6

March 20-21, 1958

Memorandum No. 1

Subject: Mortgages of Personal Property
to Secure Future Advances

I believe that this matter is now ready for final action by the Commission.

The following items are enclosed:

1. The portion of the minutes of the special meeting of the Commission held on January 18 in San Francisco containing certain recommendations relating to Commission action on this subject and presenting three questions for decision by the Commission.

2. A proposed statute which reflects the action taken at the special meeting on January 18.

3. A copy of Professor Merryman's study as revised in accordance with action taken at the meeting of January 18.

4. Copies of correspondence received by Professor Merryman from attorneys to whom he wrote soliciting suggestions on the subject.

I hope to be able to prepare a draft recommendation of the Commission to be sent to you prior to the March meeting and to be considered at that time.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JRMj:j

Minutes of Special Meeting
San Francisco - Jan. 18,1958

STUDY NO. 24 - MORTGAGES FOR FUTURE ADVANCES

The Commission considered the research study prepared by Professor John H. Merryman; Memorandum No. 3 relating to this study (a copy of which is attached to these minutes); a copy of the portions of the minutes of meetings of the Commission and of the Northern Committee relating to this study (copies of which are attached to these minutes); a bill tentatively proposed by the California Law Revision Commission to be introduced at the 1959 Session of the Legislature (a copy of which is attached to these minutes); a memorandum from Professor Merryman relating to certain revisions in his study and to certain criticisms of proposed new Section 2975 of the Civil Code received in response to Professor Merryman's invitation to a number of attorneys to comment thereon (a copy of which is attached to these minutes); and copies of letters received by Professor Merryman relating to his study and the Commission's proposed statute from Messrs. Kenneth M. Johnson, George R. Richter, Percy A. Smith, J. F. Shuman, E. H. Corbin, and Edward D. Landels (copies of which are attached to these minutes). After the matter was discussed with Professor Merryman the following was agreed upon:

1. To recommend that the Commission recommend that no changes be made at this time in the law relating to real property mortgages for future advances.

2. That Professor Merryman be requested to give further consideration to how best reflect in his study the changes necessitated by the information obtained from the 1957 legislative changes and the field study.

3. To recommend that the definition of future advances be deleted from the bill tentatively proposed by the Commission.

4. To recommend that a cross reference be made in the proposed bill to Section 2941 of the Civil Code.

5. To recommend that the Commission recommend approval of the proposed bill as revised.

6. To bring the following matter before the Commission for its consideration at a regular meeting:

(a) Whether an express provision should be enacted to give unpaid interest the same priority as principal under a personal property mortgage for future advances; it was agreed that, although this is perhaps not within the scope of the present study, it should be considered.

(b) Whether, when principal, interest and expenditures to preserve the security exceed the amount stated in the mortgage the total should nevertheless be given the priority given principal.

(c) Whether the first sentence of the proposed bill should remain as presently stated or revised to incorporate essentially the language of the first sentence of the present Section 2975 of the Civil Code as suggested by Mr. Corbin in his letter to Professor Merryman.

3/5/58

Bill Tentatively Proposed by California
Law Revision Commission to be Introduced
at 1959 Session of the Legislature.

An Act to repeal Section 2974 and to amend Section 2975 of the Civil Code, both relating to mortgages of personal property to secure future advances.

The people of the State of California do enact as follows:

SECTION 1. Section 2974 of the Civil Code is repealed.

SEC. 2. Section 2975 of the Civil Code is amended to read:*

2975. Mortgages of personal property or crops may be given to secure future advances. If the maximum amount to be secured is stated in the mortgage, the lien for all advances to that amount, whether optional or obligatory, has the same priority as that originally established by the mortgage. If the maximum amount to be secured is not stated, the lien for all optional advances made after actual notice of intervening liens is inferior to them in priority.

The stated maximum amount means the maximum amount secured at any one time, and does not include amounts already repaid or discharged. Repayment in full of amounts owing under the mortgage does not extinguish the mortgage. All such mortgages shall be discharged on demand of the mortgagor in conformity with the provisions of Section 2941 of this code.

Necessary expenditures made by the mortgagee to preserve the security constitute liens having the same priority as that originally established by the mortgage.

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*The proposed amendment of Civil Code Section 2975 is not shown in strikeout and underline as it would be in a bill introduced in the Legislature.

Smith 10

FEDERAL INTERMEDIATE CREDIT BANK OF BERKELEY

P. O. BOX 771

Berkeley 1, California

October 24, 1957

Dr. John Henry Merryman
School of Law
Stanford University
Stanford, California

Dear Professor Merryman:

I have read with interest your study of California law relating to mortgages for future advances. I believe that your interpretation of present sections 2974 and 2975 of the California Civil Code is correct. I think, however, that the proposed revision suggested in your paper goes too far.

The amendment of Section 2974 in 1935 was intended to cover a special situation. The financing of farmers for the production of their crops requires funds to be advanced at different times during the entire production and harvesting season. It was not felt to be economical or just to require a farmer borrower to take the entire loan at the time it was originally negotiated and pay interest on money he did not need. It was also thought that he should be permitted to draw funds for land preparation and planting, repay that loan from other crop proceeds and re-borrow again for harvesting expenses, without the necessity of executing new papers, provided all this was done, as a part of a regular program of financing, and the mortgage so stated. It was in recognition of this peculiar problem of farmers that Section 2974 was enacted in 1935. The proposed revision combining Sections 2974 and 2975 into one section would permit the practice of borrowing, repaying and re-borrowing to be used by any lender loaning money on the security of personal property as long as the chattel mortgage contained a maximum loan limitation of sufficient amount. I do not believe that the reasons for this practice are present in all types of lending where personal property is taken as security.

Under the proposed revision all creditors using Chattel Mortgages would undoubtedly adopt the practice of using an advance clause as a precautionary measure even though no additional advances were anticipated at the time the loan was made. Mortgagees would not release their mortgages on repayment of the original debt because of the barepossibility that at some futur time they might again extend credit to the mortgagor and could thus use the security without the necessity of taking new paper No other lender could ever extend credit where there was an unreleased chattel mortgage containing an advance clause even

though on inquiry he determined that there was no present indebtedness and put the first mortgagee on actual notice of his loan. Lenders could not safely extend credit in any case as long as there was an unreleased chattel mortgage containing an advance clause.

I think that the result intended to be accomplished by Section 2974 should be retained and limited to those cases where the loan is intended to be secured (as it is now) by crops or animat chattels as a part of a regular program of financing. There is a logical reason for according the benefits of Section 2974 to production financing which is not present in other types of chattel mortgage lending and this distinction should be retained.

Yours very truly,

/s/ Percy A. Smith
Attorney

m

October 28, 1957

Percy A. Smith, Esq.
Federal Intermediate Credit
Bank of Berkeley
P. O. Box 771
Berkeley 1, California

Dear Mr. Smith:

Thank you for your reply of October 24. I particularly appreciate your criticism of the proposed amendment since you represent a point of view that we have had a great deal of difficulty in finding.

I will discuss with the Law Revision Commission the criticism you make. At this point it appears to me that the criticism can be met by simply calling attention to the Civil Code section which provides for release of mortgages, on the demand of the mortgagor, upon payment. We had discussed including a specific reference to this section in the proposed new statute but it seemed to some of the group that no such reference was necessary. The section is in the Civil Code, so the reasoning goes, and presumably is known to anyone who takes the trouble to look. I personally incline toward a reference to this section in the proposed new statute. Would this meet your objection?

Sincerely,

/s/ John Henry Merryman
Associate Professor
at Law

JHM:jr:m

Smith

FEDERAL INTERMEDIATE CREDIT BANK OF BERKELEY

P. O. BOX 771

BERKELEY 1, CALIFORNIA

November 15, 1957

Mr. John Henry Merryman
Associate Professor of Law
Stanford University
Stanford, Calif.

Dear Professor Merryman:

I have your letter of October 28 and your suggestion to include in the proposed new section a reference to the Civil Code Section requiring a release of mortgage on demand of the mortgagor upon payment.

It is true that mortgagers have a legal right to require a release on payment of the loan, but as a practical matter I do not believe that many borrowers will be concerned with this unless they desire to borrow again on the same security from another lender.

My main objection to the proposed amendment is that the provisions of Section 2974, enacted to cover a special situation peculiar to agricultural financing, would be extended to all types of chattel mortgage lending. As I indicated before, I do not believe the reasons which led to the enactment of Section 2974 are present in other types of chattel mortgage financing.

Yours very truly,

/s/ Percy A. Smith
Attorney

Shuman

MORRISON, FOERSTER, HOLLOWAY, SHUMAN & CLARK

San Francisco 4

September 27th, 1957

Professor John Henry Merryman,
School of Law,
Stanford University,
Stanford, California.

Dear Professor Merryman:

Although we have talked over the telephone in response to your letter to me dated August 23rd, 1957 and your report on the status of optional and mandatory future advances in real and chattel mortgages in California, I thought I should make my views a matter of record with you.

Question 1. I have stated that I thought the banks of California would like to see Section 2975 Civil Code made applicable to real property mortgages. This question, however, is now before the California Bankers Association to be submitted to the banks for their views; of this we will be advised in due course.

Question 2. I agree with your interpretation of Sections 2974 and 2975 Civil Code.

Question 3. I am in accord with your views that Section 2974 should be repealed. I may say parenthetically, however, that Messrs. Pillsbury, Madison & Sutro, Counsel for The Bank of California, in a letter to me say: "We think it would be a mistake to eliminate Section 2974 of the Civil Code, particularly since it contains the express provision concerning the continuation of the lien regardless of repayment of the indebtedness." That comment indicates to me, however, that they have not carefully reviewed your revised Section 2975.

Your proposed revision of Section 2975 Civil Code is satisfactory as far as it goes. I have one question, however, which I believe I discussed with you - and it is this: Suppose the maximum amount to be secured by the chattel mortgage is $10,000.00 and the mortgage so states and this sum has been advanced. Now suppose, during the term of the mortgage, the mortgagee has to make an additional advance of $1,000.00 to preserve the security. Then the mortgagor defaults and the unpaid interest amounts to another $1,000.00. Is the mortgage security for these three (3) amounts, totalling $12,000.00, or is it security only for the maximum of $10,000.00 stated in

the mortgage to be the maximum amount to be secured? This problem has bothered me and I think it ought to be made clear by statute that the total amount of the secured claim in such a case would be $12,000.00.

I have before me a copy of the letter to you dated September 4th, 1957 from Kenneth M. Johnson, Esquire, Counsel for the Bank of America, and I am in accord with his suggestion as to the revision of the next to the last paragraph of your proposed revision having to do with necessary expenditures. This is in line with my interest problem above suggested.

Question 4. I think the suggestions made in Mr. Johnson's letter of September 4th, 1957 under the heading "Answer to Question 4" have much merit.

Yours sincerely,

/s/ J. F. Shuman.

JFS:NW:m

Law Offices of

MORRISON, FOERSTER, HOLLOWAY, SHUMAN & CLARK

Crocker Building

San Francisco 4

November 19, 1957

Professor John H. Merryman
c/o School of Law
Stanford University
Stanford, California

Dear Professor Merryman:

As you know, copies of your study on optional advances in real and personal property mortgages were sent to all the banks in California by the California Bankers Association with the request that they study the question and advise the Association whether they favored a change in the statutes of California whereby optional future advances in mortgages on real estate would be put on the same basis as optional future advances in personal property mortgages; specifically, whether Sections 2974 and 2975, Civil Code, should be made to apply to real property mortgages.

The Association to date has received answers from sixteen banks, including several of the large metropolitan banks, and I have seen copies of the letters of counsel for the Bank of America and Security First National Bank of Los Angeles to you on the subject.

The opinion is practically unanimous that so far as real estate mortgages are concerned there should be no change from the present rule and statutes; no bank favored making Sections 2974 and 2975 Civil Code applicable to real property mortgages. Several banks expressed the view that perhaps the subject should have further investigation, but no bank recommended any change for the present in the rules applicable to real estate mortgages.

I am satisfied the views expressed by these sixteen banks represent the views of our banks at the present time; they came from both large and small banks, from those in the larger cities and from banks in the smaller communities. I am sure they represent the complete view at this moment.

Yours very sincerely,

/s/ J. F. Shuman

J. F. Shuman

JFS/cb

MORRISON, FOERSTER, HOLLOWAY, SHUMAN & CLARK

San Francisco 4

November 25, 1957

Professor John H. Merryman
School of Law
Stanford University
Stanford, California

Dear Professor Merryman:

Subsequent,to my letter to you of November 19, 1957, regarding the position of the California Bankers Association on the proposal to extend Sections 2974 and 2975 Civil Code to real property mortgages I received a letter from Edw. D. Landel counsel to the Legislation and Taxation Commission ofc the Association, reading as follows:

> "For some years we have been attempting to obtain legislation which would protect the lien of a construction loan against mechanics' liens in those cases in which advances may be made not strictly in conformance with the loan agreement, but within the amount of the original commitment, or which are actually used in the construction of the building. After quite a fight we got part way with this at the last session of the legislature.
>
> I think it unfortunate that we are now on record with the Law Revision Commission to the effect that the members of the California Bankers Association are opposed to <u>any</u> change in the present rules applicable to real estate mortgages."

After receiving this letter from Mr. Landels I telephoned you to inquire if you interpreted my letter the same as Mr. Landels and you then told me you did not so interpret it; that you understood it to mean only that the Association did not favor extending Sections 2974 and 2975 Civil Code to real estate mortgages and that you did not construe it to mean that the Association did not favor <u>any</u> changes in the present rules applicable to real estate mortgages. I did not intend to even imply by my letter to you that the Association would oppose <u>any</u> changes in the present rules applicable to real estate mortgages and I do not believe my letter is subject to that implication.

However, since Mr. Landels thinks I may have "taken in too much territory" I will now say that all I intended in that letter was to advise that the California Bankers Association did not favor extending Sections 2974 and 2975 Civil Code to apply to real property mortgages; I did not mean to say that they would oppose <u>any</u> other changes in the rules applicable to real estate mortgages.

Yours truly,

/s/ J. F. Shuman

JFS:mc:m

cc: California Bankers Association
E. H. Corbin, Esq.
Edw. D. Landels, Esq.

Realty

SHEPPARD, MULLIN, RICHTER, BALTHIS & HAMPTON

ATTORNEYS AT LAW

LOS ANGELES 13

September 17, 1957

John H. Merryman, Esquire,
Stanford University School of Law,
Stanford, California.

Dear Professor Merryman:

I apologize for the delay in replying to your letter of August 23, 1957. I hope that this reply is not too late to be of some value to you.

I found your treatise on "Mortgages for Future Advances" not only very interesting but extremely well done. I quite agree with your conclusion that there is no real need for any change in the law with respect to future advances under mortgages on real property. The most common situation in the real property field is the typical building loan. In this area, at least, the lending agency takes a note and deed of trust for the full amount of the loan (which is a complete over-statement since no funds are actually advanced in most cases at the time of the recording of the deed of trust) and, at the same time, takes a building loan agreement providing for the retention of the funds by the lender and the disbursement of those funds upon the happening of certain conditions. Those conditions are usually geared to the state of completion of the structure and the inspection of the work done as being satisfactory to the lender. The building loan agreement also contains the condition upon which the lender can terminate its obligation to make advances. These conditions usually cover almost everything reasonably related to the loan which could conceivably affect the lender. These agreements generally are considered by attorneys to provide for sufficient "obligatory" advances to meet the requirements of the cases for priority over liens acquired subsequent to the recording of the deed of trust. In any event, the system seems to work satisfactorily and I am not aware of any pressing need for change. I would be extremely doubtful of any statute which attempted to lay down any rules for priority in these real property situations.

I quite agree with your interpretation of Sections 2974 and 2975 of the Civil Code. I think you have done an excellent job in analyzing them, and I would hope that, if the question ever got that far, the Supreme Court of California would agree.

With respect to the proposed revision of Section 2975, I have two questions as to the wording. The reference to "all optional advances" in the last sentence of the first paragraph may be a little broad. It might be better to refer to "optional advances other than those necessary expenditures to preserve the security." Also, the provision that repayment in full does not extinguish the mortgage might be conducive of monopoly by a lender. I believe we should have some reference to any obligation on the part of the lender to release the chattel mortgage upon demand of the mortgagor.

You also ask whether it seemed desirable to make other changes in the law relating to chattel security. For your information, I am enclosing a copy of Senate Bill 1402 as it was introduced at the last session of the Legislature. As you will note, this bill constituted an adaptation of Article 9 of the Uniform Commercial Code and was prepared by a group of attorneys representing some banks and other lending agencies. I do not have an extra copy of the bill in its last amended form, which I believe was as amended in the Senate on May 28, 1957. However, I am sure you can get a copy by writing to the Legislative Bill Room, State Capitol, Sacramento. The bill was not adopted at this session but was referred to an interim committee for study. You will be particularly interested in the provisions of Section 5312(4) at the bottom of page 18 and the top of Page 19 of the bill.

I believe that a complete recasting of the law of chattel security similar to Article 9 of the Uniform Commercial Code would be a very valuable change in the law. I do not know whether your assignment goes that far.

Cordially yours,

/s/ George S. Richter, Jr.

GRR:A:m

Johnson

BANK OF AMERICA

San Francisco Headquarters

September 4, 1957

Professor John Henry Merryman,
School of Law,
Stanford University,
Stanford, California.

Dear Professor Merryman:

This will acknowledge receipt of your letter dated August 23, 1957, in relation to mortgages for future advances.

Your four questions and my answers and comment follow:

Question 1. Should the law respecting mortgages of real property to secure future advances be changed? If so, what changes do you suggest? How would such changes affect you and persons in similar positions? How would such changes affect other interested persons or groups?

Answer - I do not feel that there is any real need for statutory changes in so far as mortgages of real property are concerned. While there are, of course, areas where some doubt exists, there is, as you note, a very substantial body of case law in this field and at least general principles are fairly clearly established.

The 1957 Session of the Legislature made one change in the field where on a numerical basis the greatest number of problems have arisen. I refer to construction loans and the new paragraph added by Chapter 1146 to Section 1188.1 of the Code of Civil Procedure. Briefly, the distinction between mandatory and optional advances is done away with if the subsequent advance actually goes into the improvement of the property; the subsequent advance having the same rank as the original advance under the mortgage. This rule seems fair since the holder of the mechanics' lien participates in the increased value of the property even though his participation is subject to that of the lender. In the past the rules as to mandatory optional advances were fairly well understood; however, difficulty arose in the classification of a particular advance. This new legislation should be very helpful in this field where many difficulties have arisen in the past.

In other situations you might be interested in a rule of practice that we have established. Take for example where an individual has a conventional real estate loan which was in the original amount of $10,000 and has a present unpaid balance of $5,000. The borrower desires a new advance to be secured by the original deed of trust in the amount of $2,500, which we are willing to make if we can be assured that the subsequent advance will have the same status as the amounts originally secured. Under the rules as they exist we could make the subsequent advance and it would be prior to other liens of whic we had no actual notice. In practice we order a Preliminary Title Report and insist upon a subordination of subsequent lien which is shown by such a report. We do this possibly out of an excess of caution. However, in nearly every branch an officer is assigned to read a daily summary of recordings put out by one of the several services in this field. Thus it could well be argued that we are on actual notice as to every recorded instrument. To avoid this argument we have adopted the practice indicated.

Question 2. Is my interpretation of Section 2974 and 2975 of the Civil Code a valid one? If not, what is your understanding of their meaning?

Answer - I agree with your interpretation of Sections 2974 and 2975 of the Civil Code and want to congratulate you on the very complete and effective exposition of the problems inherent in these two sections.

Question 3. Assuming revision of Civil Code Sections 2974 and 2975 is desirable is the proposed revision a sound one? In this connection we would appreciate your comments on the proposed statute prepared by the Commission. A copy is enclosed.

Answer - On the whole, I think the proposed revision of Section 2975 is excellent; however, I would change the next to the last paragraph to read as follows:

> "Necessary expenditures made by the mortgagee to preserve the security constitute advances under the mortgage and have the same priority as that originally established by the mortgage, even though the maximum amount to be secured thereby, as stated in the mortgage, is exceeded."

I realize that an argument can be made that the amount to be secured by the mortgage should never exceed the maximum amount; however, I think that my solution is fair in the case of necessary expenditures, and at least I felt that the question remained open under the present wording.

Also, I have a little difficulty with the language of the last paragraph. Advances made pursuant to the terms of the mortgage suggest something more than the mere permissive language found in most mortgages, i.e., usually there is no agreement to make future advances contained in the mortgage and the mortgage merely recites that there may be additional advances secured thereby. The agreement, if any, would probably be separately stated or would be reached at a later time. I realize that I am somewhat of a nitpicker at this point. I think it might be wise, however, to add to the present paragraph the words "or otherwise intended to be secured thereby." Also I wonder if we really need a definition of future advances.

Question 4. Does it seem desirable to make other changes in the law relating to chattel security? Why or why not?

Answer - Although I have done no recent work on the subject and possibly should do so before answering, there seems to me to be two areas where additional legislation in this field might be desirable.

The first situation that I have in mind is where X is the original chattel mortgagor and with the consent of the mortgagee sells the mortgaged property subject to the chattel mortgage to Y, who assumes the indebtedness secured thereby. A familiar type of transaction would be where restaurant equipment is so sold. A question arises as to the effectiveness of the original chattel mortgage as between the original lender and the subsequent creditors of Y, i.e., is the chattel mortgag constructive notice in so far as these creditors are concerned? Doubt exists because a creditor of Y finds Y in possession of the property and a search of the public records would indicate no chattel mortgage in the name of Y as mortgagor. A simple answer would be to require a new mortgage from Y; however, life being what it is, there is usually a practical objection to this on the part of the parties involved.

The second field that might be worthy of investigatio is in relation to so called accessions; for example where a

truck is subject to a chattel mortgage or conditional sales contract and new tires are put on subject to a conditional sale contract or chattel mortgage to a different seller or lender. The replacement of motors in motor vehicles presents the same problem.

Problems as to priority also exist in the situation where personal property in effect becomes a fixture, for example, built in stoves, refrigerators and washing machines. In the commercial area the installation of sprinkler systems would be another example. Where the real property is subject to a mortgage or deed of trust and where the seller or lender of the personal property attempts to retain a security interest, problems arise where the buyer defaults under one or more of the obligations he has entered into.

I am more than happy to cooperate with you and hope that the remarks above will be of some assistance.

Sincerely yours,

/s/ Kenneth M. Johnson

KMJ:MLG:m

Carlin

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

Los Angeles, California

October 23, 1957

Professor John H. Merryman
Stanford University
Stanford, California

Dear Professor Merryman:

At long last I am able to write you further about your paper on Mortgages for Future Advances.

My associates who have given particular attention to the part dealing with real property encumbrances not only feel that you have done an excellent job of researching and analyzing the present law but definitely agree with your conclusion that no revision should be attempted at this time. In this I concur. While it is true, as your analysis shows, that the law leaves something to be desired from the standpoint of logic and clarity, yet in practice it is working very well for lenders and borrowers alike.

In some respects it would of course be fine if the public record told more of the story about an enbumbrance on real property but the record cannot possibly tell it all, especially the current information. The important thing is that a junior encumbrancer or other interested person be able to learn from the record where to go to get the up-to-the-minute story. In the field of personal property, of course, there has been a trend for years toward notice filing which merely gives notice that one person intends to borrow from another on a certain kind of security device covering collateral of a certain type. The rest is left up to inquiry at the time further information is needed. It works very well.

As for chattel mortgages, I indicated some time ago that I would certainly favor a repeal of Section 2974 and certain amendments to 2975.

Frankly, I have some misgivings about completely rewriting Section 2975. Certainly your language is much more concise and workmanlike. On the other hand, there is some danger in completely rewording a statute which has served a useful purpose for twenty-two years without giving rise to litigation.

The rewording of the first sentence narrows it down to "future advances," which, by itself, would seem to restrict the securit to loans made by the lender. Perhaps the addition of your last sentence makes it clear that "future advances" includes any kind of an obligation stated to be secured by the mortgage, but I would suggest it be made even clearer. For example, suppose a mortgagor becomes obligated to a mortgagee because he has guaranteed someone else's note. It should be possible for the parties to agree that this or any other kind of an obligation arising in the future would be secured. It is common practice now for them to do so and the present language appears clearly to contemplate it.

The substantive change contained in the last sentence of your first paragraph is excellent. It makes it clear that Section 2975 has not in effect repealed the rule which obtained prior to 1935, that without a stated maximum a mortgagee has priority for future advances until he gets actual notice of an intervening encumbrance. This old case law should be expressly preserved for it is not always practicable, especially on small loans, to incorporate a maximum loan clause in the mortgage. As for the wording of this sentence, I have only one thought. Might it not be better to state the priority of the earlier recorded mortgage affirmatively rather than negatively? Perhaps the following would do:

> If the maximum amount to be secured is not stated, the lien for all optional future advances made before actual notice of intervening liens is superior to them in priority.

While I believe you have clearly restated the old rule, I would like to throw out one thought for consideration. On principle why shouldn't the mortgagee be protected in making additional advances until such time as the junior encumbrancer gives him specific notice not to do so? The future advance clause is a matter of record and if the holder of the junior lien wants the holder of the superior lien to discontinue making advances under it, I believe it is fair and reasonable to require him to say so For one thing this would get away from difficult questions of law and fact as to what constitutes actual notice. Actual notice, of course, may come in any number of ways other than direct from the junior lien holder.

I like the inclusion of the new matter contained in the second sentence of your second paragraph. It is a curious thing that it is quite clear under Section 2974 but not at all clear under Section 2975 that payment in full does not of itself discharge the mortgage.

Perhaps in view of Section 2941 it is not necessary to add that a borrower may demand a satisfaction of mortgage during a clean up period but it would do no harm to provide for it specifically as in Section 2974.

Thank you for giving us the benefit of your fine paper and for the opportunity of making known our views on the proposed legislation.

Sincerely yours,

/s/ E. H. Corbin
Vice President

EHC:MG:m

Landels

LANDELS, WEIGERL AND RIPLEY

San Francisco 4, California

September 4, 1957

Mr. John Henry Merryman
Stanford Law School
Stanford, California

Dear John:

Thank you for sending me your most thorough and instructive study on the subject of mortgages to secure future advance

I have only had time to rather hurriedly read over your paper and I will try to give it more careful study and write you more fully later. However, I thought in the meantime you might like to have the following comments.

On the subject of real property mortgages, have you seen the amendment to C.C.P. 1188.1 enacted at this session of the Legislature, Chap. 1146?

I think no doubt Section 2974 can be repealed but I am not at all sure that it is desirable to completely re-write Section 2975. It has worked well and it is not without significance that it has been considered in only one reported case.

In your re-draft it seems to me that perhaps your definition of future advances makes the section more restrictive than it is now. You define future advances as "sums to be paid.... pursuant to the terms of the mortgage". Just what does this mean? As I read the present section the mortgage will secure obligations regardless of whether they constitute payments made pursuant to the terms of the mortgage or not or whether they were even contemplated at the time the mortgage was executed.

I would suggest that the fourth paragraph should include sums advanced for the purpose of maintaining or preserving the security as well as those expended by the mortgagee and that the word "maintain" should be retained. Perhaps it should also be made clear that these sums are secured in addition to the maximum amount as is the case in the present section.

Sincerely yours,

/s/ Edward D. Landels

EDL:r:m
cc: Mr. E. H. Corbin