

Date of Meeting: April 18-19, 1958

Date of Memo: April 9, 1958

Memorandum No. 2

Subject: Study No. 24 - Mortgages for Future Advances

This study was discussed and the recommendation of the Commission decided upon at the March meeting. I was authorized to make certain changes in the proposed statute and to send the study to the State Bar for its consideration. However, we had not at that time prepared and submitted to the Commission for its consideration a proposed recommendation to the Legislature on this subject. Such a recommendation has now been prepared and is attached hereto for your consideration at the April meeting. I will defer sending any material on this study to the State Bar until after that meeting.

The proposed statute as revised in accordance with the action taken at the March meeting reflects the Commission's decision that the priority established by the mortgage should extend to interest and expenditures made by the mortgagee to preserve the security. This required a change in the second paragraph of proposed Section 2975 and the addition of what is now the 4th paragraph of the Section.

Section 2975 as redrafted also includes a new last paragraph partially defining "future advances". The language used is taken from the first sentence of present Section 2975 with two exceptions: (1) "other than expenditures by the mortgagee to preserve the security" is added after "made"; (2) "and" is substituted for "or" after the word "security". It is necessary to except expenditures made to preserve the security from

the definition of future advances because special provision is made for these in the fourth paragraph of proposed Section 2975 and under that provision such expenditures have the same priority as that originally established by the mortgage whether or not the amount to be secured is stated in the mortgage. If such expenditures were to be considered future advances, however, they would not be entitled to priority over intervening liens of which the mortgagee had actual notice when the expenditures were made, if the mortgage did not state the maximum amount to be secured thereby.

I have discussed the recommendation and proposed statute attached with Professor Merryman. He has raised a question only with respect to the last paragraph of proposed Section 2975. Professor Merryman persists in his view that it is unwise to attempt in the statute to define future advances, even partially. He is concerned lest situations arise in which the definition will be construed to be either broader or narrower than it should be. He maintains that there is sufficient case law on the general subject in California and elsewhere both to give the term "future advances" a rather well-defined general meaning and to provide adequate guidance to a court required to decide whether a particular loan, expenditure or obligation is included. He points out, further, that the courts will necessarily be defining future advances with respect to real property mortgages for future advances since there is no statutory law on that subject and that it would be somewhat anomalous if the judicial definition thus adopted should vary from the legislative definition which the last paragraph of proposed Section 2975 would enact with respect to personal property mortgages for future advances.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

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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:

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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.

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(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.