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Mortgages--The Doctrine of Future Advances

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transfer to be set aside, it does not provide for damages against those who participate in the fraudulent conspiracy which is the issue in the principal case. By statute, W. VA. CODE ch. 38, art. 3, § 6 (Michie 1961), it is provided that every judgment for money rendered in West Virginia shall be a lien on all the real estate of or to which the defendant in the judgment is or becomes possessed or entitled, at or after the date of the judgment, and the lien shall continue so long as the judgment remains valid and enforceable. However, this lien is not effective against a bona fide purchaser until it is docketed in the county where the real estate is located. W. VA. CODE ch. 38, art. 3, § 7 (Michie 1961).

These statutes create a lien only where the property is located within the state. If the real estate conveyed is located outside the state, perhaps the West Virginia court will follow the law of the principal case. As the court in *Yates v. Joyce*, *supra*, said, "The common law abhors all manner of fraud, and wherever a person is injured by the fraudulent acts or contrivance of another, it will afford a remedy." While it is understandable that a general creditor who has no lien nor judgment may be denied an action for damages, the interest of a party who has spent time and money to obtain a judgment should be protected from those who fraudulently conspire to deny him the fruits of his effort. If the debtor's acts are designed to prevent satisfaction of this judgment, the debtor and his conspirators should be required to compensate the judgment creditor for expenses or losses occasioned by their acts.

John Welton Fisher, II

Mortgages—The Doctrine of Future Advances

X, a corporation, borrowed money for the purpose of building homes upon certain real estate and executed a construction loan deed of trust upon the real estate to secure the loan. The deed of trust provided for a schedule of payments and that the lender could advance any part of, or the whole of, any payment before it became due, and the same would be deemed to be made in pursuance of the agreement. In a proceeding involving disbursement of proceeds of foreclosure sales, the circuit court ratified the auditor's reports disbursing proceeds to the holder of X's notes secured by the first deed of trust, and the trustee in bankruptcy and suppliers

of the builders, appealed. *Held*, affirmed. The lender was free to advance money as it wished as far as X's creditors without liens were concerned, in absence of fraud or bad faith, and the lender did not lose priority of its lien as to money advanced with knowledge of unpaid claims of potential mechanic lienors. *Lamar v. Nysten*, 215 A.2d 806 (Md. 1966).

The principal case represents a problem that often arises in the business of mortgage financing. The most frequent conflict occurs between mortgages executed with provisions for future advances and mechanics' liens which may intervene before the subsequent advances are made. It is possible for the entire amount of the loan to be advanced prior to construction, but the usual procedure is for the money to be advanced in installments as construction goes along. In order for the question of priority to arise, an assumption must be made that the securing instrument is recorded before any work is done or any material is furnished in connection with construction. If the facts were otherwise, the mortgage would be subject to all mechanics' liens which may be perfected.

Many courts have made a distinction in cases where the making of the advance is obligatory upon the mortgagee or beneficiary. In such cases, in the absence of contrary statutes, mortgages recorded prior to the attachment of the lien secure the advances given subsequent to the attachment of the mechanic's lien. *Potwin State Bank v. J. B. Houston & Son Lumber Co.*, 183 Kan. 475, 327 P.2d 1091 (1958). This rule also has been frequently applied even where the mortgagee knew at the time he made the advance that the mechanic's lien had attached. *Oaks v. Weingartner*, 105 Cal.App. 2d 598, 234 P.2d 194 (1951). There seems to be no West Virginia authority on the above issues, but one writer has indicated that the above rule would be applied in West Virginia. Stealey, *The Mortgage for Future Advances in West Virginia*, 56 W. VA. L. REV. 107 (1954).

If the future advances are optional, rather than obligatory, further problems arise. The West Virginia court, citing JONES, MORTGAGES § 372 (6th ed. 1933), stated that by the weight of authority a prior mortgage is affected only by actual notice of a subsequent mortgage. The prior mortgage is a valid security for all advances made before such notice is received. The duty to give actual notice lies with the subsequent mortgagee, and he should be

required to perform such duty if he wishes to stop further advances from being secured by the prior mortgage. *Hall v. Williamson Grocery Co.*, 69 W.Va. 671, 675, 72 S.E. 780, 781 (1911). The New Mexico court in *Heller v. Gate City Bldg. & Loan Ass'n*, 75 N.M. 596, 408 P.2d 753 (1965), reiterated the above position stating that there is an overwhelming agreement among the courts that a first mortgagee, making optional future advances under the first mortgage with actual knowledge of an intervening lien, will not retain priority as to subsequent advances over the intervening lien. The court reasoned that this seemed to be the better rule. A contrary rule would place a mortgagor, who is unable to demand advances from the holder of the first mortgage, in the unfortunate position of also being unable to borrow on his property from another person. The reason for this arises from the possibility that, after the mortgagor gives a second mortgage, the holder of the first mortgage might make advances to the mortgagor and such advances would take priority over the claim of the second mortgagee.

All West Virginia cases in point seem to involve the optional future advance and are in accord with the majority rule in other jurisdictions, which gives them priority to subsequent liens, except after actual notice on the part of the first mortgagee. Stealey, *supra*. No applicable West Virginia cases have been decided since the publishing of the above article.

Thus, it seems that mortgages for future advances remain susceptible to certain pitfalls. The major pitfall is likely to occur in the case of optional advances when the mortgages has actual notice of intervening liens. Whether notice is sufficient to be considered actual is a question of fact. Mr. Stealey makes several suggestions as to what the law should be pertaining to such mortgages. It is his opinion 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 incumbrances regardless of actual notice of the subsequent lien. This would constitute a departure from the majority rule and the affiliated reasoning in the case of *Heller v. Gate City Bldg. & Loan Ass'n*, *supra*. The writer advocates such a rule because of the existence of many corporate lenders. It is extremely impractical to apply the rule of actual notice to a corporation because notice may not be communicated through the channels to

the officer handling the advances. Under the present rule the only safe course for a corporate lender would be to make a complete investigation before each advance is made. Stealey, *supra*.

Until legislation changes the present status of the law in West Virginia as to mortgages for future advances, the mortgagee will remain subjected to existing risks.

James Truman Cooper

Taxation and Interstate Commerce

P, the State Tax Commissioner, instituted a declaratory judgment proceeding in order to determine whether taxes paid by *D*, a West Virginia corporation, had been unlawfully collected. *D* had been acting as a merchandise broker pursuant to a franchise arrangement under which *D* had been granted the right to represent exclusively certain food processors located outside West Virginia. All of *D*'s business activities of soliciting, securing and preparing merchandise orders took place in West Virginia. After such orders had been secured, they were sent to the food processors who reserved the right to accept or reject the orders and, upon acceptance, filled the orders and arranged for delivery of the merchandise by common carrier F.O.B. point of shipment to the purchasers in West Virginia. The billing was sent directly to the purchaser by the processor, and payment was made directly to the processor. The circuit court directed *P* to refund the taxes because the collection contravened the commerce clause. U.S. CONST. art. I, § 8. *Held*, reversed. The imposition of a state gross earnings tax on the commissions paid by nonresident sellers to the manufacturer's representative for its services in soliciting, obtaining and transmitting orders within the state was not a violation of the commerce clause. *State ex rel. Battle v. B. D. Bailey & Sons*, 146 S.E.2d 686 (W. Va. 1966).

The principal case presents two basic constitutional factors which have been before the courts many times. (1) One basic principle is that in the federal system the authority of a state is limited to its own geographical territory, and therefore, it may not tax persons, things or events not within its own boundaries. *New York Lake Erie & W.R.R. v. Pennsylvania*, 153 U.S. 628 (1894).