

1888

# Mortgages to Secure Future Advances

Andrew Robert Cunningham  
*Cornell Law School*

Follow this and additional works at: [http://scholarship.law.cornell.edu/historical\\_theses](http://scholarship.law.cornell.edu/historical_theses)

 Part of the [Law Commons](#)

---

## Recommended Citation

Cunningham, Andrew Robert, "Mortgages to Secure Future Advances" (1888). *Historical Theses and Dissertations Collection*. Paper 159.

This Thesis is brought to you for free and open access by the Historical Cornell Law School at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Historical Theses and Dissertations Collection by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

Cunningham, Andrew Robert

## Mortgages to Secure Future Advances.

Introduction-- It has been for some time a well settled principle of law that Mortgages to secure future advances or liabilities are equally as binding and valid, if made in good faith and free from fraud, as those made to secure a past or present indebtedness.

Their adoption and extensive use have been the outgrowth of the requirements of trade and their special adaptation to business transactions.

They have become a recognized form of security throughout the United States, except perhaps in a very few states where statutes have been passed forbidding or restricting their use.

Parties are enabled by this means to arrange for prospective dealings, the ultimate character and scope of which cannot be known or estimated at the time of entering into the agreement, and securities of this nature avoid the necessity and expense of preparing new articles of agreement for each separate dealing.

It is not unusual for a person who contemplates

entering into some project that will entail the investment of considerable capital, to mortgage his property to his creditors as a security for debts to be contracted, as well as for those already due, and by so doing insure the payment of legitimate obligations.

Mortgages made in good faith, for the purpose of securing creditors, have been generally sustained both in early and recent cases by reason of their fairness and consistency with common usage.

There is a great diversity of opinion with respect to the subject of future advances, but this lack of harmony does not exist because of any question regarding the validity of such mortgages in general, but for the following reasons, viz.:

1. Whether or not the nature of the subject matter and the definite amount to be secured should be expressed on the face of the instrument.

2. Whether such a mortgage is to take precedence over the subsequent liens of creditors, purchasers and incumbrancers, for advances made after such subsequent liens have attached.

In some states it is held to be essential to the

validity of such a mortgage that it should expressly and distinctly specify on its face what it secures, so that it would be unnecessary for a stranger to seek beyond the mortgage to ascertain, aliunde, the required information.

Again, we find many courts holding directly to the contrary.

Others have held that a mortgage for future advances to be made or liabilities to be incurred, when duly recorded, is valid and enforceable for all indebtedness entailed on the strength of it before actual notice of the supervening rights of third persons. Then again many eminent judges have held merely constructive notice to be adequate.

The latter views have been qualified and a distinction made between mortgages, on the one hand, where the constituent part of the agreement is the binding contract by which the mortgagee is bound to make and the mortgagor to accept such advances, wholly unaffected by any change of circumstances, and the other class, which is optional to the parties interested, whereby there is no obligation on the one side to make and the

other to accept such advances.

The most important class of mortgages to secure future advances is where the future advances arranged for at the time of giving the security are designated or designed by both parties to be made, provided the general status of the parties remains unchanged, but where nevertheless it remains optional with both the mortgagor and mortgagee to put an end to their business relations whenever such a course is deemed advisable, sometimes by definite notice to that effect, or by simply treating their agreement as to future advances in the light of a nullity, and of no binding force.

Under this category we can include by far the greater number of cases ranged under the general denomination of mortgages to secure future advances, and they in a great measure embrace that class which is practically important to the commercial world.

It will be here attempted to present the leading features of this subject in as concise and lucid a manner as possible, and in order to do so in something like a systematic way the subject will be treated under the following heads, viz.;

I. Whether the purpose of a mortgage to secure future advances should be stated on its face ;

II. What evidence independent of the deed is admissible to interpret and explain the terms of the agreement ;

III. whether or not the utmost limit of the lien should be specified ;

IV. As to what notice is sufficient to charge the mortgagee with knowledge of the rights of a subsequent incumbrancer.

I. What language in the deed itself is necessary and sufficient to create such a security ?

There is some little conflict among the authorities regarding the necessity of stating the purpose of the agreement upon the face of the instrument, and numerous cases could be cited holding that the omission to state fully and clearly the object would in itself be sufficient to render the mortgage invalid for the purpose for which it was executed : but the more moderate and

reasonable doctrine, and that which is accepted by the great preponderance of authority, is, that where there is a definite and determined amount expressed in the instrument, which the mortgage is given to secure, there would seem to be no imperative need for stating whether the amount so specified was to cover a past indebtedness or for the purpose of obtaining future advances.

Some writers have endeavored to draw a distinction between the principle of making a mortgage to be a security for subsequent advances as between the parties themselves, and that of giving it the same extended application when employed against third persons.

Though the mortgage need not necessarily express that it was given as security for advances to be made or liabilities to be incurred by future endorsements, still the extent of the lien intended to be created should be described with a reasonable degree of certainty ; but the condition need not be so definite as to preclude the necessity of extraneous inquiry---it is sufficient if enough is stated so that by exercising

ordinary prudence and diligence in consulting the mortgagee the nature and amount of his incumbrance can be ascertained and all requisite information gained ; so that there can be no justifiable reason for establishing a different principle of law for the guidance of third persons holding other liens upon the estate, ~~and~~ <sup>from</sup> that applied to the parties to the instrument themselves.

Though it is not necessary that the mortgage should express on its face the object for which it is given, still it would be better to state such object in the mortgage, as such omission, though not affecting the validity of the instrument, renders it liable to suspicion and imposes upon the mortgagee much stricter proof of the payment of the consideration than if such purpose had been clearly and definitely stated.

The form of the security varies considerably and is governed by the attendant circumstances of each case, but the general rule of law is now perfectly well settled that a mortgage to secure future advances may be given in the form of a gross sum expressed on the face of the instrument, as representing a present indebtedness ; and as it frequently happens that this indebtedness

arises out of complicated transactions, where it would be exceedingly difficult if not absolutely impossible to describe the securities or the debts except in this general way, such a description will be deemed sufficient as against subsequent incumbrancers, purchasers and creditors.

What more could rightfully be required of the prior mortgagee than that he should give the subsequent incumbrancer fair and reasonable notice of the utmost possible amount of his lien ? Should the supervening incumbrancer feel disposed to do so, he could readily ascertain from the mortgagee the exact amount of his claim within the amount specified in the mortgage, or should he feel so inclined, he could treat the mortgage as security for the whole amount named. In either case he could not possibly suffer any injury. The prior mortgage in any event is only a lien for the actual amount of the indebtedness existing between the parties at the particular time, and it cannot make an <sup>^</sup>possible difference *y/* to the incumbrancer whether such indebtedness existed at the time of the execution of the mortgage,

or was created by subsequent advances.

It is to be observed with no small degree of satisfaction that the courts have exhibited a commendable disposition to recognize any form of security which was executed in good faith and relied upon at, and subsequent to, the time the advances were made.

In a leading American case upon the subject :  
Shirras vs Caig 7 Cranch 34. A mortgage given presumably as security for 30,000 pounds sterling, but with the real purpose of securing various debts existing and due at the time from particular mortgagees, advances afterwards to be made and liabilities to be incurred to an uncertain amount ; the security was held valid as against future incumbrancers and creditors even as to future advances made before notice of any intervening equity.

A mortgage to secure sums due and to become due held sufficient.

Insurance Co. vs Brown 11 Mich. 266.

The following was held to be sufficient "to secure all past indebtedness due and owing."

Machette vs Wanless 1 Col. 225.

"What I may owe him on book" was construed to mean future accruing accounts after it was ascertained that there was nothing owing at the time.

McDaniels vs Colvin 16 Vt. 300.

A mortgage for the payment of such sums of money as the mortgagee might advance in pursuance of an agreement mentioned in the condition of a certain bond given by the mortgagee to the mortgagor of even date, contains reasonable notice of the incumbrance.

Crain vs Deming 7 Conn. 387.

Mix vs Cowles 20 Conn. 420.

When it has been shown that the mortgage was given in whole or in part as security for future advances, the burden of proof rests upon the mortgagee to show the amount which has been advanced.

The next question to be considered is :

II. What evidence independent of the deed itself is admissible to interpret and explain the terms of the agreement ;

It is a general rule that parol evidence cannot

be given to deny or contradict a written contract, but to this rule there are some exceptions : e.g. It has been held in many cases that parol evidence can be given to contradict or explain a mere receipt, and this principle has long since been extended to the acknowledgement of the payment of the consideration as represented in a deed. And again the occurrences are very frequent where parol evidence is admitted, not to vary or contradict a written contract, but to indicate and explain the purpose and intent for which it was executed : e.g. Where evidence is admitted to show that a deed, absolute upon its face, was intended merely as a security for money.

The authorities seem to agree almost universally that when a mortgage has been made to secure an existing debt or liability, parol evidence is admissible to prove the identity of the debt or obligation intended to be secured by the parties, and the fact that such evidence differs materially from the written description in the deed, would not affect the competency of such evidence. Therefore where a mortgage expresses on its face that it is given as security for a certain, fixed sum of

money, it may be shown that its purpose was to secure advances which were to be made subsequent to the execution of the instrument, and the fact that the agreement to make and accept such advances was made verbally, will not be detrimental to the rights of the mortgagee. This conclusion is reached from the fact that supervening purchasers or incumbrancers must have consulted the records and therefore could not have been ignorant of the fact that the prior mortgagee had a claim on the property mentioned as security, and such knowledge must naturally have been obtained before giving credit ; therefore there seems to be no valid reason why the mortgagee should not have priority to the full extent of advances made and liabilities incurred according to the terms of the agreement ; providing such claim does not exceed the amount specified in the mortgage.

Chancellor Kent 4 Kent's Commentaries 176, says :

"So a mortgage or judgment may be taken and held as  
"a security for future advances and responsibilities  
"to the extent of it, when this is a consistent part  
"of the original agreement, and the future advances

"will be covered by the lien in preference to the  
"claim of the junior intervening incumbrancer with  
"notice of the agreement."

III. Another fruitful field of discussion is the question as to whether or not the utmost amount of the lien should be specified in the mortgage.

The decisions on this point are equally as conflicting as those bearing on the necessity of expressing the purpose of the agreement.

In a number of cases it has been held that where a mortgage expresses on its face that it was executed for the purpose of securing future advances, it is essentially necessary that it should also state the ultimate extent of such advances ; otherwise it would be invalid.

Pettibone vs Griswold 4 Conn. 158.

Garber vs Henry 7 Watts 57.

The great weight of authority, however, at the present time tends the other way, and with the exception of a few states the courts strongly favor the opposite theory ; that where a mortgage expresses on its face that it is to secure future advances the utmost limit

of such advances need not be expressed.

Robinson vs Williams 22 N Y. 380.

Witczinski vs Everman 51 Miss. 841/846.

1 Jones on Mortgages 367 and note.

If the mortgage contains enough to show an agreement that is to be regarded as a security to the mortgagee for such subsequent dealings as may be entered into by the party, it will be sufficient warning to put a future purchaser or creditor upon inquiry, and if he should fail to exercise due diligence and ordinary prudence in making the investigation, he cannot claim the equities of a bona fide purchaser.

With our present system of recording, a mortgage, immediately on being filed, becomes a notice to the world of its contents ; until discharged it stands as a security for all indebtedness which it covers, accruing between the mortgagor and mortgagee. A person consulting the record is put upon inquiry to ascertain the amount of the liability which the mortgage was given to secure ; having been advised of the claims of the mortgagee, it would, under the circumstances, be folly on

the part of a third person to voluntarily buy or accept, as security, a deed of the mortgaged property.

The senior mortgagee having secured himself by a mortgage which, on being duly recorded, recited facts sufficient to give supervening incumbrancers reasonably fair means of ascertaining full information regarding the extent of his claims, such subsequent incumbrancers would be subordinated to the paramount rights of such prior mortgagee.

There have been strong expressions of disapproval by some writers claiming that a mortgage not stating the utmost limit of the prospective advances conflicts with and defeats the main purpose of our registry laws, and that instead of the record serving as a guide to subsequent creditors or purchasers by making known the real transaction, it contravenes and leads them astray by purporting to show what it does not do in effect.

Many persons seem to have a very erroneous idea as to the object and purpose of the recording acts. When the idea of the recording of written instruments was first conceived, it was most assuredly never intended by the legislature that the register should show the actual

amount due from time to time upon a mortgage, and the idea which was then formulated has not, that I can discover, undergone any change in this particular. A mortgage may be half paid a week after it is executed, and so only half the amount be due upon it as it stands upon the record, or it may be a mortgage of long standing with a considerable accumulation of interest upon it, so that the amount is much larger than that expressed on the record : yet no person would venture to assert that simply because the record does not at all times express the actual amount due on the respective mortgages it must therefore be charged with holding out a false light to misguide and embarrass those who consult it, and by so doing fail most signally in accomplishing the purpose for which it was created.

"If the means of ascertaining the extent of the lien are pointed out in the mortgage it is enough."

Allen vs Lathrop 46 Ga. 133.

IV. The most important remaining inquiry is in regard to whether or not actual notice is necessary to limit advances.

It is a well settled principle of law that, when the mortgagee has for a consideration undertaken to make, and the mortgagor bound himself to accept, certain future advances, such advances when made will relate back, and the mortgage will be a good and valid security for advances made and liabilities incurred against supervening purchasers, creditors and incumbrancers having notice of the prior mortgage.

Again, where there is no obligation between the parties, and the making and acceptance of such advances or liabilities are entirely optional, and the mortgagee has actual notice of a subsequent conveyance or incumbrance of the mortgaged premises before making advances or incurring liabilities, his security would not be good as against such subsequent incumbrancers.

But whether the senior mortgagee in a purely voluntary agreement, where the making and accepting of the advances are entirely optional, shall hold the mortgaged property as security for advances made after the making and recording of the subsequent mortgage, is a much mooted question in the courts of the various states ;

indeed there is no question which has yet arisen on the subject of future advances which has caused the same amount of vexed discussion and been marked by such diversity of opinion as that bearing upon the legal sufficiency of notice from a supervening incumbrancer or creditor to a prior mortgagee in a purely optional agreement for future advances.

Judge Redfield, in treating of the subject in a very full and clear exposition of the principles and authorities, says : "The general view of the American courts and uniform declaration of the English courts as far as we know, is, nothing short of notice in fact of the subsequent mortgage will have the effect of postponing advances made by the first mortgagee in favor of constructive notice of the intervening security : 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."

The same writer in a note to *Boswell vs Goodwin*, 3 Am. Law Rep. N. S. 92 ; favors the rule that a senior mortgagee to secure future advances should be governed by a constructive notice of a subsequent mortgage which had been duly recorded, and that his priority of lien would be of no avail for optional advances made afterwards. The learned judge says : "We never have been able to comprehend the hardship of requiring the prior mortgagee to secure future advances to take notice of the state of the registry at the time he makes the advance."

There would be no questioning the reasonableness of this doctrine in cases where the advances are to be made at long intervals of time and in definite and determinate sums. It is conceded that under such circumstances the prior mortgagee could have no just excuse for failing to notice the state of the register, if the law so required. But if, on the other hand, such advances were to be made daily or hourly, as is frequently the case in continuous dealings with bankers and brokers, the mortgagee would be compelled to keep a running account which would be constantly changing its balance.

Under such circumstances the mortgagee ought to have actual notice of a subsequent mortgage. The requirement that one should constantly watch the register in such a case, would either impose such an arduous duty and inconvenience upon the mortgagee as to render it scarcely less than a burdensome task, or it would tend to make such continuing security of little avail.

As it is necessary to have a uniform rule governing both classes of cases, which would merit the approval of business men, and at the same time commend itself to their ideas of right and justice, no better can probably be suggested than that which is sanctioned by the weight of authority.

Every subsequent purchaser knows that he is compelled to consult the record at his peril, and having examined it, he is immediately notified of the preëxisting lien upon the property and therefore, he having such notice, and the mortgagee being totally ignorant of the contemplated purchase, why should not the subsequent purchaser, who bargained with his eyes open as to the claim of the mortgagee, be compelled to sustain any loss that might arise from the foolishness of his act ?

To a subsequent incumbrancer who advanced money on the mortgaged property it might be said : you saw the record of the prior mortgage and knew what it was given to secure ; you voluntarily advanced your money subject to the prior incumbrance, and you cannot now be preferred to any part of it. He would unquestionably in the plainest equity be bound to give notice of such intervening interest or suffer the consequences of his negligence.

To make it imperative upon the senior mortgagee, after he has duly recorded his mortgage, to make inquiries before he acts, lest he might perchance injure some one, would be imposing the duty of notice and negligence upon the wrong person, as it would be compelling the prior mortgagee to perform a duty for the junior mortgagee which the latter should in all fairness be constrained to do for himself. It would be inequitable to allow such subsequent purchaser or incumbrancer, having notice of the record, to claim a preference over the senior mortgagee, who has made endorsements or advanced moneys upon the faith of the mortgage, after the

second incumbrancer, in ignorance of the supervening right or title.

The general principle of construction of the registry laws upon the point of notice, is that the registration of incumbrances is notice to subsequent incumbrancers only. Such notice is prospective not retrospective in its operation.

Chancellor Greene in Ward vs Cooke, 17 N. J. Equity 79 says : "A mortgage given to secure future advances, "duly registered, is good not only as against the mortgagor, but is entitled to priority over subsequent incumbrances for all advances made prior to the notice of "the subsequent incumbrance ; and the notice must be an "actual and not a constructive notice."

In Shirras vs Caig 7 Cranch 51. The Supreme Court of the United States held : "That a mortgage given for "future advances was a security for all advances made "and liabilities incurred upon its faith prior to the "receipt of actual notice of the subsequent title."

There are a few general principles which, not having a place under any particular head, will bear incidental mention before closing this treatise on the subject of future advances.

The validity of a mortgage to secure future advances is not in any way affected by the fact that such advances were to be made in another commodity than money, or that the advances are to be made to a third person at the solicitation of the mortgagor.

Where a grantee purchases subject to a mortgage for future advances, which the mortgagee has bound himself to make, such mortgage will stand as a lien for the amount agreed upon, even though the advances have not been made at the time of the purchase.

It is now well settled in this state that any debtor, whether solvent or insolvent, may, when acting in good faith, mortgage a part or the whole of his property as security for future loans or advances.

When a party by virtue of a mortgage obtains additional security for a preëxisting debt, it is to be regarded as a valid consideration for his promise to assume certain liabilities, and the agreement is not

optional but compulsory on his part, because there is a legal obligation on him to perform his agreement.

In reference to agreements for additional advances made subsequent to the execution of the mortgage.-

Where the original agreement between the mortgagor and mortgagee is in the form of an absolute deed, and the conditional defeasance is made by parol, a subsequent agreement to the effect that the mortgagee should make further advances or incur additional liabilities on the same security, would be valid and binding as between the parties. But, should the instrument state definitely the amount which it was given to secure, it could not afterwards be construed to represent other than the amount to be stated. Under such circumstances any subsequent agreement that the mortgage should stand as security for a sum additional to that named, would be invalid and of no binding force even as between the original parties, because the mortgage being clear and explicit in its terms speaks for itself, and under no circumstances can the written evidence of one contract be admitted as competent evidence to deny or contradict another.