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MARYLAND MORTGAGES FOR FUTURE ADVANCES

By R. DORSEY WATKINS*

"No one, I am sure" said Lord MacNaghten, "by the light of nature, ever understood an English mortgage of real estate." This aphorism applies with equal appropriateness to a type of mortgage that has been the subject of statutory and lengthy case consideration in Maryland, and which the recent case of Neeb v. Atlantic Mill & Lumber Realty Co., Inc. shows is still of practical importance.

The validity of mortgages for future advances—mortgages intended to be security from their date of execution (or recordation) for loans and advances thereafter to be made—was well-recognized at common law. Their effect was to permit the rights of the mortgagee to be determined, as regards other lienors or encumbrancers, not by the date or dates upon which such advance or advances were made, but by the date (or recordation) of the mortgage itself, subject in some cases to the question of notice to the mortgagee of the existence of other liens when his advance was made, and to the further question of whether his advances were optional or obligatory.

Although probably intended primarily to serve as security for current balances in running accounts, or strictly by way of indemnity of an indorser, guarantor or accommodation party to commercial paper, they were often the

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2 5 A. (2d) 283 (Md. 1939).
4 See n. 23, infra.
subject of fraudulent or at least preferential arrangements. They might "cover a mortgagee against all future liabilities of any and every description, which the mortgagor might incur or be responsible for, to the mortgagee." In such a case, creditors subsequent to the effective date of the mortgage had no way of ascertaining with certainty the outstanding debts then secured by the mortgage, nor would such knowledge have been of more than momentary value, since immediately thereafter the mortgagee might make other loans or advances which would come under the lien of the mortgage. Moreover, while ordinarily called mortgages for future loans or advances, under such mortgages containing the broad coverage above mentioned (any liability for which the mortgagor might be responsible to the mortgagee) a mortgagee might buy up at depreciated prices claims against the mortgagor, and under the mortgage acquire priority for their face amounts against other creditors not so secured.6

As explained in Cole v. Albers,7 the first important case arising after legislation in Maryland on this question, a practice

"prevailed . . . of taking mortgages for specified sums of money, greatly below the value of the mortgaged premises, with a clause or clauses providing that the mortgaged premises should be held as a security for all future liabilities or advances by the mortgagee to the mortgagor, by which means the creditors of the mortgagor were defrauded, sometimes by fraudulent combinations between the mortgagor and mortgagee, or by the acts of the mortgagee alone, who, after the known insolvency of the mortgagor, purchased up liabilities of the mortgagor at depreciated rates, and held them as liens on the mortgaged premises for their nominal amounts; thus excluding a portion of the creditors from an equal dividend of the mortgagor's estate. Creditors becoming such after date of such mortgage, were deluded and suffered loss, which no precaution could guard them against."

6 Cole v. Albers & Runge, 1 Gill 412, 424 (Md. 1843).
6 Ibid.
7 Ibid.
This possibility, and apparently reality, of abuse, led to the passage of a statute in 1825 which reads as follows:  

"That no mortgage, or deed of that nature, that may be executed after the first day of August, one thousand eight hundred and twenty-six, shall operate or be construed to operate, either in law or in equity, as a lien or charge, on any estate or property whatsoever, for any other or different principal sum or sums of money than the principal sum or sums that shall appear on the face of such mortgage, and be specified and recited therein, and particularly mentioned and expressed to be secured thereby, at the time of executing the same."

It is to be noted that its terms were applicable to mortgages generally, and that it did not attempt to invalidate mortgages for future loans or advances to, or obligations of, the mortgagor, but only to fix, at the time of the mortgage, the maximum amount for which it could be held as security. It at least put the subsequent creditor on his guard, and warned him of the possible total amount for which the mortgage might be a prior lien.  

The Court in Cole v. Albers, in construing an instrument, intended to secure present and future advances to a fixed amount, succinctly stated the purpose of the Act, and the result accomplished by it, as follows:

"The design of the law-makers in the passage of the Act of 1825, Ch. 50, was to prevent liens on property, to the prejudice of creditors, for amounts and claims never contemplated by the parties at the time of its execution, and of which the deed, by its terms, gave no notice . . . Such transactions the law was designed to meet; but not a case like this, where the amount is stated; where the world is apprised of its limits, and where the parties design to cover all advances which may be made, to the extent of the sum limited in the mortgage. In the mortgage, now under consideration, no one could be deceived or prejudiced."

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7a Md. Laws 1825, Ch. 50. This is substantially the same as the first clause of the present Md. Code (1924) Art. 66, Secs. 2, 3.
8 The mortgage of course would be a lien only for its face amount or the amount due the mortgagee, whichever was smaller.
9 1 Gill 412, 424 (Md. 1843).
10 Called a "bill of sale" in the statement of facts, 1 Gill 418; a "deed of mortgage", 420; a deed, 422.
The Act was so strictly construed by the Chancellor in *Re Young*\(^{11}\) that in foreclosure proceedings he refused to allow the mortgagees, in addition to the principal sum, any further sum for "costs, charges or commissions", although the mortgage expressly contained such a stipulation. The mortgagees were held to be limited to "the sum which, upon the face of the instrument, is specifically secured by it."\(^{12}\) When this question came before the Court of Appeals in *Maus v. McKellip*\(^{13}\) a different conclusion was reached, and counsel fees and costs were recognized as expenses properly to be allowed in foreclosure. The Court said:

"It will thus be seen that although the Act of 1825, codified in Article 64 of the Code, was directed against any other or different principal sum or sums of money than the principal sum or sums that shall appear on the face of the mortgage, that is, against new loans or debts, not contemplated by the parties at the time of the execution of the mortgage, but contracted subsequently and attached to the original debt by a new and springing contract between the parties, yet there is nothing in the terms of the Act, either in its letter or spirit preventing a mortgagor from covenanting to pay in addition to the debt such costs and charges as the mortgagee may be obliged to incur in the collection of the same."\(^{14}\)

No cases of any significance\(^{15}\) followed until the leading

\(^{11}\) 3 Md. Ch. 461, 473-474 (1851).
\(^{12}\) Ibid., 474.
\(^{13}\) 38 Md. 231 (1873).
\(^{14}\) Ibid., 237.
\(^{15}\) In Claggett v. Salmon, 5 G. & J. 314 (Md. 1833) and Markell v. Eichelberger, 12 Md. 78 (1858) the validity of indemnity mortgages, the first of which, at least, contemplated future advances, was not raised. Fouke v. Fleming, 13 Md. 392 (1859) construed a "deed of trust, or quasi mortgage" for indemnity, and turned upon an unrelated point.

The Court was also required to determine whether or not the early Building and Loan Association member mortgages, not providing for the repayment of a designated sum, but for weekly or monthly payments until such time as there should be sufficient money in hand to pay each unredeemed share of its stock, were violative of the Act of 1825, for failure to state the amount secured ( repayable). It was decided that since the Act of 1862, Ch. 148, authorizing such associations, permitted mortgages in that form, the Act of 1825 was thereby repealed to the extent of any inconsistency. Robertson v. American Homestead Association, 10 Md. 397, 405, 69 Am. Dec. 145 (1857); Franz v. Teutonia Bldg. Assn., 24 Md. 259, 270 (1869). The question has also arisen since the Act of 1872, *infra*. It
decision of Wilson v. Russell. In that case the facts, somewhat simplified, were that Wilson had agreed to lend to Mason & Son, "promissory notes, from time to time, as may be desired by said firm" to an aggregate amount of $36,000 during three years from the date of the first loan, and $18,000 during the fourth year. The notes were to mature in six months and were "to be regularly taken up and retired at maturity" before new notes were issued. Mason & Son also agreed to pay Wilson an amount of money equal to five per cent. on the amount of each such note, to be applied on account of an old debt to Wilson discharged in insolvency. A deed of trust was executed by Mason & Son to secure Wilson "from all loss and injury in the premises" and also to secure the five per cent. payments. The deed of trust was promptly recorded. Later Mason & Son sold the property covered by the deed of trust, taking notes for the purchase price secured by a bond of conveyance, promptly recorded. Some of the appellees were holders of these notes, and claimed that at the time of the receipt thereof, they had no "knowledge or notice that any advances had been made under the" deed of trust, if in fact any had. The evidence clearly established that one series of notes was issued by Wilson immediately upon the execution of the deed of trust. These had been paid, and at the time of the execution and recording of the bond of conveyance a second series was outstanding. Thereafter these were paid, a third series lent and paid, and a fourth series issued and unpaid. Various questions were raised, including the validity of a mortgage in which the date of the first advance was not stated so as to fix the duration of the mortgage, and were decided adversely to the appellees. The question was clearly presented as to

is believed that these cases also are confined to the exemption of such mortgages from the application of the first clause only of Art. 66, Sec. 2—specification of the principal sum the mortgage is intended to secure—and do not hold that such mortgages are exempt from the provisions generally applicable to mortgages for future advances. Appeal Tax Court v. Rice, 50 Md. 302, 318 (1879); Loan & Savings Assn. v. Tracey, 142 Md. 211, 215, 120 A. 441 (1923); Bldg. & Loan Assn. v. Lumber Co., 168 Md. 199, 203, 178 A. 214 (1935).

15a 13 Md. 494 (1859).
the priority between advances under a prior recorded instrument intended to cover future advances, but in which the advances now sought to be enforced were not actually made until the recording of, and advances under, a subsequent encumbrance, and claimants under the second encumbrance.

The Court considered that the requirements of the Act of 1825 were met, as "the amounts which it was intended to secure are expressed in the deed, as required . . ." Nor was there any question as to the validity of instruments to secure future loans and advances, "if unexceptionable in other respects".

The Court, in giving retroactive effect to the subsequent advances under the prior lien, placed great reliance upon the case of Gordon v. Graham. The quotation from that case is as follows:

"A. mortgages to B. for a term of years to secure the sum of . . . already lent to the mortgagor, as also such other sums as should hereafter be lent, or advanced to him. Afterwards A. makes a second mortgage to C. for a certain sum, with notice of the first mortgage, and then the first mortgagee having notice of the second mortgage, lends a further sum, etc. The question was, upon what terms the second mortgagee shall redeem the first mortgage?

"Cowper, Lord Chancellor, held, 'that the second mortgagee shall 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; for it was the folly of the second mortgagee, with notice, to take such a security.'"

The Court referred to Spader v. Lawler as the only case to the contrary, but itself containing a strong dissent, and concluded:

\[^{15b}7\] Vin. Abr. 52 E. Plac. 3, 2 Eq. Cas. Abr. 598.
\[^{16c}\] 17 Ohio 371 (1848).
\[^{18}\] The question was whether or not a prior mortgage, with a clause covering "any other sum, or sums of money which the said [mortgagor] may be owing, or indebted to" the mortgagee, would be subordinate to a second mortgage, where the original loan had been repaid and the advances claimed for were made after the recording of the second mortgage. According to
“Upon this question there is some conflict of authority, but after an examination of the cases cited at the bar, and some others, we are of the opinion that the weight of authority sustains the principal of Gordon v. Graham.

“If the junior creditor may, ‘by inspection of the record, and by common prudence, ascertain the extent of the incumbrance’, the first incumbrance must prevail.”

The case is an interesting one, both from what it decides and what it ignores.

1. The instrument being construed is described as, and has the characteristics of, a deed of trust. It is, however, indifferently called a deed of trust or a deed “in the nature of a mortgage”. It certainly was not a technical mortgage, although the whole discussion was based upon the law of mortgages. If it were simply a deed of trust, the provisions of the Act of 1825, and of the provisions of Article 66, even before the amendment of Sections 2 and 3 in 1924, would have been inapplicable.

2. Nothing is said about whether or not the advances made by Wilson after the bond of conveyance were made with knowledge or notice of this conveyance. The bill of complaint stressed the plaintiffs’ lack of knowledge of advances by Wilson, but made no point of his knowledge or notice of their encumbrance. The answer of the trustees

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the counsel for the appellee, “the only notice on either side was that resulting from the recording of the mortgages.” (p. 377)

The majority opinions pointed out that in Ohio recording is “a part of the execution” of a mortgage, and it was questionable if a clause for future advances was of any effect whatever. Equitable mortgages were not recognized (p. 378), and a subsequent mortgagee with knowledge of an unrecorded prior mortgage would therefore be preferred if he recorded his mortgage first (p. 379). The first mortgagee was therefore bound by notice of the second mortgage from its recording.

The dissent felt that the burden should be on the second lienor to ascertain “the extent of the incumbrance at the time he makes his loan”, and that if the subsequent mortgagee wished to bind the first mortgagee, he should give actual notice.

17 Bank of Commerce v. Lanahan, 45 Md. 396, 409 (1876).
18 That a deed of trust is not a mortgage within the provisions of Md. Code (1924) Article 66, and its predecessors, has often been held. Eisinger Mill, etc. Co. v. Dillon, 159 Md. 185, 190, 158 A. 267, 269-270 (1930); Kinsey v. Drury, 146 Md. 227, 230, 126 A. 125, 126 (1924) (recording statutes); Dudley v. Roberts, 144 Md. 155, 124 A. 883 (1923); Digs v. Fidelity and Deposit Co., 112 Md. 50, 72, 75 A. 517, 521 (1910); Bank of Commerce v. Lanahan, 45 Md. 396, 408-9 (1876).
under the deed of trust in favor of Wilson expressly denied knowledge by them of the subsequent sale and bond of conveyance. The answer of Wilson seems carefully to avoid this point.

The failure of the Court to discuss this phase may permit any of several possible inferences.

a. It may have been considered immaterial; i.e., advances by the prior mortgagee, with or without knowledge of the second encumbrance, would be entitled to the benefit of the lien of the first mortgage.

b. The Court may have assumed that the first mortgagee necessarily had constructive notice of the second encumbrance, but was unaffected by that notice. The construction of Section 25 of Article 66, enacted in 1892, shows that, contrary to the usual rule, the holder of a recorded interest in mortgaged land may be charged with notice of subsequently recorded instruments. The enactment of the Act of 1892, and the strong reliance placed upon it in the cases cited in the preceding footnote may, however, indicate a contrary result.

c. The significance of notice to the prior mortgagee may not have been realized.

The conclusion of the writer, however, is that the Court intended to adopt the rule it believed was established in Gordon v. Graham, that the prior mortgagee under a mortgage with a clause for future advances, may make them whether or not he has knowledge or notice of a subsequent lien, and that advances so made are covered by the lien of his mortgage (provided, of course, the maximum principal amount is set forth). Such would seem to be the conclusion of the headnote writer also.

3. No discussion occurs as to whether the rule of Gordon v. Graham applies whether the making of future ad-

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19 Recording is notice to subsequent encumbrances only. JONES, MORTGAGES (5th Ed. 1928) Secs. 453, 456; WALSH, MORTGAGES (1934) 256.
21 7 Vin. Abr. 52, 2 Eq. Cas. Abr. 588.
22 Ibid.
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advances is optional with, or obligatory upon, the mortgagee. 23 Here again no certain conclusion can be drawn.

a. Gordon v. Graham, as quoted, clearly makes no distinction between the rights of the mortgagee in either case.

b. The undertaking here could fairly be construed as obligatory—Wilson agreed to lend his notes "from time to time, as may be desired by said firm of Mason & Son" up to a stated maximum at any time.

4. The Court considers Gordon v. Graham to have been accepted as authority, construes the doubts expressed by a famous authority on mortgages 24 as overcome by his final conclusions. The Court pointed out that Chancellor Kent's suggested limitation 25 to cases in which a subsequent judgment or mortgage had not intervened, was reconsidered in his Commentaries where he said: 26

"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 constituent part of the original agreement, and the future advances will be covered by the lien, in preference to the claim under a junior intervening incumbrance, with notice of the agreement."

The case of Gordon v. Graham was, however, reviewed and "overruled" by the House of Lords in 1861, in the later case of Hopkinson v. Rolt. 27 The appellants were mortgagees under a mortgage from M, to secure the amounts then due, "or at any time thereafter, should or might be due or

23 By the great weight of American authority, in the absence of controlling statutory provisions a mortgagee bound to make advances is entitled to priority over intermediate liens irrespective of notice. If the future advances are optional, and not obligatory, he is postponed to intervening liens of which he had actual, not merely constructive notice. 1 JONES, op. cit. supra n. 19, Secs. 452-4, 456; WALSH, op. cit. supra n. 19, 77-80; Note, Mechanics' Liens—Priority Over Mortgage for Future Advances (1911) 25 Harv. L. Rev. 91; Note, Mortgages—Priorities—Mortgage for Future Advances (1909) 23 Harv. L. Rev. 68; Note, Priority of a Mortgage to Secure Future Advances (1911) 11 Col. L. Rev. 459; Annotation, 81 A. L. R. 631; TIFFANY, REAL PROPERTY (3rd Ed. 1939) Secs. 1463-64.

24 Coventry's notes to 2 POWELL, MORTGAGES, 533, 534, express some doubts as to the decision in Gordon v. Graham, but state in conclusion that he "individually places but slender dependence in the force of their application."


26 4 KENT, COMMENTARIES 175.

owing to" the appellants, not to exceed a total of 20,000£. Subsequently M mortgaged the same property to Rolt to secure money due, or money which Rolt might be called upon to pay on account of M. Each mortgagee had notice of the other's mortgage. Emphasis was laid upon the fact that advances were not obligatory. The question was expressly involved as to whether advances made by the appellants after the execution of the mortgage to Rolt, and with knowledge of it, took priority over Rolt's mortgage. The original record of Gordon v. Graham was re-examined, and the Lord Chancellor (Lord Chelmsford concurring) concluded that the case had been misreported in both reports in that they incorrectly stated that "then the first mortgagee, having notice of the second mortgage, lends a farther sum"; and that in fact the amount allowed the first mortgagee in that case did not include any advance after notice of subsequent incumbrances. In the instant case, the provision as to future advances "secured farther advances to the amount of 20,000£, absolutely, till there should be notice of a second mortgage and continuously as between mortgagor and mortgagee, although there should be a second mortgage." Lord Chelmsford thought that to give Gordon v. Graham the construction for which the appellants contended would "effectually preclude a mortgagor from afterwards raising money in any other quarter".

Lord Cranworth, dissenting, did not agree that Gordon v. Graham had been erroneously reported, and argued that it had been so regularly followed that a rule of contract, right or wrong, had been established. He suggested as a possible limitation the case of a second mortgagee lending

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28 Ibid., 9 H. L. Cas. 531-533.
29 Ibid., 533.
30 Ibid., 536.
31 Ibid., 553. The case had been heard before the Master of the Rolls (25 Beav. 461, 53 Eng. Rep. 713), then on appeal by the Chancellor, who was then Lord Chelmsford, the decision in each instance being favorable to Rolt. In the House of Lords two opinions for affirmance and one for reversal were rendered. Chelmsford sitting in review of his own judgment thus swung the balance.
32 9 H. L. Cas. 514, 540.
upon the express promise of the mortgagor, communicated to the first mortgagee, not to borrow any further from the first mortgagee.33

Wilson v. Russell was, however, referred to in 1874 by the Court of Appeals34 as a "case which was very carefully considered, and has been repeatedly recognized by subsequent decisions of this Court . . ." In 1880, the attention of the Court was directed to the decision of Hopkinson v. Rolt, and the contention was made that Wilson v. Russell, resting on the overruled case of Gordon v. Graham, should itself be overruled. The Court said, however:35

"The decision in 13 Md. does not rest, and was not placed, solely on Gordon v. Graham; for this court, mentioning the conflict of authority existing on the subject, and citing the various authorities upon both sides of the question, said that 'the weight of authority sustained the principle established in Gordon v. Graham.'"

By Ch. 213 of the Acts of 1872, an important change was made in the law. The Act of 1825, codified as Section 2 of Article 64 with immaterial changes in language, had placed the simple limitation on all mortgages or deeds in the nature of a mortgage (but not deeds of trust)36 that they could be security only for the principal amount37 appearing on the face of the mortgage and expressed as secured thereby. The Act of 1872 provided that, except as to indemnity mortgages and mortgages by brewers to malsters, (a) no mortgage should be a lien for future advances except from the time such advances are actually made, and (b) no mortgage to secure future advances should be valid unless the amounts and times for such advances are specifically stated. Anne Arundel, Baltimore, St. Mary's and Prince

33 Ibid., 544. The opinions reveal a more than usual depth of feeling. Cranworth rather adroitly refers to the Master of the Rolls' erroneous ascription of the doubt (supra, n. 24) to Powell, not Coventry. The diametrically opposite construction of this doubt is reminiscent of the forensic rather than the judicial.
34 Ahern v. White, 39 Md. 409, 421 (1874).
36 Supra, n. 18.
37 Or the amount due, if less.
George's Counties were excluded from these changes and left under the old Act exclusively. The additions (omitting the reference to the excepted four counties) read as follows:

"... and no mortgage, or deed in the nature of a mortgage, shall be a lien or charge for any sum or sums of money to be loaned or advanced after the same is executed, except from the time said loan or advance shall be actually made, and no mortgage to secure future loans or advances, shall be valid unless the amount or amounts of the same, and the times when they are to be made shall be specifically stated in said mortgages, this not to apply to mortgages to indemnify the mortgagee against loss from being indorser or security, nor to any mortgages given by brewers to malsters to secure the payment to the latter of debts contracted by the former for malt and other material used in the making of malt liquor . . . ."

A later statute\textsuperscript{37a} struck out Anne Arundel and St. Mary's Counties from the special exception, and left only Baltimore and Prince George's Counties subject to the Act of 1825.

Both the Act of 1872 and the later one, by piling exception on exception, and then an exception to the exception, presented interesting questions of statutory construction. However, the Court of Appeals was never required to pass upon them. After their enactment (and taking simply the Act of 1882 to avoid repetition) the result would appear to have been:

1. In the entire state, other than Baltimore and Prince George's Counties, all mortgages (except indemnity, and brewers to malsters) were required to state the maximum principal amount to be secured, and if for future advances, were security only from the time of such advances, which advances had to be particularly described as to date and amount.

Indemnity mortgages, and brewer to malster mortgages, did not have to describe the principal amount secured;

\textsuperscript{37a} Md. Laws 1882, Ch. 471.
and these two classes, if for future advances, need not de-
scribe the amount or date thereof, and were security from
the date of recording, regardless of when the advances
were made.

2. In Baltimore and Prince George's Counties, all mort-
gages, including indemnity mortgages, were subject to the
requirement that the principal amount be stated, but with-
out further limitation; i. e., were governed exclusively by
the Act of 1825.

In the Code of 1888, this one section was recodified into
two, and so it continues to the present. 38 Section 2 of
Article 66 is codified as enacted by the Act of 1882, minus
the special counties exception, and so appears to be State-
wide. Section 3 of Article 66 relates only to Baltimore and
Prince George's Counties, and enacts verbatim the first
clause of Section 2, requiring a statement of the principal
amount, but expressly excepts indemnity mortgages.

By Chapter 224 of the Laws of 1924, another exception
was added in identical language to Sections 2 and 3, as
follows:

"... nor are the provisions hereof intended to
apply to deeds of trust in the nature of mortgages or
any other deeds of trust to secure bonds, notes or other
obligations."

The result may perhaps 39 thus be summarized:

1. Generally, throughout the State, mortgages must
state the principal amount secured, but this does not
apply to

(a) Indemnity mortgages;
(b) Deeds of trust; and
(c) Brewer to malster mortgages (except in Balti-
more and Prince George's Counties, where the amount
must be stated).

38 The Code of 1888 was enacted as law, and not simply evidence thereof,
as the later codes now serve.
39 The Acts of 1872 and 1882 by their very terms made the excepted
counties subject only to the Act of 1825. The Code of 1888 carried this
forward but as two sections, and unfortunately made Section 2 of Article
66 read as if statewide. In that case Section 3 would in effect have been
repealed. It is most improbable that if the compiler had intended to effect
a repeal he would have created a new section containing the repealed
2. Mortgages for future advances are a lien only from the time such advances are made, and the amounts and times of such advances must be specifically stated, except in the case of

(a) Indemnity mortgages;
(b) Brewer to malster mortgages;
(c) Baltimore and Prince George's Counties.

Deeds of trust are excepted, now by statute, as well as by construction.\(^4\)

Another general exception to the future advance provisions is also recognized in the cases—a judgment to secure future advances. In *Neidig v. Whiteford*\(^4\) the Court found as a fact that the judgment in question had not been intended to cover future advances, but recognized that an agreement entered into at the time of confessing a judgment could be given that effect, saying:\(^4\)

"It is now well settled that a judgment, as well as a mortgage, may be taken to secure future advances and liabilities when such is a constituent part of the original agreement under which it was entered; and any future advances, not exceeding the amount of the judgment made thereunder, will be covered thereby."

This statement was followed and applied in *Robinson v. Consolidated Real Estate & Fire Ins. Co.*\(^4\) In that case

language, when the repeal could have been effected by a simple omission. The simultaneous repeal and re-enactment of Sections 2 and 3 by Md. Laws 1924, Ch. 224, was a recognition of the existence of Section 3. To give it any effect it must constitute an exception to Section 2. This extended discussion of what should have been obvious is required by the inconsistency of an all-embracing and an exceptional provision existing simultaneously, and by the practical consequences in Baltimore and Prince George's Counties. The effect of this exception was raised in the appellant's brief in *Bldg. & Loan Assn. v. Lumber Co.*, 168 Md. 199, 178 A. 214 (1934), where it is stated Judge Grason held Section 2 applicable to a mortgage of Baltimore County realty. The appellants urged that if the mortgage were one for future advances, Section 3 was controlling, and required only the (ultimate) principal amount to be stated. The Court of Appeals held that the mortgage was not one for future advances and did not mention this point. It was not raised in the Neeb case, 5 A. (2d) 283 (Md. 1939), one also from Baltimore County.

\(^4\) *Supra*, n. 18.
\(^4\) 29 Md. 178 (1889).
\(^4\) 55 Md. 105 (1880); see also 2 *Poe, Pleading and Practice* (5th Ed. 1925) Sec. 401.
the appellee had leased certain lots to J, a builder. Under an agreement by which the appellee was to advance him money from time to time for the erection of houses, J confessed a judgment for $4,500, with which an agreement was filed stating that the judgment was security for the repayment "of all moneys which it [appellee] may loan or advance" to J from October 3, 1874, to January 1, 1876. A mortgage to secure such advances, specifying the amounts and times, was also executed, and the lease, judgment and mortgage were recorded before any work was begun upon the premises. Some construction work was, however, started before any advances were actually made. In a contest between the mortgagee-judgment creditor and the holders of mechanics' liens, the judgment for future advances was given priority. The Court said:

"The Act of 1872 modifying the law in respect to mortgages to secure such advances, has no effect on a case like the present, which is rested on the judgment lien; the judgment having been taken for the whole amount intended to be loaned. That judgment being of record was notice to the world of its existence, as a lien from its date against the property of the judgment debtor. The lien existed, and execution could have issued, for there is no stay of execution entered. Equity it is true might have restrained a sale attempted under it, if it appeared that the advances forming the debts for which it was given, or no part of them had been made. But we see no ground upon which execution could have been refused at any time for such advances as may have been made . . . The lien relates to, and begins from the date of judgment . . ."

The cases dealing with mortgages executed subsequent to the effective date of the Act of 1872 have primarily involved conflicts between the mortgagor and mechanics' lien claimants. In such cases (other than mortgages in the

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55 Md. 105, 110. A judgment is only a general lien; a mortgage is a specific lien. Why an elusive "public policy" should place obstacles in the way of security for future advances under mortgages, and not under judgments (with a separate provision or agreement) is not discussed, and no reason occurs to this writer.
two excepted counties) the contest has turned upon whether or not the mortgage in fact was one for future advances, in which event the mechanics' lien claims would have prevailed as to advances subsequent to the commencement of work, or whether the mortgage was one in which the amount named on the face of the mortgage had actually been advanced, or made available, at the time the mortgage was recorded. The possibility of such controversy primarily arises out of the natural desire of the mortgagee, who lends money to be used from time to time for expenditures from which the greater part or perhaps all of his security will be created, to control such expenditure along particular lines. Specifically, if a construction loan is intended, it will usually be provided that the builder-mortgagor will be entitled to payments, either of a designated amount or percentage, at certain stages of completion. Restricting for the present the consideration to cases in which the security for repayment takes the form of a mortgage, it is obvious that at least the following arrangements are possible:

1. A mortgage for future advances may be executed in strict compliance with the statute. In such a case the mortgage will become a lien as to each advance only from the time it is made, and therefore subject to intervening liens, whether recorded, as subsequent mortgages for value, or judgments; or mechanics' liens for work done (and in the Counties for materials furnished) before such advance, if subsequently perfected by proper recording in the manner and within the time allowed by Article 63 of the Code. The effect is therefore the same as if a new mortgage were executed and recorded simultaneously with, and for the amount of, each advance. The only real advantage, if any, is that the mortgagee is saved this slight inconvenience.

2. A mortgage for the full amount may be given, and that amount actually delivered to the mortgagor, with an

46 The same examination of the record would be required in either case, to ascertain the existence of liens.
understanding as to its application. The honesty of the mortgagor, and perhaps the effect of actual notice to those dealing with him, would be the only safeguards.

3. The proceeds of the mortgage may be placed with a third person, under a trust, escrow or agency agreement, to be distributed in accordance with the terms of a definite agreement or understanding. Where this is really done, the Court has had no hesitancy in holding the mortgage not to be within the future advance provisions.

4. The mortgagee may retain the stated principal amount, or part thereof, to be disbursed by him in accordance with a clearly defined schedule. This is regarded with real, and justifiable, suspicion.

5. A general plan may be attempted to give the mortgage, really intended to secure future advances, the guise of an indemnity mortgage.

The last three alone need be considered.

A. Where the proceeds of a mortgage are in fact placed in the control of a third person, to be disbursed by him in accordance with a designated plan or arrangement, the transaction is not regarded as coming within the restrictions on mortgages for future advances. In such cases the mortgage is to secure a present loan, although the proceeds are not immediately available to the mortgagor, and are to be advanced in the future.

Where the proceeds are at or before the execution of the mortgage paid by the mortgagee directly or through the mortgagor to a third person to be by him applied, the mortgage is good as security from the date of recording for the entire amount, even although

46 In High Grade Brick Co. v. Amos, 95 Md. 571, 52 A. 582 (1902), the Court said that if the subsequent mechanics' lienor had known of the true relation of the parties to a mortgage for future advances, it could not have complained. It is doubtful, however, that funds in the hands of the mortgagor, although intended to be applied to specified projects only, would have a legally protectable status different from free funds or general assets. Cf. Frounfelter v. State, Use Carroll, 66 Md. 80, 87, 5 A. 410, 414 (1886) ; Am. Bonding Co. v. Milwaukee Co., 91 Md. 733, 742-3, 48 A. 72, 74 (1900).

47 See cases cited infra notes 49-51.

48 Ibid.
There is an express understanding or agreement that the mortgagor is immediately to deliver the proceeds to a third person, and not directly to retain any of the amount lent.\textsuperscript{49}

(2) The agreement that the proceeds are to be placed with a third person is contemporaneous with the loan, and is a condition precedent.\textsuperscript{50}

(3) The third person is in the event of default in the mortgage, authorized or required to apply any unexpended balance to the payment of the mortgage debt.\textsuperscript{51}

B. The proceeds of the mortgage may, at least in cases in which the mortgagee is a financial institution, be retained by the mortgagee for disbursement in accordance with a stated schedule. Whether this can be done by an individual mortgagee is at least very doubtful, and in the only case before the Court of Appeals in which it was attempted, the Court held that such control made the mortgage one for future advances. In that case\textsuperscript{52} although checks were drawn by the mortgagee for the full principal amount, they were payable to the order of a corporation wholly owned by the mortgagee, and one of the checks was never deposited. They were drawn on the mortgagee's interest-bearing account, so that until deposited, the title to such sums, and the accruing interest, remained in the mortgagee. The Court referred to the arrangement as one it could not sanction, and pointed out that "the statute would be largely nugatory if the device adopted in this case were held to be consistent with its terms."\textsuperscript{53}

In three cases, however, the Court has recognized or held that the retention of the funds by the mortgagee will not of itself make the mortgage one for future advances.

\textsuperscript{49} Neeb v. Atlantic Mill & Lumber Realty Co., 5 A. (2d) 283 (Md. 1939); Land Corp. v. Loan & Sav. Ass'n, 138 Md. 529, 114 A. 469 (1921); Western Nat'l. Bank v. Jenkins, 131 Md. 239, 252, 101 A. 667, 671, 1 A. L. R. 1577 (1917).

\textsuperscript{50} Ibid., and Bldg. & Loan Ass'n. v. Lumber Co., 168 Md. 199, 204, 178 A. 214, 215 (1934).

\textsuperscript{51} Neeb v. Atlantic Mill & Lumber Realty Co., supra n. 49; Bldg. & Loan Ass'n. v. Lumber Co., supra n. 50; Western Nat'l. Bank v. Jenkins, supra n. 49.

\textsuperscript{52} Groh v. Cohen, 158 Md. 638, 643, 149 A. 459, 461 (1930).

\textsuperscript{53} Ibid., 158 Md. 644, 149 A. 461.
In Edelhoff v. Horner-Miller Mfg. Co. the Court referred to the fact that the principal sum secured by a chattel mortgage was, immediately after the execution of the instrument, in the hands of the mortgagee, and the mortgagor "could draw on it at its own pleasure. There is no evidence that the mortgage was executed for the purpose of securing other sums to be thereafter advanced".

In two later cases, however, each involving a building association mortgagee, the question was seriously raised and fully considered. In the case of Loan & Savings Ass'n v. Tracey, the mortgage was made with the distinct understanding that the sum so borrowed should be expended solely in the erection of houses, and for assurance this would be done, it was agreed between the mortgagor and the agent of the mortgagee "that the money should be deposited with" the mortgagee, its withdrawal to be subject to the control and supervision of the agent of the mortgagee. Accordingly, the mortgagor "was credited" by the mortgagee with the full amount of the loan "which he deposited with the mortgagee, and it was agreed between Tracey and John H. Richardson, representing the Association . . . that as the work on the houses progressed, certain amounts were to be paid on the approval of Mr. Richardson." Richardson's testimony was to the effect that he was to have control of the money and deposit it where he pleased. He did deposit it with his principal.

The Court suggested that "for some reasons, it might have been better to have deposited" the money in some bank, and not to have left it with the mortgagee but upheld the transaction as a present loan. As to the subsequent disposition of the balance, transferred from the mortgagor to a builder, by the issuance of checks drawn on

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54 86 Md. 595, 39 A. 314 (1898).
55 Ibid., 86 Md. 610, 39 A. 316.
56 142 Md. 211, 120 A. 441 (1923).
57 Land Corporation v. Loan & Savings Ass'n., 138 Md. 529, 114 A. 469 (1921), an earlier phase of the Tracey case, in which the history of the negotiations is reviewed.
58 142 Md. 211, 215, 120 A. 441. 442 (1923).
59 Ibid., 142 Md. 213, 120 A. 444.
60 Ibid., 142 Md. 219, 120 A. 444.
another bank, endorsed to the mortgagee for account of the builder, and handled without presenting the checks, but by a transfer by the mortgagee on its books of the funds from the account of the mortgagor to that of the builder, the Court considered that a presentation, cashing and redeposit would have been "an idle and unnecessary form." \(^6\)

In the *White Eagle Bldg. & Loan Assn. v. Lumber Co.* case,\(^6\) the mortgage recited the receipt of $30,000, of which only $2,250.25 was then paid to the mortgagor, "but, in accordance with an agreement made by and between the mortgagor and mortgagee, contemporaneous with the execution and delivery of the mortgage, it was agreed that the balance of the $30,000 should be retained by the mortgagee and credited to the mortgagor on the books" of the association, "to be used from time to time in payment of the construction work upon the mortgaged property." \(^6\) A side agreement confirmed this, and authorized the mortgagee, after completion of the buildings, to apply any surplus to the mortgage, or to pay it over to the mortgagor.\(^6\) The case was treated as controlled by the *Tracey* decision, since in both cases "the money was left with the Association to the credit of the mortgagor, to be expended in improvements upon the mortgaged premises" upon the approval of a third person.\(^6\) The fact that in the *Tracey* case three checks for part of the consideration were passed to the mortgagor, who endorsed and returned them, while here the whole consideration, less $2,500, "was left with the mortgagee to the credit of the mortgagor" was considered no ground of distinction.\(^6\)

\(^{62}\) 168 Md. 199, 178 A. 214 (1934).
\(^{66}\) *Ibid.*, 168 Md. 209, 178 A. 217. Although analogies, particularly when drawn from another field, are dangerous, yet might not the question of whether the funds alleged to be held by the mortgagee are really those of the mortgagor, in the custody of the mortgagee, or simply a promise to advance in the future, be tested by the consequence of an unjustifiable failure by the mortgagee to make payments in accordance with the schedule? In the former case this would probably constitute embezzlement; in the latter, simply breach of contract.
C. If the mortgage is in reality for future advances, an attempt to have the transaction take the form of an indemnity mortgage will be ineffective. The case of *High Grade Brick Co. v. Amos* was an ingenious but unsuccessful attempt to use this device.

Spalding and another owned land which they wished to have developed, retaining ground rents. They made a bonus building arrangement with Amos, agreeing to pay a bonus of $40,000 in installments, and to advance $35,800 for materials, to be secured by mortgages. To avoid personal liability on the covenants in the lease, D was used as a straw man—a customary arrangement. D who was a day laborer of Amos, was further used in the scheme, of which he understood nothing, on the assurance that “he would get into no trouble.” The land was leased to D, and the following papers were simultaneously executed:

1. An agreement that D would erect the buildings, and Spalding would pay him the $40,000 bonus. Amos guaranteed this contract.

2. An agreement between Amos and D by which Amos agreed to sell D all materials needed for construction, and D agreed to procure Spalding to guarantee payment for materials up to $700 per house.

3. A guaranty by Spalding to Amos, of the payment by D for materials.

4. An order on Spalding by D to pay Amos “all sums of money due on account of my agreement with you for an advance in and about the erection of the houses.”

5. A mortgage from D to Spalding, reciting a present indebtedness, maturing in one year, in an amount equaling the guaranty to Amos for materials, “and also to indemnify [Spalding] against loss under their guaranty to Amos of payment for building materials to be sold by him to” D. This was construed by the Court to be a mortgage “to secure the return to the mortgagees of such sums of money, to the extent therein mentioned, as they should thereafter

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67 95 Md. 571, 52 A. 582 (1902).
68 The Chancellor thought the arrangement to be entirely regular, 2 Balt. C. Rep. 226 (1902).
advance to the builder of the houses in the course of the construction thereof."  

Amos admitted that he, not D, was the real party in interest, and that his name could properly be substituted for D throughout. The guaranties were considered fictitious, and the mortgage invalid against subsequent creditors of Amos without knowledge, since it failed to afford "accurate and reliable information as to the extent of the liens thereon and the times from which they became effective."

CONCLUSION

Whether or not our whole theory of mortgages should be reconsidered and revised, it is submitted that some revision of Sections 2 and 3 of Article 66 is in order. If those sections are, as they appear to be both from their language and statutory history, mutually independent, it is doubtful if conditions in Baltimore and Prince George's Counties are so essentially different, in the field of mortgages, at least, as to justify different treatment. If in fact the theory of restriction on future advances is sound, why should it be possible to protect such advances by the use of a deed of trust, or a confession of judgment with an agreement to make advances? If creditors should be entitled to know the maximum amount for which a mortgage is to be security, why should not this apply to indemnity mortgages as well? There seems either to have been an unconsidered series of efforts to remedy special conditions, without adequate perspective of the whole field, or a sacrifice of substance for form.

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69 High Grade Brick Co. v. Amos, 95 Md. 571, 588, 52 A. 582, 585, 53 A. 148 (1902).  
70 Ibid., 95 Md. 600, 53 A. 149.  
71 Ibid., 95 Md. 591, 52 A. 586.