PRIORITIES OF MORTGAGES—MORTGAGE FOR PRESENT AND FUTURE ADVANCES—WHETHER FIRST MORTGAGEE MAY TACK FUTURE ADVANCES WHERE THERE HAS BEEN AN INTERVENING ENCUMBRANCE

Under the land titles system, a mortgagee will normally register his mortgage at the appropriate Land Titles Office and a memorandum of the mortgage will be noted on the certificate of title. This memorandum constitutes constructive notice to anyone dealing with the land and assures the mortgagee priority over subsequent encumbrances as to monies previously advanced. Many mortgages are, however, taken to cover present *and future* advances. There is no question that such mortgages are valid and, in the absence of intervening encumbrances, any future advances will be secured. But if there is an intervening encumbrance the question arises as to whether the mortgagee can "tack," that is, add later advances to earlier advances so as to obtain priority over the intermediate encumbrancer.

COMMON LAW POSITION

The common law position was laid down in the leading case of *Hopkinson* v. *Rolt*.[1] In that case a landowner executed a mortgage on certain property to the defendant, the Commercial Bank, "in order to secure the sums now due, and which shall from time to time become due from him." The landowner subsequently executed a second mortgage to the plaintiff, Rolt, and notice of this second mortgage was given to the bank. Notwithstanding such notice, the bank made future advances on two separate dates of some £15,500. In a dispute over priority, the House of Lords, by a majority of two to one, held that the first mortgagee could not tack since he had notice of the intervening encumbrance. All three of the Law Lords supported their decisions with vigourous policy considerations. Because of the importance of this particular case, it is proposed to quote from their judgments at some length. The Lord Chancellor (Lord Campbell) stated:[2]

> How is the First Mortgagee injured by the Second Mortgage being issued [to his knowledge]? The First Mortgagee is secure as to past advances and he is not obliged to make any further advances. He has only to hold his hand when asked for a further loan . . . the Second Mortgagee cannot be charged with any fraud upon the First Mortgagee in making the advances with notice of the First Mortgage; for, by the hypothesis each has notice of the security of the other, and the first Mortgagee is left in full possession of his option to make or to refuse further advances as he may deem it prudent. The hardship [to the First Mortgagee] at once vanishes, when we consider that the security of the First Mortgage is not impaired without notice of a second and that when a notice comes, the [First Mortgagee] have only to consider . . . what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or to loss.

Lord Cranworth delivered an ardent dissent in the following terms:

> Mortgages are but contracts; and when once the rights of parties under them are defined and understood, it is impossible to say that any rule regulating their priority is unjust. If the law is once laid down and understood that a person advancing money on a second mortgage covering future as well as present debts will be postponed to the first mortgage to the whole extent covered or capable of being covered by the prior security, he has nothing to complain of. He is aware when he advances his money of the imperfect nature of his security, and acts at his peril.

1 (1861), 34 L.J. Ch. 468 (H.L.).
2 *Id.*, at 470.

Lord Cranworth thus felt that there were no policy considerations which compelled a decision in favour of the second mortgagee and went on to hold that the authorities in fact supported a decision in favour of the first mortgagee. Lord Chelmsford attempted to rebut the points made by Lord Cranworth: [3]

> The reason upon which the doctrine proceeds is, "that it was the folly of the Second Mortgagee with notice to take such security." Now, what is this but to say that a Mortgagee, by taking a security for advances which may never be made, may effectually preclude a Mortgagor from afterwards raising money in any other quarter? And as the First Mortgagee is not bound to make the stipulated further advances, and with notice of a subsequent mortgage he can always protect himself by inquiries as to the state of the accounts with the Second Mortgagee, if he chooses to run the risk of advancing his money with the knowledge, or the means of knowledge, of his position, what reason can there be for allowing him any priority? What injustice is done to him by postponing him to the Second Mortgagee under such circumstances? But, on the other hand, if it is to be held that he is always to be secure of his priority, a perpetual curb is imposed on the Mortgagor's right to encumber his equity of redemption.

It is respectfully suggested that the best rationale for the decision is given in the judgment of Lord Chelmsford. Lord Cranworth is correct in stating that, should tacking be permitted, there would be no particular hardship rendered to the second encumbrancer, who took his encumbrance with full notice of the circumstances. However, considerable harm may be done to the mortgagor in a case where the future advances are to be made *at the option of the mortgagee* (which is the normal case). The mortgagor may then be prevented from borrowing to the maximum amount of his equity in the property and "a perpetual curb is imposed on the mortgagor to encumber his right of redemption." On the other hand, as the Lord Chancellor points out, no harm is done to the first mortgagee under the rule, as he is only prevented from tacking when (as will be shown) he has express notice of the second encumbrance; therefore the future advances will be made with knowledge of all the circumstances. "It is contrary to the general principles of equity that a Mortgagee should, by thus taking a security for advances which may never be made, put pressure on the Mortgagor by taking away his power of raising money from other persons."[4]

The doctrine set out in *Hopkinson* v. *Rolt*[5] was extended somewhat in *West* v. *Williams*.[6] The facts of that case are somewhat complicated and it is sufficient to note that the prior mortgage (which was not actually first in time, but took priority because the mortgagee was the first to give notice to the trustees) was for the immediate payment of £2,297 and for the future payment of £200 per annum for five years. The prior mortgagees, the defendants, subsequently received notice of a second mortgage. Nevertheless the defendants continued to advance the £200 per annum as they felt that they were obligated to do so by the terms of their mortgage agreement. The second mortgagee, the plaintiff, claimed priority over the advances made after notice of his mortgage, and his contentions were upheld by the Court of Appeal. The defendants had attempted to distinguish *Hopkinson* v. *Rolt* by alleging that they

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3 *Id.*, at 476.
4 Thom, *The Canadian Torrens System*, 553 (2nd Ed.).
5 *Hopkins* v. *Rolt*, *supra* n. 1, actually decided that there could be no tacking where there was notice of the intervening encumbrance. But it implicitely held that tacking would be allowed when there was no notice given prior to the future advance. It is this latter aspect of the decision which is hereafter referred to as the doctrine of *Hopkins* v. *Rolt*.
6 (1899)), 1 Ch. 132 (C.A.).

were under a contractual obligation to advance the £200, whereas in the *Rolt* case the subsequent advances were voluntary. Lindley, M. R., dismissed this contention by stating that the obligation was extinguished when the mortgagor gave a second mortgage on the property, thereby impairing the security: "Whatever prevents the Mortgagor from giving to the first mortgagee the agreed security for his further advances releases the first mortgagee from his obligation to make them."[6a] Chitty, L. J., stated:[7]

> The principle on which these decisions are founded appears to me that a Mortgagee cannot obtain a charge on the property which is no longer the Mortgagor's to charge, and which the Mortgagee knows at the time he makes the advances is no longer the property of the Mortgagor. No charge arises for a further advance until it is actually made. This principle is plain and simple and based on natural justice and fair dealing. If this be the principle (which I think it is), the covenant to make further advances creates no difficulty—and for this reason: The covenant is to make the further advances on the security of the property, and inasmuch as the Mortgagor has by his own act deprived himself of the power to give the stipulated security, no action for damages would lie on the covenant.

The *Hopkinson* v. *Rolt* doctrine received application in slightly different circumstances in *Bradford Banking Co. Ltd.* v. *Henry Briggs, Son & Co. Ltd.*[8] The articles of association of the defendant company provided that the company should have a "first and permanent lien and charge, available at law and in equity, upon every share for all debts due from the holder thereof." A shareholder deposited his share certificates with a bank as security for the balance due and to become due on his current account, and the bank gave the company notice of this deposit. The share certificate itself stated that the shares were held subject to the articles of association of the company. Notwithstanding notice that the certificates had been deposited with the bank, the company allowed the shareholder to become indebted to it. The House of Lords, following *Hopkinson* v. *Rolt,* held that notwithstanding the terms of the certificate the company did not have priority as to advances made to the shareholder after notice of the deposit.

Thus the Common Law position was clear: A mortgagee could tack only where his future advances were made without notice of an intervening encumbrancer.

PRESENT ENGLISH POSITION

Before examining Canadian cases which have applied the rule in *Hopkinson* v. *Rolt,* it is to be noted that the rule has been slightly modified by statute in England. The essence of the rule remains unchanged, but now the first mortgagee is allowed to tack *where the mortgage imposes an obligation on him to make further advances (Law of Property Act, 1925).*[9] This would seem to overrule *West* v. *Williams,*[9a] but there is a certain amount of ambiguity in the provision. *West* v. *Williams* stated that the giving of a subsequent encumbrance on the security *extinguished* the contractual obligation of the prior encumbrancer to make future advances. If this is the case, then the original mortgage no longer imposes an obligation to make further advances and the statute may well be inapplicable.

6a *Id,* at 143.
7 *Id.,* at 146.
8 (1886), 12 A.C. 29 (H.L.).
9 15 & 16 Geo. 5, c. 20, s. 94(3).
9a See 27 *Halsbury's Laws of England* 220.

CANADIAN CASES

It was a matter of course that Canadian Courts would adopt the doctrine of *Hopkinson* v. *Rolt* so long as they operated in similar circumstances.[10] It was also a matter of course that the same doctrine would continue to be applied in non-mortgage situations. For instance, in *Fraser* v. *Imperial Bank,*[11] a bank, in order to secure present or future advances to a customer, had taken from him an assignment vesting in it the legal title to a chose in action arising out of a contract. Subsequently the bank received notice of a second assignment of the said contract, but nevertheless made further advances. The Supreme Court of Canada held that the claim of the bank for advances made after notice was postponed to that of the intermediate encumbrancer.

However, land in Western Canada was brought under Land Registration systems and it was thus possible for Canadian Courts to decide that the doctrine of *Hopkinson* v. *Rolt* was inapplicable, and to prohibit tacking altogether. The special circumstances inherent in a land titles system which might justify such a departure from the common law rule are twofold. Firstly, at common law the mortgagee usually took the legal estate, and this was no doubt a significant factor in inducing the courts to allow him to tack where he had no notice of an intervening encumbrance.[12] In a land titles system, however, the legal title remains in in the mortgagor, subject to the registered mortgage. Secondly, in such a system all encumbrances must be registered against the title to be effective. Such registration is generally deemed constructive notice of the encumbrance to all persons dealing with the land. If this rule were applied in the *Hopkinson* v. *Rolt* situation, the first mortgagee would be deemed to have had notice of the second mortgage as soon as it was registered and tacking would be disallowed altogether. It was soon to be seen, however, that neither of these reasons were of sufficient weight to justify a change in the common law rule.

The question as to priorities under a land registration system first arose in *Pierce* v. *Canada Permanent Loan Co.*[13] In that case the plaintiff sold land and took back a mortgage from the purchaser as part of the purchase price. It was expressed that the mortgage would be subject to a second mortgage which the purchaser intended to give to the defendant to secure a building loan. The second mortgage to the defendant was executed and duly registered, but before all the money was advanced thereunder the plaintiff registered his mortgage. Such registration was not brought home to the defendant who proceeded to advance the rest of the monies. The issues were twofold:

(1) Should *Hopkinson* v. *Rolt* be applied under a land registration system?

(2) Did the statutory provisions of the Ontario Registry Act, R.S.O. 1887, c. 114, s. 80, which provided that "The registration of any instrument under this Act *shall constitute notice of the instru-*

10 See, for instance, *Gordon* v. *Dothian* (1851), 2 G.R. 293, which was actually decided before the *Rolt* case; and *Blackley* v. *Kenny* (1889), 16 O.A.R. 522.

11 (1912), 10 D.L.R. 232.

12 This is not to confuse the type of tacking herein under discussion with the doctrine of *Tabula in Naufragio,* which holds that person who has taken an equitable mortgage for valuable consideration without notice of a *prior* encumbrance, may, *even after notice* of such prior encumbrance,, get in the legal title and thereby gain priority over the first encumbrance.

13 (1895), 25 O.R. 671 (Ont. C.A.).

ment to all persons claiming any interest in the lands . . .", affect notice to the defendant of the intervening encumbrance?

The trial Judge held that the defendant was affected with notice of the plaintiff's mortgage upon its registration, but this decision was reversed on appeal. Boyd, J., stated in respect to the transaction by which the future advances were made:

> Treated practically, it cannot be regarded as such a dealing with the land as requires to be registered—or such as necessitates a search before making the advance. The instrument securing all the advances past and prospective has been registered,—the function of the Registry Act has been satisfied by this initial transaction, and the scope of the Act contemplates no further registration and consequently no further search in order to justify the payment of the above advances, as called for by the Mortgagor. The *onus* is not on the First Mortgagee who has registered to do something more to complete his claim upon the land for all that is specified in the Mortgage: The onus is on the one subsequently acquiring an interest in the land by conveyance from the Mortgagor to give express notice of that to the First Mortgagee in order to intercept payments or advances thereafter made pursuant to the First Mortgage. In the absence of notice, (i.e., *notice which gives him real and actual knowledge, and so affects his conscience*), the Mortgagee is entitled to assume and act on the assumption that the state of the title has not changed. The protection is given to him by virtue of the Registry Act, as well as the doctrine enunciated in *Hopkinson* v. *Rolt*, until he is made aware of a change, not by the hypothetical operation of an instrument registered subsequent to his, but by a reasonable communication of the fact by the one who comes in under the subsequent instrument. . . .
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> Otherwise consider the consequences. Before making any subsequent advance the First Mortgagee would need to have telegraphic or other electrical advice as to the state of registration on the land each time he paid, for if, before the payment, some transfer from the Mortgagor intervened his advance would be postponed to the claim of the new comer.[14]

Thus, *Hopkinson* v. *Rolt* was applied in Ontario, the condition of applicability being express notice of the intervening encumbrance.

The first case in which these issues arose under a land titles system was *Robinson* v. *Ford*.[15] The facts are not clearly set out in either the notation of the trial, or in the appellate judgment of Elwood, J. However, it appears as if the defendant company, the Crown Life Insurance Company, had taken a mortgage in respect to certain lands to secure present and future advances. After the execution of the mortgage the company received notice from the plaintiff in the following terms:

> Further take notice that said Grant Robinson claims that the said land was obtained from him by fraud and the said Grant Robinson, intends to bring an action against the present owner of the said lands to establish his claim thereto, and
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> Further take notice that if you advance monies to the owner of the said lands upon the security thereof that the said Grant Robinson intends to join you as a party to the action on the ground that any advance of money so made by you is made with notice of the said fraud. . . .

Notwithstanding this notice, the defendant company did advance further monies under the mortgage. The plaintiff brought an action and got the title of the registered owner set aside because of fraud and a new certificate of title issued in his own name. The plaintiff then claimed that the defendant had no right to security under the mortgage for those monies advanced after the above notice. The defendant company claimed that the position of the first mortgagee who made future advances had been changed by the Land Titles Act of Saskatchewan and that tacking

14 *Id.*, at 675, 676.
15 (1912), 5 W.W.R. 542, on appeal rev'd. at (1914), 7 W.W.R. 747 (Sask. C.A.).

should now be permitted *notwithstanding express notice* of an intervening encumbrance. Elwood, J., stated:

> But it is contended that under our Land Titles Act the effect of registering the prior Mortgage was to give the Mortgagee the right to advance all of the money notwithstanding the above notice. After the receipt of this notice the defendant company, in making any further advances, would in my opinion practically be acting in collusion with the Mortgagor, and would be committing a fraud upon the Plaintiff, and to the extent of such subsequent advance would not be a bona fide Mortgagee.[16]

The next case arising under the Land Titles Act was *Marshall-Wells* v. *Alliance Trust Company.*[17] A mortgage was executed on October 9, 1913, with the defendant Alliance Trust Company as mortgagee. This mortgage was duly registered on October 10th. On October 25th a writ of execution was registered against the mortgagor, who was the registered owner of the land in question. Without knowledge of this writ of execution, twenty-five thousand dollars, being the full amount of the mortgage monies, were advanced to the attorney for the mortgagor. Having registered the writ of execution, the plaintiff alleged that the defendant should not be entitled to priority on his mortgage because the advances were made after the registration of the writ. The Alberta Court of Appeal affirmed the trial decision of Chief Justice Harvey and held that the mortgagee was entitled to priority. Beck, J., felt that the matter was governed by a decision of the Supreme Court of Canada in *Grace* v. *Kuebler,*[18] where a purchaser of land continued to pay the purchase price installments to the registered owner without notice that the registered owner had subsequently transferred the land to another and also assigned the purchase monies. The new registered owner had had a new certificate of title issued in his own name but had failed to inform the purchaser of the transaction. It was held that in the absence of express notice the original purchaser was entitled to continue payments to his vendor, and that the *mere registration of the transfer did not operate as constructive notice.* Beck, J., went on to say:

> The doctrine that in such and similar cases the party liable to pay may safely continue payments to the other unless he has actual notice that the other has no longer a right to the money and that subsequent registration merely is not equivalent to actual notice was laid down, not as a new, but as a well recognized doctrine.
>
> That broad and predominating principle is the one upon which I would rest my opinion in the present case.[19]

An interesting application of the *Hopkinson* v. *Rolt* doctrine occured in *Royal Bank of Canada* v. *Doering.*[20] In that case the defendant had taken a mortgage to secure himself for a present debt and also for any future sums which might become owing to him from the mortgagor. Shortly thereafter the defendant guaranteed a promissory note of the mortgagor. Subsequently a second mortgage was given by the mortgagor to the plaintiff and notice was duly given to the defendant. Eventually the mortgagor defaulted on both mortgages and also on the promissory note. Consequently the defendant, as guarantor of the note, was required to satisfy a certain proportion of the indebtedness of the mortgagor under the note. The defendant later attempted to secure his payments

16 *Id,* at 750.
17 [1920] 1 W.W.R. 378, on appeal aff'd. [1920] 1 W.W.R. 907.
18 [1917] 3 W.W.R. 983 (S.C.C.).
19 *Supra,* n. 17, at 912.
20 [1924] 1 W.W.R. 251 (B.C.S.C).

under the note by bringing these payments under the terms of the original mortgage, thereby gaining priority over the second mortgage.

It was held by Macdonald, J., that the facts of this case did not bring it within the *Hopkinson* v. *Rolt* doctrine, as extended in *West* v. *Williams*. The distinguishing feature was that the further amount sought to be secured under the first mortgage arose from a transaction prior to the execution of the second mortgage. In other words, although payment of the further amount occurred after notice of the intervening encumbrance, *the obligation to pay this amount arose from a transaction previous to such encumbrance.* The plaintiff attempted to rely on *West* v. *Williams,* but the learned Judge correctly pointed out that the court had there stated that the obligation to make the further advances was *extinguished* by the impairment of the security in giving a second mortgage, and that, therefore, the future advances were *voluntary.* In the present case the obligation to satisfy the promissory note was owed not to the mortgagor but to the promisee. As such, it was *clearly binding* on the defendant and *West* v. *Williams* was inapplicable.

CONCLUSIONS

From the above cases two conclusions may be drawn with a reasonable degree of certainty with respect to land under a land titles system:

(1) A prior mortgagee may tack (i.e. add future advances made under the mortgage to the earlier advances so as to obtain priority over an intermediate encumbrancer) provided he does not have "notice" of the intermediate encumbrance at the time he made the future advances.

(2) The "notice" which will prevent the prior mortgagee from tacking is actual notice; it is *not* the constructive notice affected by registration of the subsequent encumbrance under the Land Titles Act.

It is thus apparent that the first mortgagee may continue to make future advances to the extent permitted by the terms of the mortgage so long as he is not actually aware of a subsequent encumbrance. The onus is clearly on the subsequent mortgagee to give actual notice of his charge. However, although there are no cases on point, it is submitted that if the prior mortgagee should become aware of the subsequent encumbrance through some other means than notification from the subsequent mortgagee, as, for instance, incidentally in searching the title for mechanics liens, he would not be able to tack further advances. It is the *fact* of notice, not the *method* thereof, which disentitles the prior mortgagee to tack.

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