Thus real estate loans are customarily made for a fixed amount advanced contemporaneously, or nearly so, with the execution of the mortgage or deed of trust. Any further advance then requires a new mortgage, new note, new title examination and all of the expense incident to the making of any real estate loan. If a business man needs a line of credit in varying amount, say to $20,000.00, and owns real estate which is acceptable as security for a total advance of that amount, it is obviously advantageous to both borrower and lender to use one security instrument which will secure any advance, present or future, up to that amount. The borrower is thus able to use his real estate for collateral as effectively as the man who pledges intangible property.

Assuming that the mortgage or deed of trust is duly recorded, and there are at that time no liens, whether recorded or not, which would be entitled to priority, two legal problems arise which must be considered in determining whether the instrument offers and will continue to offer, until its release, security for future advances. First, is it valid between the parties? Second, to what extent will it be prior to subsequent lienors or purchasers whose rights intervene between the recordation of the instrument and the actual making of the future advance or loan?

The law is well settled as to the first question. As between the parties, the instrument will stand as security for any claims of the creditor which it was intended to secure, past, present, or future, and evidence is admissible to show the true intention of the parties. And it is not necessary that the instrument correctly describe the claims or debts intended to be secured.[1]

But what if subsequent rights intervene before the advance is actually made? Assuming prior recordation of the security instrument, this question can arise in several ways. The grantor and debtor may sell and convey to a purchaser for value, without actual notice, but only constructive notice from recordation. The grantor may commence construction or repairs, and inchoate mechanics' liens may attach, dating from the time when the first work is done or materials furnished, or mechanics' liens may be perfected and filed. The grantor may execute and record a subsequent mortgage or deed of trust, on which an advance may be actually made before an advance on the first. Judgments against the grantor may be docketed before an advance is actually made. Do the rights of such intervening parties take priority over a subsequent advance by the mortgage creditor?

In the first West Virginia decision, *McCarty v. Chalfant,*[2] the validity of a mortgage for future advances was affirmed as between the parties and subsequent purchasers, after the advances were made.[3] This does not reach the problem under consideration, but in *Barbour v. Tompkins,*[4] where the grantor executed interest

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[1] Riggs v. Armstrong, 23 W. Va. 760 (1884); Haas v. Teets, 117 W. Va. 700, 188 S.E. 113 (1936) (trust deed referred to note, did not state amount; held good as against subsequent lien creditors); Simms v. Ramsey, 79 W. Va. 267, 90 S.E. 842 (1916); Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S.E. 501 (1892) (mortgage for future advances, no subsequent creditors involved). The mortgage is likewise valid if the debt to be secured, although not termed a future advance, is not actually advanced until after the execution of the mortgage. Pence v. Jamison, 80 Va. 761, 94 S.E. 383 (1917). And see Holley's Ex'r v. Curry, 58 W. Va. 70, 51 S.E. 135, 112 Am. St. Rep. 944 (1905), where the debt was described as "whatever amount said B. F. Curry may owe him as such executor on a settlement," and was held sufficient. In none of these cases was a question of priority actually involved.

[2] 14 W. Va. 531 (1878).

[3] This was stated in Syllabus 1, and is pure dictum. The court held that on a proper settlement of accounts between the parties there was nothing due the trust creditor, and no advances were claimed subsequent to the conveyance of the property, so that the question of intervening rights did not arise on the facts.

[4] 31 W. Va. 410, 7 S.E. 1 (1888). The opinion intimates that if the trust deed had secured any renewals of the original note, and interest had been added to such renewals, the trust would cover the accumulated interest so added. which would then bear interest.

notes as interest became due on the secured debt, which interest notes themselves bore interest, it was held that the interest on interest was a future advance, not entitled to priority over judgments recovered after the execution of the deed of trust. In another decision[5] rendered shortly after, the court said the rationale of the *Barbour* case was want of notice to the subsequent purchaser of the contemplated advance (the trust securing only interest on the original debt).

From these three cases the formulation of a logical rule might be deduced, holding the future advance good against encumbrancers provided the mortgage gave due notice that such an advance might be made. But subsequent decisions, not discussing these cases, took a different tangent. Thus, in *Lawyer v. Barker*[6] the court held that a mortgage for future advances was a preference as to existing unsecured creditors of the grantor, even though the consideration was actually subsequently furnished by the mortgagee on the strength of the lien. Such a conclusion seems insupportable by logic and authority and has not been followed in West Virginia or elsewhere, but it serves to cast a serious cloud on the validity of such mortgages, as the lien creditor cannot know how many general creditors the borrower may have and whether or not he may be technically insolvent. Certainly it cannot be assumed that any court would today hold a mortgage fraudulent as to

[5] Bensimer v. Fell, 35 W. Va. 15, 12 S.E. 1078 (1891). Here a debtor had agreed to pay a judgment creditor a substantial sum (usury not being pleaded) to forbear enforcement of the judgment. It was held that this sum could not be tacked to the original judgment as against a subsequent purchaser, because of want of notice to the purchaser as to the excess at the date of his purchase.

[6] Lawyer v. Barker, 45 W. Va. 468, 31 S.E. 964 (1898). The deed of trust covered an equity of redemption in a tract of land and secured a note in a definite amount for repairs which were completed within two months. Nevertheless, this was held a preference on the authority of Grocer Co. v. Williams, 43 W. Va. 323, 27 S.E. 345 (1897), and Casto v. Greer. 44 W. Va. 332, 30 S.E. 100 (1898). Strangely, these cases involved deeds of trust on stocks of goods and merchandise, which have long been held void as to creditors in West Virginia, and have nothing to do with the law of preferences or voluntary conveyances. If the consideration for the note had been advanced contemporaneously, it would have been no preference, because to constitute a preference there must be a pre-existing debt to prefer. And this is necessarily true as to a future advance. If the rights of subsequent lien creditors were involved, the decision would be in point, but it is impossible to visualize a mortgage for future advances as a preference, and yet that is the ground of decision, syllabus 1, the opinion further saying (45 W. Va. at 471), "A deed of trust for future advancements or repairs may enable the debtor to place his property beyond the reach of his creditors." This same contention was rejected by the supreme court of Virginia in an earlier case. Alexandria Savings Inst. v. Thomas, 29 Gratt. 483 (Va. 1877). Under certain circumstances a mortgage for future advancements might be used in furtherance of a scheme to defraud creditors, but there was no such allegation in this case.

creditors merely because it was given to secure bona fide future advances, actually made thereafter in reliance thereon.

Then, without mentioning *Lawyer v. Barker*, or citing any of the earlier cases, the court decided *Hall v. Williamson Grocery Co.*,[7] in which a mortgage for future advances was accorded priority over a subsequent mortgage recorded before the advances were made. It held that in the absence of actual, not constructive, notice of the execution of the subsequent mortgage, advances by the first mortgagee will take priority. The rule, quoting a text authority[8] was stated,

> "A prior mortgagee is affected only by actual notice of a subsequent mortgage, and not by constructive notice from the recording of the second mortgage, and for all advances made by such mortgagee before receiving such notice of a subsequent encumbrance his mortgage is a valid security. Such, it is conceived, is the rule supported by reason and the weight of authority. * * * * Whether the mortgage intended to secure future advances disclosed the nature of the transaction or not, there is no good reason why it should not remain a valid security for all advances that may be made until the mortgagee receives actual notice of subsequent claims upon the property. The burden of ascertaining the amount of an existing incumbrance should rest upon him who takes a conveyance on the property subject to the mortgage. He has notice by the record of the existence of a mortgage for the full amount of the intended advances, and if he wishes to stop the advances where they are at the time of recording his subsequent deed, it is only reasonable to require him to give actual notice of his claim upon the property; otherwise he should not be heard to complain that the prior encumbrance amounts at any future time to the full sum for which it appeared of record to be an incumbrance."

Subsequently, in *Simms v. Ramsey*,[9] this rule was reaffirmed, and there appear to be no later decisions on the subject.

In order to better appraise the situation of the mortgagee or trust creditor in making future advances, it may be well to examine the various types of such instruments before mentioned, and the

[7] 69 W. Va. 671, 72 S.E. 780 (1911). The deed of trust was to secure Grocery Company in a sum not to exceed $800 for any and all future sales and deliveries of goods to the grantors within a period of two years. A subsequent deed of trust to Hall & Co. was executed at a time when there was nothing due Grocery Co. Hall & Co. alleged actual notice to Grocery Co. of the execution of the subsequent trust, but the court held that the evidence was insufficient to prove this fact.

[8] 69 W. Va. at 675, quoting JONES ON MORTGAGES § 372 (6th ed. 1933).

[9] 79 W. Va. 267, 90 S.E. 842 (1916). The actual point of decision was whether certain debts were secured by the trust, but the opinion restates the rule of Hall v. Grocery Co., *supra* note 7, without citing that case, or any of the earlier decisions.

application of these decisions and other pertinent authorities from other jurisdictions.

The problem under consideration is peculiarly evident in construction loans where the funds are advanced during, or after, construction. As mechanics' liens attach from the time the first work is done or materials furnished,[10] there are always some such inchoate liens in existence until after the work is completed and all potential lienors paid or until the period of limitation (ninety days) for filing has elapsed. What then, is the priority of advances where the instrument is recorded before work begun but the advances made during the course of construction?

If the principle of *Hall v. Grocery Co.*[11] be applied literally, in most instances the mortgage construction advances would probably be subordinate to the mechanics' liens, as almost every such lender has actual notice of the pendency of construction and of the fact that work is being done and materials furnished, although whether actual notice existed of any particular mechanics' or materialmen's claim would, in each case, be a question of fact.[12] Unless, therefore, the mortgagee secures releases or waivers from each possible mechanic lien claimant, the priority of subsequent advances under the prior mortgage would be in doubt, as it would turn, in each instance, on the question of actual notice. This is not an enviable state of the law for the construction loan mortgagee,

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[10] W. VA. CODE c. 38, art. 2, § 17 (Michie, 1949). Mechanics' liens take priority over a deed of trust recorded subsequent to the commencement of work. Cushwa v. Imp. L. & B. Ass'n, 45 W. Va. 490, 32 S.E. 259 (1898).

[11] 69 W. Va. 671, 72 S.E. 780 (1911).

[12] There are no West Virginia cases involving priority between construction loans and mechanics' liens in which either the question of priority or the subsidiary question of notice has arisen. In Cushwa v. Imp. L. & B. Ass'n, 45 W. Va. 490, 32 S.E. 259 (1898), and Houston Lumber Co. v. W. & T. Ry., 69 W. Va. 682, 72 S.E. 786 (1911), it was held that the mechanics' lien was prior for the full amount, including work done or material furnished subsequent to the recording of the deed of trust, where the deed of trust was recorded after work had commenced. Of course, the mechanics' lien can attach only to such interest as the person contracting for the work may own, so a vendor's lien is superior, Charleston L. & M. Co. v. Brockmeyer, 18 W. Va. 586 (1881), even if reserved in a deed executed and delivered subsequent to the commencement of work. And where the person contracting for the work has no title, legal or equitable, no lien can attach. Mahan v. Bitting, 103 W. Va. 449, 137 S.E. 889, 52 A.L.R. 689 (1927). There appears to be a division of authority as to whether more than notice that work is being performed is necessary to constitute actual notice of intervening liens. *Cf. W.* A. Allen Co. v. Emerson, 108 Me. 221, 79 Atl. 905 (1911), and Gray v. McClellan, 214 Mass. 92, 100 N.E. 1093 (1913) (knowledge of construction sufficient); Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288 (1888) (actual notice of particular lien necessary); Kentucky Lumber etc. Co. v. Trust Co., 184 Ky. 244, 211 S.W. 765, 5 A.L.R. 391 (1919) (mere knowledge of construction not sufficient).

and it is surprising the question has not reached the supreme court of appeals.

In certain other jurisdictions, apart from statutes which sometimes regulate construction mortgages,[13] priority is made to turn upon whether the making of the advances is obligatory upon and not merely optional with the mortgagee.[14] This principle is not mentioned in any of the West Virginia decisions, but it is often a decisive factor in other jurisdictions, also, in other types of mortgages for future advances, as will be noticed hereafter. Certainly, if the advances are obligatory, actual knowledge of intervening mechanics' liens should not defeat the priority of the advances, but some of the cases require both an obligation to advance, and lack of actual notice. And some allow priority to optional advances, where made before actual notice.[15] But in one jurisdiction, priority is allowed only to the extent the advances are actually used in construction, regardless of obligation or notice. The construction mortgagee is required to use diligence to ascertain that the advances are so used.[16]

In one class of cases only does there seem to be unanimity of opinion in allowing priority to the mortgagees. Where the mortgage secures an issue of negotiable notes or bonds, which are to be sold to third parties, the mortgage is accorded priority as of its

[13] In Virginia, a construction loan, even though recorded prior to the commencement of work, is subordinate to mechanics' liens. Rust v. Indiana Flooring Co., 151 Va. 845, 145 S.E. 321 (1928). And a prior mortgage takes precedence only to the extent of the estimated value of the land without the structure. VA. CODE §§ 43-20, 43-21 (1950). Thus, short of complete supervision of the project, the security of the construction mortgagee rises no higher than the integrity of the owner and general contractor, if any.

[14] W. P. Fuller & Co. v. McClure, 48 Cal. App. 185, 191 Pac. 1027 (1920) (advancements optional, no priority); Valley Lumber Co. v. Wright, 2 Cal. App. 288, 84 Pac. 58 (1905) (advancements obligatory, priority); Weissman v. Volino, 84 Conn. 326. 80 Atl. 81 (1911); Erickson v. Ireland, 134 Minn. 156, 158 N.W. 918 (1916) (advancements obligatory, priority although notice of construction); Alexandria Savings Inst. v. Thomas, 29 Gratt. 483 (1877) (if obligatory, priority although actual knowledge; if optional, priority if no knowledge).

[15] *Cf.* Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641 (1888), where the rule is stated to require both, and W. P. Fuller & Co. v. McClure, 48 Cal. App. 185, 191 Pac. 1027 (1920), where the obligation to advance is held sufficient.

[16] First National Bank v. Virden, 208 Miss. 679, 45 So.2d 268 (1950). Mortgage recorded before start of construction, and loan advance in installments by mortgagee without ascertaining state of construction, and without actual knowledge as to particulars thereof. Of $11,200 only $7,315.76 went into construction. The mortgage was accorded priority only to the extent of the funds which actually were used in construction, the court holding that it was the duty of the mortgagee to see to the application of the funds even though the advances were obligatory, saying, "The mortgagee, in a case such as this, should advance the proceeds with reasonable diligence in order that the holders of statutory liens may not be unjustly defeated in their claims. It is simple justice that such mortgagee shall have preference only to the extent that its funds actually went into construction."

recordation, regardless of the time of actual sale of the notes or bonds, or of equities, such as mechanics' liens, which may have intervened before they are sold.[17] The opinion in *Central Trust Co. v. Continental Iron Works*,[18] a leading case, quotes from the opinion in *Reed's Appeal*[19] as to the rationale of the rule:

> "Where a mortgage is given to cover future advances of one man to another, it is not a matter of much inconvenience for the mortgagee to ascertain, from time to time, as he is called on for advances, whether there be intervening liens. But a different case is presented where a public improvement is undertaken, requiring the expenditure of large sums of money and the floating of a debt of great magnitude. The debt is necessarily divided into small parts and carried into different and distant markets. It would be out of the question to ascertain the state of the record or of the company's affairs each time a bond was about to be sold. If this were made the duty of purchasers it would prevent the sale of such securities altogether, or at least confine their purchase to such large concerns as could buy in bulk after due and careful inquiry; even then the facts would be open to doubt at every subsequent sale. Thus, their value would be entirely reduced."

This is, indeed, pragmatic law, not based on legal principle or logical reasoning, but purely upon the supposed convenience of the parties. Logically and historically, the law makes no distinction between the *number* of persons who may be affected by a rule of law. A hundred persons should have no greater rights than one. And it is, of course, pure hypothesis to premise that one person may have greater access to the facts that a hundred, as the greater number can, and often do, more effectively protect their interests through agents or representatives.

As the usual construction loan is made by only one mortgagee, is there, then, any practical manner by which such construction loan mortgagee may be assured of actual priority, where the mortgage is recorded prior to the commencement of any construction? The entire loan can, of course, be advanced simultaneously with recordation, but few mortgagees are willing to so trust the owner. A common practice is to advance only as construction progresses in certain stages, but this offers no protection unless all the potential

[17] Landers-Morrison-Christenson Co. v. Ambassador Holding Co., 171 Minn. 445, 214 N.W. 503, 53 A.L.R. 573 (1927); Central Trust Co. v. Continental Iron Works, 51 N.J. Eq. 605, 28 Atl. 595, 40 Am. St. Rep. 539 (1894). Both involved intervening mechanics' liens, although the rule is the same regardless of the nature of the intervening lien claim.

[18] *Supra note* 17.

[19] 122 Pa. St. 565, 16 Atl. 100 (1888).

lien claimants are, in fact, paid as the advances are made. If partial waivers or releases are secured from those performing the work, before making an advance, the lender has actual notice of their possible future claims and liens, and can safely make no subsequent advance without another release or waiver. But securing such releases or waivers is, indeed, the only sure means of protection to the mortgagee, as impractical and difficult as it may be. Eternal vigilance is the only assurance of safety, where priority is so dependent upon extrinsic circumstances.

Certainly, the rule ought to be that future advances pursuant to an agreement between the mortgagor and mortgagee, obligating the latter to make them, are protected irrespective of notice of intervening liens. And this is no less true of other types of mortgages for future advances. And although there is no authority in West Virginia on the question, most of the courts which have considered the problem do allow priority to obligatory advances, irrespective of intervening liens or actual notice thereof. As one Court put it,[20] "to hold that under such circumstances a subsequent mortgagee and a stranger could arrest the performance of such a contract, against the will of the immediate parties, would be practically to impair its obligations." But "optional" has usually been treated in the sense of "not obligatory" or "not required," and so has resulted sometimes in priority being denied where the mortgagee is given the right to make further expenditures, at his option, on the security of the mortgaged premises,[21] irrespective of the consent or lack thereof of the mortgagor.

Almost every mortgage or deed of trust contains a provision of this type for a future advance to protect the security. Commonly, the mortgagee is permitted to pay taxes, procure insurance, defend litigation, and by various other means make independent advances and tack the same to the secured debt. As to taxes the mortgagee is clearly entitled to priority under the principle subrogating the lien holder to the lien of the state,[22] but the status of other advances, not so privileged, would seem in doubt, since the mortgagee might decline to make the advances. But where failure to make the ad-

[20] Hyman v. Hauff, 138 N.Y. 48, 33 N.E. 735 (1893). The advances were of building materials for use in construction, pursuant to a contract.

[21] In Elmendorf-Anthony Co. v. Dunn, 10 Wash.2d 29, 116 P.2d 253, 138 A.L.R. 558 (1941), the construction mortgage gave the lender, at its option, the right to complete the dwelling upon abandonment by the owner. At the time of abandonment, the mortgagee had actual notice of a second mortgage, but finished the dwelling in order to make it salable. The court held this an optional advance and junior to the second mortgage.

[22] Henry v. Musgrave, 113 W. Va. 448, 168 S.E. 474 (1933).

vances subjects the mortgagee to risk of loss, they cannot be termed optional in a realistic sense.[23]

Actually the optional advance should mean only such advance as requires the concurrent request or consent of the mortgagor. If the mortgagor is bound by contract to permit the advance, and the recorded mortgage gives notice of this fact, third parties should have no right to alter the pre-existing agreement.

The West Virginia cases, disregarding *Lawyer v. Barker*,[24] all seem to involve the truly optional future advance and accord with the majority rule in other jurisdictions which gives them priority over subsequent liens, except after actual notice of such intervening liens, constructive notice by the recordation of the intervening lien being insufficient.[25] Certain decisions in other jurisdictions support the contrary doctrine and accord priority to the optional advance, where the subsequent encumbrancer had record or other sufficient notice.[26] And under either view it is immaterial whether the recorded mortgage so describes the indebtedness or advances secured thereby so that the intervening encumbrancer could have determined from the mortgage the true amounts secured.[27]

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[23] This distinction is recognized in *Re* Harris, 156 Misc. 805, 282 N.Y. Supp. 571 (1935). In Cedar v. Roche Fruit Co., 16 Wash. 652, 134 P.2d 437 (1943) the same court which decided Elmendorf-Anthony Co. v. Dunn, 10 Wash.2d 29, 116 P.2d 253 (1941), recognized as obligatory advances by the mortgagee necessary to protect a crop and prepare it for sale.

[24] But in Lawyer v. Barker, 45 W. Va. 468, 31 S.E. 964 (1898), it may well be inferred that an agreement had been made by the mortgagee to make the repairs for the mortgagor, and hence his performance was not optional. Certainly his rights were not less than the mortgagee in Hyman v. Hauff, 138 N.Y. 48, 33 N.E. 735 (1893).

[25] The following cases are illustrative, but not exhausive. Savings & L. Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922 (1895) (record notice not sufficient); DuBois v. First Nat. Bank, 43 Colo. 400, 96 Pac. 169 (1908) (same); Schmidt v. Zahrndt, 148 Ind. 447, 47 N.E. 335 (1897) (same); Brinkmeyer v. Browneller, 55 Ind. 487 (1876) (actual notice defeats priority); Heintze v. Bentley, 34 N.J. Eq. 562 (1881) (actual notice through judicial proceedings); Alexandria Savings Inst. v. Thomas, 29 Gratt. 483 (Va. 1877) (knowledge of subsequent encumbrance defeats priority). There are a few cases contra to the effect that mere recordation of the intervening encumbrance is sufficient to cut off priority of advances under the prior mortgage.

[26] Texas appears to adhere to this view. Jolly v. Fidelity Union Trust, 15 S.W.2d 68 (Tex. Civ. App. 1929); Mercantile Co. v. Hause, 184 S.W. 737 (Tex. Civ. App. 1916). Mississippi has usually been cited as supporting it, but in North v. J. W. McClintock, 208 Miss. 289, 44 So.2d 412 (1950), the supreme court of Mississippi, with one dissent, refused to follow Witczinski v. Everman, 51 Miss. 841 (1876).

[27] Hall v. Williamson Grocery Co., 69 W. Va. 671, 72 S.E. 780 (1911); Mercantile Co. v. Hause, 184 S.W. 737 (Tex. Civ. App. 1916); Bullard v. Fender, 140 Fla. 448, 192 So. 167 (1939); Union National Bank v. Moline, 7 N.D. 201, 73 N.W. 527 (1897).

It is the opinion of this writer that a duly recorded mortgage or deed of trust for future advances, optional or not, which states with sufficient clarity the amount and character of future advances which it is intended to secure, should take priority as to future advances over subsequent encumbrancers and purchasers, whatever the nature of the encumbrance and regardless of actual notice or knowledge of the subsequent lien. It is certainly no hardship to the mortgagee to require that the amount and extent of future advances be stated with reasonable accuracy, in order that subsequent parties may have notice of the possible extent of his claim. While this opinion is bottomed more upon the hard facts of modern financing than upon any attempt to do theoretical justice as between encumbrancers, which is the sole justification for the prevailing rule, it is certainly not unfair to subsequent parties.

Theoretically, perhaps, the first mortgagee may suffer no loss if his right to make an optional advance is cut off by actual notice of an intervening equity. This may be a just rule as between individual mortgagees, but it will not work as to corporate lenders, which are by far the greater proportion of mortgage lenders today. What constitutes actual notice to a corporation? As is often the case, the general rule is easy to state but difficult to apply. Broadly speaking, corporations are bound by the knowledge acquired by their officers or agents acting within the actual or apparent scope of their authority.[28] Thus, it is not only possible, but often probable, that notice to one officer may not actually be communicated to another officer or employee actually handling the advances. Thus the only safe course for the corporate lender is complete investigation before any advance, and the difficulties of that have already been pointed out in discussion of the construction loan.

The rule allowing a subsequent encumbrancer to cut off the right of a prior mortgagee is, in fact, but an offshoot of the traditional vigilant watch kept by the courts to prevent a debtor from conveying his property so as to delay or hinder even subsequent

[28] There are, of course, exceptions. American National Bank v. Ritz, 70 W. Va. 409, 74 S.E. 679, 40 L.R.A. (N.S.) 156 (1912), where the interest of the officer is adverse to the bank; First National Bank v. Lowther-Kaufman Oil & Coal Co., 66 W. Va. 505, 66 S.E. 713, 28 L.R.A. (N.S.) 511 (1909), same as to director. The ramifications of the rule are beyond the scope of this article.

creditors.[29] Further, the recording acts have been construed to have no application to creditors, except as to the rights of purchasers for a valuable consideration without notice.[30] Thus it is but logical for the courts to view the prior mortgagee as a voluntary grantee as to the advances not yet made. Indeed, stretching that logic to its end result, all mortgages would be void as to the advances not yet made, as the supreme court actually once held in the *Barker*[31] case.

But why should not the subsequent encumbrancer take subject to the prior recorded instrument, if that fairly discloses the facts? The public records are open to all, and it is no hardship to require an interested encumbrancer to take notice of and subject to what they may disclose. If displeased, he may proceed no further, and can lose nothing. Why should the subsequent encumbrancer be permitted to destroy the right of the prior mortgagee to make future advances secured by an instrument of record? This view would require, of course, a change of the presently prevailing rule that it is unnecessary for the mortgage to truly disclose the advances to be secured. In all "open-end" mortgages and all construction mortgages which this writer has seen, the possible amount of any future advance is now stated.

It is interesting to note that if the debtor should pledge intangibles, such as notes or securities, the pledgee may make further advances without risk, so long as he retains possession of the pledge, barring, of course, a creditors' suit to reach the pledgor's equity. The law of real property conveyancing has advanced far since the day when livery of seisin, or physical transfer of possession of the land was requisite, to place it on an equality with the ease of transferring, or pledging, intangible personalty, but the present status of the law as to future advances secured by real property is so fraught with peril for the lender as to make doubtful the wisdom of making such loans on so precarious a security. The situation can, and should, be remedied by legislation, particularly as to construction loans.

[29] W. VA. CODE c. 40, art. 1, §§ 1, 3 (Michie, 1949). While the latter section provides that as to subsequent creditors a conveyance shall not be set aside solely because voluntary, yet if the subsequent creditor proves that the grantor had existing creditors at the time of his conveyance, and there was not left in his hands an ample amount of estate to satisfy the existing creditors, the conveyance was deemed fraudulent as to subsequent creditors also. Rogers v. Verlander, 30 W. Va. 619, 5 S.E. 847 (1888).

[30] Bank of Marlinton v. McLaughlin, 121 W. Va. 41, 1 S.E.2d 251 (1939). Of course, mortgagees are conceded to be purchasers for a valuable consideration as to advances contemporaneously made.

[31] Lawyer v. Barker, 45 W. Va. 468, 31 S.E. 964 (1898).