

**Chattel Mortgages—Future Advances—Validity of Future Advance Clause.**

A chattel mortgage covering future advances will take precedence over a second mortgage when the future advances are a fixed sum and there is a binding agreement on the part of the mortgagee to advance the same.

April 14, 1917.

Hon. H. S. Magraw,  
Superintendent of Banks,  
Helena, Montana.

Dear Sir:

You have submitted a form of chattel mortgage, which contains a clause providing for future advances of money, and also provides that the same security should cover said future advances; the question submitted is: Whether or not a second mortgage taken by a third party and filed prior to the future advances being made by the mortgagee of the first party, is subject to this future advance clause?

The clause in the mortgage referred to is as follows:

"And also, as security for such future and additional sums of money as may, from time to time, hereafter, during the life of this instrument, be advanced and loaned by said mortgagee to said mortgagor, together with the interest thereon, which said future advances when made are to be evidenced by note (s) from said mortgagor to said mortgagee and are to be as fully secured hereby as though the same were specifically described and set forth herein, but for no greater amount, however, than.....Dollars."

The question of mortgages given to secure future advances was before the Supreme Court in the case of *Westheimer v. Goodkind*, 24

Mont. 90. At the time the mortgage was given to Goodkind to secure the payment of the \$600.00 note, the real indebtedness to Goodkind was \$374.14, and the mortgage was given to secure the debt then existing, as well as future advances. The plaintiff asked the court to instruct the jury that the effect of the mortgage in the particular mentioned, was to hinder, delay and defraud the creditors of the mortgagors. The Court refused the charge.

In passing upon the question, Mr. Justice Piggott said:

"Council insists that when a chattel mortgage is given to secure an amount then owing, and also future advances, it is necessary that the mortgage itself shall show the amount of the intended advances. The law is, however, well settled, that a mortgage need not itself disclose that it was given to secure the payment of future advances, and that it may be, as the one under consideration is, in the shape of a security for the payment of a sum certain, leaving the true nature and condition of the debt or obligation to be shown by evidence dehors the mortgage. (Citing cases)."

Mr. Jones in his work on Chattel Mortgages (Fifth Edition) Section 94, says:

"The earlier cases started with the proposition that a mortgage of personal chattels made to secure an existing debt was not invalid by a further provision intended to cover future advances. (Citing cases). While this proposition is true, the broader proposition, that a mortgage may be made to secure a debt which is wholly future, is also true, and has general recognition.

"If the amount of the advances be defined, and there be fixed obligations to make them, or the mortgage shows upon its face that it was given as a continuing security for advances to a certain amount, it is valid to that amount not only between the parties, but also as against creditors."

And again, Section 97:

"Advances made by a mortgagee after he has actual notice that others have acquired rights in the property will be postponed to the rights acquired by such other persons, unless the mortgagee be under a binding contract to make the advances, or it be essential to his own security to complete the advances contemplated by the mortgage. The general rule is, that a prior mortgagee is affected only by actual notice of a subsequent incumbrance, and not by constructive notice or it, but there are numerous authorities which hold that if the mortgagée has the option to make the advances or not, as he chooses, the mortgage, as to each advance made upon it, is to be regarded as a fresh mortgage, and is subject to the lien of any incumbrance which has been duly recorded at the time the advance is made, whether the mortgagee has actual notice of it or not."

From an examination of the future advance clause, *supra*, it will be seen that the mortgagee is under no binding contract to make ad-

vances and has the option to make the same or not, as he chooses, and should he elect to make said advances, the mortgage given is security for the same, to the amount limited in the mortgage.

Under the provisions of the said future advance clause, I am of the opinion that advances made by mortgagee after notice that others have acquired rights in the property are subsequent to the rights acquired by such person, and it follows that a second mortgage is subsequent to the future advances to the amount limited in the mortgage where the first mortgagee had no notice of others having acquired rights in the property.

Respectfully,

S. C. FORD,

Attorney General.