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INTRODUCTION

The recent expansion in the business of banking and loan institutions and attractive new financing developments in the housing industry have led to the increased use of a unique form of security transaction. The tendency in these institutions is to add to the standard mortgage form a clause which provides that it shall secure additional loans or future advances, or to make similar provision by a collateral agreement.[1] The increasing use of this financing arrangement justifies some mention of the advantages and disadvantages both to the lender and borrower.

The advantages afforded to the parties are manifold, but in the field of financing new homes the mortgage to secure future advances seems especially promising in that it enables low and middle income groups to own or construct their own homes.[2] For many years the device has been employed as a useful method of providing continuous dealings between the lender and borrower in construction loans where advances are made as the work progresses pursuant to commitments.[3] In more recent years

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1. The most popular form currently in use is the mortgage to secure optional future advances which is a combination of two security arrangements whereby the borrower makes an irrevocable offer of his property as security for a subsequent loan which may later be accepted at the option of the mortgagee. See Architectural Forum, June, 1949, p. 103.

2. See Note, 65 HARV. L. REV. 478 (1952).

3. *E.g.*, Stephens v. Ahrens, 179 Cal. 743, 178 Pac. 863 (1919); Nussenfeld v. Smith, 110 Conn. 438, 148 Atl. 388 (1930); Kentucky Lumber and Mill Co. v. Kentucky Title Savings Bank & Trust Co., 182 Ky. 244, 211 S.W. 765 (1919); New Baltimore Loan & Savings Ass'n v. Tracey, 142 Md. 211, 120 Atl. 441 (1923); Whelan v. Exchange Trust Co., 214 Mass. 121, 100 N.E. 1095 (1913); Creigh Sons & Co. v. Jones, 103 Neb. 706, 173 N.W. 687 (1919).

it has been increasingly used in connection with real estate mortgages to permit optional[4] future advances which enables the mortgagee to make funds available to the mortgagor for later repairs, replacements or improvements.[5] Financing these later needs is frequently one of the most serious obstacles to the prospective home owner who all too often will exhaust his loan before the completion of the shell of the house or before the necessary additions in household equipment have been purchased.

The advantages accruing to the borrower or mortgagor are evident. Mortgages for future advances generally make available opportunities for long term repayments and will frequently make additional funds available for the purchasing of chattels or fixtures at the same low interest rate rather than force the borrower to finance household goods by purchasing on an installment plan with a high "finance charge" or by small loans, secured or unsecured, which also typically provide high interest rates.[6] At the same time the mortgagor is encouraged to reduce the mortgage debt because he can more readily obtain the money necessary to make repairs to the property as they are required. Furthermore, the mortgagor finds a distinct advantage in eliminating the expenses attendant upon the execution of subsequent mortgages as each later advancement is made,[7] and

4. Mortgages to secure optional future advances are more commonly referred to as "open end" mortgages, but use of the latter term will be avoided in this article because the term is also used to designate a mortgage to secure after-acquired property.

5. However, the use of the optional type is not limited to homes which are newly purchased. For a discussion of the varied applications of this mortgage, see Architectural Forum, "The Open End Mortgage", June, 1949, p. 102; Fortune, Sept., 1949, p. 18.

6. This is accomplished by the combined use of a mortgage for future advances and the "package mortgage". By the use of the package mortgage, newly constructed homes can be sold equipped with such essentials as refrigerators, stoves, washing machines, or other appliances, with the entire "package" constituting the security. It will generally provide for a composite rate of interest at about four or five per cent which covers the loan on the real property, fixtures, and chattels. At the same time it provides for an extended payment term. Neither of these results could be accomplished under separate mortgages. The mortgagee benefits by obtaining a more complete security at a reduction of administrative expense. For a discussion of the package mortgage, see Architectural Forum, April, 1945, p. 9; Architectural Forum, Dec., 1946, p. 8; Note, 65 HARV. L. REV. 478 (1952).

7. 31 N. CAR. L. REV. 505 (1933).

realizes a further interest savings on the portion of the loan which is reserved and made at a later date.[8]

The opportunities and advantages offered to the mortgagee or lender appear to be even more numerous. From his standpoint, as the value of the security is increased, the mortgage value also increases so that the mortgagee's equity in the property gives greater assurance that the loan will be a safe one.[9] In other words, the mortgagee can simultaneously create a future loan market with persons in whom he has confidence and, at the same time, enhance the security of the original loans by increasing the property value. Further, the closer relationship between the parties allows the mortgagee to act as a check on the mortgagor to discourage excessive credit buying. This is accomplished because the mortgagor is forced to look primarily to the mortgagee in seeking any further credit; in this manner conditional vendors and purchase-money mortgagees are virtually kept out of the total picture.[10] In construction loans an important advantage is found by avoiding the risk incurred by turning over the full amount required for the project at a time when the property is insufficient security. Examples of reduction in administrative costs can also be realized in many instances.[11]

But in spite of the many advantages, mortgages securing future advances fall far short of reaching a financial utopia. Mortgages to secure future advances are virtually limitless in their variations of form and scope, and there have been so many abuses in their use that the courts have seized upon the more extreme types and reviewed the transactions

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8. *Id.* at p. 506; Other new advantages in modern mortgages may include: 1) composite loan on the equipment and real estate ("package mortgage"); 2) advances to cover costs of modernization and equipment at no extra charge up to the amount of the loan; 3) health and accident insurance which guarantees mortgage payments for the term of any disability; 4) payment deferment up to four months after the first three years: 5) self reducing interest which decreases as the equity increases. See Architectural Forum, April, 1945, p. 10.

9. See Architectural Forum, June, 1949, pp. 102-104.

10. See 65 HARV. L. REV. 486 (1953).

11. In the majority of jurisdictions, actual notice to the lender is required to cut of priority as to subsequent advances, so that the mortgagor need only sign a note for the additional loan; where constructive notice is sufficient, it is generally the practice to record the advances. See notes 68-71, *infra*. In the many states where a mortgage registry tax is imposed, the amount of the tax may also be reduced if no extension is desired. Further, the cost of title insurance will generally be reduced since a search at the inception is sufficient; where constructive notice will subordinate subsequent advances, the search is still somewhat shortened and need cover only the period between the date of the original mortgage and the date of the subsequent advance.

with scrutiny. The use of forms which tend to be too broad in the scope of security or indebtedness which they embrace has been detrimental to the growth of this mortgage device. A too familiar example of this is the so-called "anaconda"[12] or "dragnet"[13] mortgages which employ broad and general terms binding the borrower's hands so that he can look only to the mercy of the mortgagee and is unable to secure credit elsewhere. The courts have viewed such clauses with disfavor and generally placed limitations upon the indebtedness which may be secured by the mortgage. The policy effect of these limitations has created doubt as to the validity and discouraged the use of other more reasonable forms in many jurisdictions where these more reasonable forms have not been construed by the courts.

To the uncertainties growing out of the many possible forms or types available must be added the uncertainties resulting from the judicial and statutory requirements for validity and priority which often seem to outnumber the variations in form and to make difficult or impossible any general or concise formulation of a controlling rule. Employment of this security technique is further impeded by a general misunderstanding of the problems, and as a result there are many forms in use by banking and lending houses in Missouri and elsewhere which are either invalid *ab initio* or else fail to give priority to the original mortgagee as against subsequent incumbrances upon the secured property.

Certain practical problems have not been thought through; the author has examined a large number of printed forms used by lending institutions throughout Missouri and has not found any forms containing a suitable provision for the release of the mortgage upon the satisfaction of the debt.[14]

However these faults and omissions in draftsmanship should be viewed with sympathy, and are due in part to the scarcity and ambiguity of cases dealing with the general problem in Missouri.

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12. *E.g.*, Berger v. Fuller, 180 Ark. 372, 377, 21 S.W.2d 419, 421 (1929), where the court stated that, "mortgages of this character have been denominated 'Anaconda mortgages' and are well named thus, as by their broad and general terms they enwrap the unsuspecting debtor in the folds of indebtedness embraced and secured in the mortgage which he did not contemplate, and to extend them further than has already been done would, in our opinion, be dangerous and unwise."

13. See, *e.g.*, First v. Byrne, 238 Iowa 712, 716, 28 N.W.2d 509, 511 (1947); See also notes 39 and 40, *infra*.

14. The problem of release is treated in detail in a subsequent portion of this article.

Nevertheless, the numerous advantages apparent in the use of this mortgage technique indicate that these difficulties soon will be overcome, for the increasing utilization of the device promises to make it a familiar credit instrument in the near future.[15] Therefore the material to follow is presented in anticipation that many of these problems and difficulties can be settled or corrected.

The term "mortgage" should be understood to include "deed of trust" unless otherwise indicated.

TYPES AND VALIDITY

Mortgages to secure future advances generally fall into one of four broad catagories of form.[16] In the first type the instrument makes no mention of future advances but rather takes the form of a mortgage absolute on its face which states a definite sum which is secured thereby. Actually only a portion of this stated amount is lent to the mortgagor, and, by oral agreement or a written collateral agreement, the parties manifest their intentions with reference to future advances.[17]

In the second catagory, the instrument is drafted so as to expressly provide for the making of future advances. This type distinguishes itself, however, in that the mortgagee, by the terms of the agreement, contractually binds himself to make these subsequent advances. This form is generally referred to as a mortgage to secure "obligatory future advances."[18]

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15. Many of the banks in the larger cities of the United States have adopted this form as a part of their standard real estate mortgage. In 1948 approximately $100,000,000.00 was loaned to home owners under the mortgage to secure optional future advances. See Architectural Forum, June, 1949, p. 102.

16. But *Cf.*, OSBORN, MORTGAGES § 116 (1951) where it is stated there are only two forms. This difference is, however, merely one of classification and not of substance, and they are here divided into four catagories for purposes of clarity in a later treatment on priorities.

17. See, *e.g.*, Foster v. Reynolds, 38 Mo. 553 (1866); White v. Meiderhoff, 281 S.W. 98 (Mo. App. 1926); Thomas v. Blair, 208 Ala. 48, 93 So. 704 (1922); Tully v. Harloe, 35 Col. 302, 95 Am. Dec. 102 (1868); Matz v. Arick, 76 Conn. 388, 56 Atl. 630 (1904); Citizens Savings Bank v. Kock, 117 Mich. 225, 75 N.W. 458 (1898); Westheimer v. Goodkind, 24 Mont. 90, 60 Pac. 813 (1900); Schofield Implement Co. v. Minot Farmers Grain Ass'n, 31 N.D. 605, 154 N.W. 527 (1915).

18. See, *e.g.* Machado v. Bank of Italy, 67 Cal. App. 769, 228 Pac. 369 (1924); Boswell v. Goodwin, 31 Conn. 74, 81 Am. Dec. 169 (1862); Hance Hardware Co. v. Denbigh Hall, Inc., 17 Del. Ch. 234, 152 Atl. 130 (1930); Bullard v. Fender, 140 Fla. 448, 192 So. 167 (1929); Schmidt v. Zahrndt, 148 Ind. 447, 47 N.E. 335 (1897); Wilson v. Russell, 13 Md. 494, 71 Am. Dec. 645 (1859); Landers-Morrison-Christenson Co. v. Ambassador Holding Co., 171 Minn. 445, 451, 214 N.W. 503,

In the third type, the mortgage will also provide expressly for the making of future advances, but the making of these advancements is strictly within the discretion of the mortgagee.[19] Such a device is termed a mortgage to secure "optional future advances," but currently is becoming more familiarly known as an "open end" mortgage.[20] Instruments purporting to secure optional advances are generally drawn either as "limited" or "unlimited." The unlimited type makes no mention of the total amount or limit which may ultimately be advanced and secured.[21] The limited form is drafted with a provision providing a maximum amount of advances to be made and secured; or it may be limited as to the time during which such advances shall be made as well as limited in amount.[22] Furthermore, where a mortgage on its face states it is to secure future advances or loans up to

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506 (1927); Creigh Sons & Co. v. Jones, 103 Neb. 706, 173 N.W. 687 (1919); Chartz v. Cardelli, 52 Nev. 1, 279 Pac. 761 (1929); People's Nat. Bank & Trust Co. of Lynbrook v. Harkay Realty Co., 258 App. Div. 964, 16 N.Y.S.2d 779 (2nd Dep't 1940); Williams v. Whitinsville Savings Bank, 283 Mass. 297, 186 N.E. 502 (1933); Kuhn v. Southern Ohio Loan & Trust Co., 101 Ohio 34, 126 N.E. 820, *aff'g* 12 Ohio App. 184 (1920); Land Title & Trust Co. v. Shoemaker, 257 Pa. 213, 101 Atl. 335 (1917); Blackmar v. Sharp, 23 R.I. 412, 50 Atl. 852 (1901); Jolly v. Fidelity Union Trust Co., 15 S.W.2d 68 (Tex. Civ. App. 1929); Eltopia Finance Co. v. Collerby, 126 Wash. 554, 219 Pac. 24 (1923).

19. See, *e.g.*, Rice v. Davis, 99 Mo. App. 636, 74 S.W. 431 (1903); Holmes v. Straynorn-Hutton-Evans Commission Co., 81 Mo. App. 97 (1899); Smith-Wallace Shoe Co. v. Wilson, 63 Mo. App. 326 (1895); Thomas v. Blair, 208 Ala. 48, 93 So. 704 (1922); Hamilton v. Rhodes, 72 Ark. 625, 83 S.W. 351 (1904); Langerman v. Puritan Dining Room Co., 20 Cal. App. 637, 132 Pac. 617 (1913); Everist v. Carter, 202 Iowa 498, 210 N.W. 559 (1926); State Bank v. Tinker, 131 Kan. 525, 292 Pac. 748 (1930); Alnord v. Mallory, 10 Ky. L. Rep. 590 (1888); Bunker v. Barron, 93 Me. 87, 44 Atl. 372 (1899); Pinconning State Bank v. Henry, 258 Mich. 44, 241 N.W. 913 (1932); Chandler v. Cromwell, 101 Miss. 161, 57 So. 554 (1911); Wagner v. Breed, 29 Neb. 720, 46 N.W. 286 (1890); Chartz v. Cardelli, 52 Nev. 1, 279 Pac. 761 (1929); First Nat. Bank v. Byard, 26 N.J. Eq. 255 (1875); Coon v. Bosque Bonita Co., 8 N.M. 123, 42 Pac. 77 (1895); Robinson v. Williams, 22 N.Y. 380 (1860); Union Nat. Bank v. Melburn & Stoddard Co., 7 N.D. 201, 73 N.W. 527 (1897); Pascal v Bohannan, 59 Okla. 139, 158 Pac. 365 (1916); Moats v. Thompson, 283 Pa. 313, 129 Atl. 105 (1925); *Ex parte* Amer. Fertilizing Co., 122 S.C. 171, 115 S.E. 236 (1922); Freiberg v. Magale, 70 Tex. 116, 7 S.W. 684 (1888); Lamoille County Sav. Bank & Trust Co. v. Belden, 90 Vt. 535, 98 Atl. 1002 (1916); Elmendorf-Anthony Co. v. Dunn, 10 Wash.2d 29, 116 Pac.2d 253 (1941).

20. See note 4, *supra.*

21. A majority of the cases passing on the subject support the rule that a mortgage may be valid though given to secure unlimited future advances. *Cf.*, Holmes v. Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97 (1899). But *cf.*, Balch v. Chaffee, 73 Conn. 318, 47 Atl. 327 (1900) where it was held that an unlimited clause would be invalid to secure the advances. For annotations of cases in other jurisdictions supporting the majority rule, see 81 A.L.R. 631 (1932).

22. Since the vast majority of courts hold that the unlimited form is valid, note 21, *supra, a fortiori,* the limited type is valid. This is also the form recommended by the United States Savings and Loan League.

a stated maximum, it is valid only up to that amount,[23] but it may be made a continuing security so that when advances have been made up to the limited amount and these are partially or totally repaid, the mortgage will continue as security for further loans within the prescribed limits.[24]

The fourth and final classification of future advances is, in a sense, both optional and limited, but here the limitation is one of purpose wherein it is provided that the mortgagee may, at his own option, and without the consent of the mortgagor, make such advances or expenditures as are necessary to protect his interest or preserve the value of the security.[25] Provisions for the payment of taxes, insurance, repairs, and prior liens are typical.

In the absence of a statute to the contrary,[26] the validity of mortgages and deeds of trust which secure future advances has long been established and recognized in this country and in England.[27] However, a few juris-

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23. Mowry v. Sanborn, 68 N.Y. 153 (1877); Ford v. Davis, 168 Mass. 116, 46 N.E. 435 (1897). In Stoddard v. Hart, 23 N.Y. 556 (1861), it was held that a collateral oral agreement to extend the advances beyond the limitation in the mortgage instrument would not be upheld; but *cf., contra,* Stone v. Lane, 92 Mass. 74 (1865).

24. U.S. v. Hope, 3 Cranch 73, 2 L. Ed. 370 (U.S. 1805); Robinson v. Williams, 22 N.Y. 380 (1860); Shores v. Doherty, 65 Wisc. 153, 26 N.W. 577 (1866).

25. See, *e.g.,* Realty Sav. & Inv. Co. v. Washington Sav. & Bldg. Ass'n, 63 S.W. 2d 167 (Mo. App. 1933); Hamilton v. Rhodes, 72 Ark. 625, 83 S.W. 351 (1904); Cedar v. W. E. Roche Fruit Co., 16 Wash.2d 652, 134 P.2d 437 (1943).

26. In Georgia it is provided by statute that "no particular form is necessary to constitute a mortgage. It must clearly indicate the creation of the lien, specify the debt to which it is given, and the property upon which it is to take effect." GA. CODE ANN. §§ 67-102 (1937). In construing this statute the courts have held that future advances can be made if a maximum amount is stated in the instrument. See *In re* Corbett, 248 Fed. 988 (Ga. D.C. 1918). Otherwise no mortgage to secure future advances will be valid. See also, Benton-Shingler Company v. Mills, 13 Ga. App. 632, 79 S.E. 755 (1913).

In Maryland, a mortgage to secure future advances will be valid only where it clearly indicates the amount of each advance and the time when it is to be made. See MD. ANN. CODE GEN., LAWS, Art. 66 § 2 (1951); Baltimore High Grade Brick Co. v. Heath, 95 Md. 571, 52 Atl. 582 (1902); 3 GLENN, MORTGAGES § 403 (1943); Watkins, *Maryland Mortgages for Future Advances,* 4 MD. L. REV. 111 (1940).

In New Hampshire the mortgage to secure future advances is void unless the mortgagee binds himself contractually to make advances, and the amount which the mortgage can secure is capable of ascertainment. See N. H. REV. LAWS, c. 261, §§ 3 and 4 (1942), as amended, N. H. LAWS 1943, c. 20; 3 GLENN, MORTGAGES § 403 (1943).

27. Foster v. Reynolds, 38 Mo. 553 (1866); Russell v. Letton, 56 Mo. App. 541, 548 (1894); Williams v. Alnutt, 72 Mo. App. 62 (1897); Smith-Wallace Shoe Co. v. Wilson, 63 Mo. App. 326 (1895); Holmes v. Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97 (1899); Rice v. Davis, 99 Mo. App. 636, 74 S.W.

dictions have applied a somewhat stricter approach in the first type of mortgage where there is no express provision for future advances and the true amount secured is overstated in the mortgage instrument.[28] The courts will carefully scrutinize the transaction to determine whether or not it was consummated in good faith.[29] In some cases the courts have placed the burden of proving good faith or absence of fraud upon the original parties, and at least one court has concluded that such an overstatement is constructively fraudulent as to subsequent encumbrancers and has limited the security to the amount which was actually advanced at the inception of the transaction.[30] The argument used to buttress this approach is that the overstatement is misleading; that a creditor in searching the record will

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431 (1903); White v. Meiderhoff, 281 S.W. 98 (Mo. App. 1926); GILL ON MISSOURI TITLES § 429 (3rd ed. 1931); Lawrence v. Tucker, 23 How. 14 (U.S. 1859); Farmer's Union Warehouse Co. v. Barnett Bros., 223 Ala. 435, 137 So. 176 (1931); Griffith v. State Mutual Building & Loan Ass'n, 46 Ariz. 359, 51 P.2d 246 (1935); Hamilton v. Rhodes, 72 Ark. 625, 83 S.W. 351 (1904); American Sav. Bank v. Kemp, 21 Cal. App. 571 (1913); Tully v. Harloe, 35 Col. 302, 95 Am. Dec. 102 (1868); Boswell v. Goodwin, 31 Conn. 74, 81 Am. Dec. 169 (1862); Hance Hardware Co. v. Denbigh Hall, Inc., 17 Del. Ch. 234, 152 Atl. 130 (1930); Bullard v. Fender, 140 Fla. 448, 192 So. 167 (1939); Hurst v. Flynn-Harris-Bullard Co., 166 Ga. 480, 143 S.E. 503 (1928); Schmidt v. Zahrndt, 148 Ind. 447, 47 N.E. 335 (1897); Everist v. Carter, 202 Iowa 498, 210 N.W. 559 (1926); Union State Bank v. Chapman, 124 Kan. 315, 259 Pac. 681 (1927); Toublee v. First Nat. Bank of Jackson, 279 Ky. 153, 130 S.W.2d 48 (1939); Hortman-Salmon Co. v. White, 169 La. 1057, 123 So. 711 (1929); Bunker v. Barron, 93 Me. 87, 44 Atl. 372 (1899); Wilson v. Russell, 13 Md. 494, 71 Am. Dec. 645 (1859); Williams v. Whitinsville State Bank, 283 Mass. 297, 186 N.E. 502 (1933); Pinconning State Bank v. Henry, 258 Mich. 44, 241 N.W. 913 (1932); Landers-Morrison-Christenson Co. v. Ambassador Holding Co., 171 Minn. 445, 214 N.W. 503 (1927); Chandler v. Cromwell, 101 Miss. 161, 57 So. 554 (1911); Westheimer v. Goodkind, 24 Mont. 90, 60 Pac. 813 (1900); Omaha Coal, Coke and Lime Co. v. Suess, 54 Neb. 379, 74 N.W. 620 (1898); First Nat. Bank v. Byard, 26 N.J. Eq. 255 (1875); Coon v. Bosque Bonita Co., 8 N.M. 123, 42 Pac. 77 (1895); Peoples Nat. Bank & Trust Co. of Lynbrook v. Harkay Realty Co., 258 App. Div. 964, 16 N.Y.S.2d 779 (2nd Dep't. 1940); Chartz v. Cardelli, 52 Nev. 1, 279 Pac. 761 (1929); Kuhn v. So. Ohio Loan & Trust Co., 101 Ohio 34, 126 N.E. 820 (1920); Union Nat. Bank v. Moline, Milburn & Stoddard Co., 7 N.D. 201, 73 N.W. 527 (1897); Spader v. Lawler, 17 Ohio 371 (1848); Paschal v. Bohannan, 59 Okla. 139, 158 Pac. 365 (1916); Batten v. Jurist, 306 Pa. 64, 158 Atl. 557 (1932); Blackmar v. Sharp, 23 R.I. 412, 50 Atl. 852 (1901); *Ex parte* American Fertilizing Co., 122 S.C. 171, 115 S.E. 236 (1922); McGavock v. Deery, 41 Tenn. 265 (1860); Jolly v. Fidelity Union Trust Co., 15 S.W.2d 68 (Tex. Civ. App. 1929); Patch v. First Nat. Bank, 90 Vt. 4, 96 Atl. 423 (1916); Elmendorf-Anthony Co. v. Dunn, 10 Wash.2d 29, 116 P.2d 253 (1941); Simms v. Ramsey, 79 W. Va. 267, 90 S.E. 842 (1916); Shores v. Doherty, 65 Wisc. 153, 26 N.W. 577 (1886); Hopkinson v. Rolt, 9 H.L. Cas. 514 (Eng. 1861).

28. See *e.g.*, Griffin v. New Jersey Oil Co., 11 N.J. Eq. 49 (Ch. 1855); Shirras v. Caig, 7 Cranch 34, 50 (U.S. 1812).

29. See Heim v. Chapel, 62 Minn. 338, 64 N.W. 825 (1895).

30. Matz v. Arick, 76 Conn. 388, 56 Atl. 630 (1904).

discover the amount stated as secured in the instrument and conclude that it would be useless to attempt reaching the property in satisfaction of his own debt.[31] However, the better view would be to decide the issue of fraud on the facts as in any other fraud case, rather than to make an outright rejection of a mortgage technique which serves a useful economic function between the parties.[32] It is true that the exaggerated statement of amount is deceptive,[33] but such deception may be found in any type of mortgage to secure advances, and it may be found in the form of an absolute deed. The better view seems to be that which is followed by the vast majority of jurisdictions having no statutory restrictions, *viz.*, that the instrument overstating the present loan is valid to secure future advances,[34] that parol evidence is admissible to show that it was, in fact, given to secure such future advances and their amounts,[35] and that the indefiniteness as to the ultimate total of indebtedness is not sufficient reason to invalidate the instrument.[36]

Therefore it can be fairly stated that mortgages to secure future advances are valid, with the exception of the few encroachments on the general rule which have been pointed out. It should be mentioned, how-

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31. See Griffin v. New Jersey Oil Co., 11 N.J. Eq. 49 (Ch. 1855).

32. See 3 GLENN, MORTGAGES 1600 (1943); Jones, *Mortgages Securing Future Advances*, 8 TEX. L. REV. 371-382 (1930). See *e.g.* Ackerman v. Hunsicker, 85 N.Y. 43 (1881); *cf.* Stoughton v. Pasco, 5 Conn. 442 (1825).

33. Matz v. Arick, 76 Conn. 388, 56 Atl. 630 (1904), where the court held that by nature such a mortgage was deceptive and constructively fraudulent as to subsequent encumbrancers; that the coverage of the mortgage would be good only for the amount of the original outlay. In Balch v. Chaffee, 73 Conn. 318, 47 Atl. 327 (1900), the court stated that future advances cannot be secured as against subsequent lienors who take only with record notice by a mortgage which shows no agreement to make advances nor states the amount to which they may be made.

34. This does not mean it will or will not be valid against an encumbrance which intervenes between the original outlay and the advancement. This phase of the problem has been met by the greatest divergence of views and treatment in the various jurisdictions; the problem will be treated fully in the subsequent discussion of priorities.

35. See *e.g.*, Foster v. Reynolds, 38 Mo. 553 (1866); Bynon v. Citizen's Bank of Carbon Hill, 221 Ala. 626, 130 So. 391 (1930); Tully v. Harloe, 35 Col. 302, 95 Am. Dec. 102 (1868); Morton v. Jones, 136 Ky. 797, 125 S.W. 247 (1910); Glassman v. Ficksman, 238 Mass. 580, 131 N.E. 316 (1921); Schofield Implement Co. v. Minot Farmers Grain Ass'n, 31 N.D. 605, 154 N.W. 527 (1915); Blackmar v. Sharp, 23 R.I. 412, 50 Atl. 852 (1901).

36. See *e.g.*, Thomas v. Blair, 208 Ala. 48, 93 So. 704 (1922).

ever, that in spite of their generally accepted validity, such advances are ineligible for F.H.A. Title I insurance.[37]

Even though the validity of security for future advances is rarely questioned, there is frequent litigation to determine whether a particular future advance or additional obligation was intended to be secured by the instrument. To determine the scope of the security the courts will purport to make a determination of the parties' intentions at the time of executing the mortgage by examining their acts and the language of the instrument.[38] In the typical mortgage to secure future advances, there is little difficulty here, but it should always be kept in mind that the courts may employ a great deal of judicial discretion when professing to "find the intention," so it may be well to avoid the use of any "dragnet" clauses[39] in the mortgage. The attempt to employ broad and sweeping language will not necessarily render the mortgage invalid,[40] but it may tend to limit the scope of its security[41] and, most certainly, invite subsequent litigation.

PRIORITIES

One of the most difficult questions presented by the mortgage to secure future advances is the effect of a subsequently acquired lien, such as a second mortgage or attachment lien, on the periodic advances made after the junior lien is placed upon the record. The validity of the original mortgage, as has been pointed out, is rarely disputed, but the important

37. In a letter from B. C. Bovard, General Counsel of the F.H.A., Nov. 2, 1951, the opinion was expressed that a mortgage for future advances would probably be outside the statutory authority of the National Housing Act to insure mortgages, and would be administratively impracticable. See Note, 65 HARV. L. REV. 486, n. 51 (1952); see 48 STAT. 1248 (1934), as amended, 12 U.S.C. § 1709 (Supp. 1951).

However, under the Veteran's Administration, guaranteed loans are permitted to be secured by mortgages containing provisions to secure future advances within certain defined limitations. See 38 CODE FED. REG. § 36:4313 (1949), § 36:4355 (Supp. 1951).

38. See, *e.g.*, Henricks v. Webster, 159 Fed. 927 (1908); Hedrick v. Stockgrowers' Credit Corp., 64 N.D. 61, 250 N.W. 334 (1933); Monroe Co. Bank v. Qualls, 220 Ala. 499, 125 So. 615 (1929); Monticello State Bank v. Schatz, 222 Iowa 335, 268 N.W. 602 (1936).

39. See, *e.g.*, First v. Byrnes, 238 Iowa 712, 716, 28 N.W.2d 509, 511 (1947); 36 AM. JUR., pocket part, § 68.5; 172 A.L.R. 1082-1106. See also notes 12 and 13, *supra*.

40. *Ibid.*

41. *Ibid.*

new issue is whether advances made pursuant to the original mortgage will take priority over other recorded incumbrances or purchases which intervene between the original mortgage and later advancements.[42]

The answer to this problem is not a simple one, for the type or form of the advance, made pursuant to the mortgage securing future advances, will generally control in determining priority. Further complicating the problem, the authorities are somewhat in conflict in the priority they accord to the various types of advances. It is therefore necessary that each type of mortgage securing future advances be treated separately with a corresponding examination of the different consequences in the courts and the underlying rationale supporting these views.

Obligatory advances. Basically a mortgage securing future advances is either optional or obligatory insofar as the making of future advances is concerned. The tendency of the courts is to find that they are obligatory unless the mortgage clearly indicates upon its face that the mortgagee has a right to refuse further advances.[43] A typical example of the obligatory form is found in commercial construction projects where the lender is contractually bound to make subsequent advances to cover the costs as the work progresses.

If from the agreement it is found that the mortgagee does so bind himself to make the advances, the mortgage will take priority from the date of its recordation over all subsequent encumbrances to the extent of all

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42. See Notes, *Refinements in Additional Advance Financing: The "Open End" Mortgage*, 38 MINN. L. REV. 507 (1954); Ashley, *Mortgages to Secure Future Advances*, 31 N. CAR. L. REV. 504 (1953); Notes, *The Package Mortgage and Optional Future Advances*, 65 HARV. L. REV. 478 (1952); Schemberg, *Future Advances Clauses in Chattel Mortgages*, 56 COM. L. J. (1951); OSBORNE, MORTGAGES §§ 113-125 (1951); Hiester, *The Open End Mortgage*, 28 DICTA 204 (1951); Waldo, *The Effect of After Acquired Liens Upon Mortgages for Future Advances*, 22 FLA. L.J. 58 (1948); 3 GLENN, MORTGAGES § 401 (1943); Krilich, *Future Advances on Mortgages in Washington*, 18 WASH. L. REV. 24 (1943); 4 POMEROY, EQUITY JURISPRUDENCE § 1199 (5th ed. 1941); 9 THOMPSON, REAL PROPERTY 326 (Perm. Ed. 1940); Watkins, *Maryland Mortgages for Future Advances*, 41 MD. L. REV. 111 (1940); Goell, Mortgages to Secure Future Advancements, 8 ST. JOHN'S L. REV. 371 (1930); 1 JONES, MORTGAGES, c. 12 (8th ed. 1928); WALSH ON MORTGAGES, p. 78 (1934).

43. See, *e.g.*, Rochester Lumber Co. v. Dygert, 136 Misc. 292, 240 N.Y. Supp. 580 (Sup. Ct. 1930); it has also been held that a mortgage is obligatory even though the mortgagee may refuse to make advances if another lien attaches. *Cf.* Hyman v. Hauff, 138 N.Y. 48, 33 N.E. 735 (1893); but *cf.* Althouse v. Provident Mutual Ass'n, 59 Cal. App. 31, 209 Pac. 1018 (1922), where it was held to be optional when the only requirement to make future advances was contingent solely upon the possible loss of profits to the mortgagee.

advances actually made,[44] regardless of whether or not they were made before or after the junior encumbrance,[45] and regardless of whether or not the advancer had constructive or actual notice of the intervening lien.[46] To protect the mortgagee the courts will invoke the doctrine of "relation back" which constructively dates each advancement, as made, back to the date of the mortgage so that the advances constitute merely a fulfillment of the contract.[47]

This rule is desirable and the reason for the rule is obvious. Since the mortgagee would be liable to the mortgagor for breach of contract in the event that he ceased to make the advances, it would be grossly inequitable to give priority to the subsequent incumbrancer. Furthermore, a search of the record by the mortgagee would be immaterial since he is contractually bound to make the advances regardless of the appearance or knowledge of other liens which have been recorded.[48]

"Optional" advances to protect security. In other instances a mortgage will provide for optional advances or expenditures which are limited

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44. Allis Chalmers Co. v. Central Trust Co. 39 L.R.A. (N.S.) 84, 190 Fed. 700 (1911); Valley Lumber Co. v. Wright, 2 Cal. App. 288, 84 Pac. 58 (1905); Weissman v. Volino, 84 Conn. 326, 80 Atl. 81 (1911); Anglo-American Savings and Loan Ass'n v. Campbell, 13 App. D.C. 581, 43 L.R.A. 622 (1898); Gray v. McClellan, 214 Mass. 92, 100 N.E. 1093 (1913); Whelan v. Exchange Trust Co., 214 Mass. 121, 100 N.E. 1095 (1913); Hill v. Aldrich, 48 Minn. 73, 50 N.W. 1020 (1892); Erickson v. Ireland, 134 Minn. 156, 158 N.W. 918 (1916); Taylor v. La Bar, 25 N.J. Eq. 222 (1874); Jacobs v. Mutual Ben. L. Ins. Co., 27 N.J. Eq. 604 (1876); Blackmar v. Sharp, 23 R.I. 412, 50 A.H. 852 (1901); See 53 A.L.R. 580 (1928).

45. Hance Hardware Co. v. Denbigh Hall, Inc., 17 Del. Ch. 234, 152 Atl. 130 (1930); Bullard v. Fender, 140 Fla. 448, 192 So. 167 (1929); Creigh Sons & Co. v. Jones, 103 Neb. 706, 173 N.W. 687 (1919); Land Title & Trust Co. v. Shoemaker, 257 Pa. 213, 101 Atl. 335 (1917); Blackmar v. Sharp, 23 R.I. 412, 50 Atl. 852 (1901); Eltopia Finance Co. v. Collerby, 126 Wash. 554, 219 Pac. 24 (1923).

46. Boswell v. Goodwin, 31 Conn. 74, 81 Am. Dec. 169 (1862); Schmidt v. Zahrndt, 148 Ind. 447, 47 N.E. 335 (1897); Commercial Bank v. Cunningham, 41 Mass. 270, 35 Am. Dec. 322 (1837); Whelan v. Exchange Trust Co., 214 Mass. 121, 100 N.E. 1095 (1913); Kuhn v. Southern Ohio Loan & Trust Co., 101 Ohio St. 34, 126 N.E. 820 (1920); Elmendorf-Anthony Co. v. Dunn, 10 Wash.2d 29, 116 P.2d 253 (1941). See 9 THOMPSON, REAL PROPERTY 326 (Perm. Ed. 1940).

Of course, the lien of the mortgage and obligatory advances will not take priority where the mortgage is made after constructive or actual notice of a prior lien. See Kentucky Lumber and Mill Work Co. v. Kentucky Title Co., 184 Ky. 244, 211 S.W. 765 (1919).

47. Machado v. Bank of Italy, 67 Cal. App. 769, 228 Pac. 369 (1924); Chartz v. Cardelli, 52 Nev. 1, 279 Pac. 761 (1929); Jolly v. Fidelity Union Trust Co., 15 S.W.2d 68 (Tex. Civ. App. 1929); Poole v. Cage, 214 S.W. 500 (Tex. Civ. App. 1919).

48. See Kuhn v. Southern Ohio Loan & Trust Co., 101 Ohio St. 34, 126 N.E. 820 (1920).

to preserving the value of the security. Technically speaking this is an optional type, but the courts will treat it as a hybrid form and give it the same priority advantages as is applied in the case of obligatory advances.[49] This distinction is likewise sound and equitable. The original mortgagee is, in a sense, "obligated" to make expenditures to satisfy taxes, assessments, and other liens which will substantially diminish or imperil the security in the event the mortgagor fails to prevent their attachment or to satisfy them. This works no hardship on the mortgagor because he is legally responsible to pay these charges, and no real hardship is imposed on an intervening lienor. The situation is much the same with reference to advances for insurance premiums and repairs.

This rule is usually easy to apply. The courts need only make a simple factual distinction between the advancement which is purely optional and the "optional" advancement which is essential to preserve the value of the property. However, in the Missouri case of *Realty Savings and Investment Co. v. Washington Savings and Building Association,*[50] decided in 1933, the St. Louis Court of Appeals refused to regard the payment of an inchoate mechanic's lien as sufficient to give the mortgagee priority. Although the facts of this case are somewhat complex, they are worth stating. The plaintiff conveyed a lot to one Patterson and, at the same time, the defendant made a $7,500 loan to Patterson to enable him to build a home on the premises. Patterson executed his note and gave a first deed of trust to the defendant to secure the sum of $7,500, the cost of insurance, and any "prior liens or incumbrances which they must pay off." Patterson then gave a second deed of trust for $2,500, which represented the price of the lot, to the plaintiff. Patterson began construction of his home but the original loan made by the defendant was insufficient to meet the costs, and in due time approximately $3,600 in labor and materials went into the completion of the house. While these mechanic's liens were inchoate, *i.e.,* before they were filed, the defendant paid these charges to

49. See, *e.g.,* Hamilton v. Rhodes, 72 Ark. 625, 83 S.W. 351 (1904) where the court stated that the mortgagee will be given priority for advances made on a growing crop necessary to protect the security against waste and destruction; in Cedar v. W. E. Roche Fruit Co., 16 Wash.2d 652, 134 P.2d 437 (1943), it was held that advances would be given priority even where the mortgagee had actual notice of the second or junior mortgage.

50. 63 S.W.2d 167.

prevent a later mechanic's lien from attaching to and taking priority over its security.

After Patterson defaulted under the deed of trust, the defendant foreclosed and received $10,200 in proceeds from the sale. The plaintiff brings this suit for $2,600 claiming that this amount was available after the satisfaction of the defendant's lien under the first deed of trust ($7,500) and that such amount was due him in satisfaction of the second deed of trust. The defendant contended that it was entitled to this amount in view of the additional expenditure of $3,600 which it had made for labor and material.

However, the appellate court held for the plaintiff after making an adjustment for insurance premiums which the defendant had also paid. The court reasoned that, in spite of the clause securing other prior liens and incumbrances which were paid, a mechanic's lien was statutory and therefore did not exist within the meaning of the words "prior lien" in the first mortgage until the statutory requirements for filing had been met. When the defendant made the expenditures, the mechanic's liens were still inchoate and consequently the payment of the charges for labor and materials was not included in the security of the deed of trust.

This is the only case in Missouri which touches on the question of the treatment of optional advances necessary to preserve the value of security. The decision may seem harsh but it would seem that the court was moved by the fact the defendant apparently knew at the time the $7,500 loan was made that it would be insufficient to meet the total cost of the house and that additional amounts would be necessary, while the plaintiff believed that his $2,500 second mortgage should be subject to a first mortgage of $7,500 rather than a first mortgage of $11,100.

By deciding the case on a narrow construction of "prior liens", the court did not need to consider the issue of bad faith or estoppel.

The above case is significant in this field in that the court allowed to the defendant the insurance costs. This indicates that certain types of later expenditures made pursuant to a mortgage will have priority over intervening liens. Furthermore, with reference to the payments for labor and materials, the court seems to proceed on the theory that if the mechanic's lien had been filed, then the payment of this lien by the defendant would have increased the defendant's security under the first deed of trust

so as to give him priority for the amount of these actual expenditures over the second mortgagee. It seems reasonable, therefore, to conclude that in Missouri future advances to protect the value of the security will be given priority over intervening liens, provided the first mortgage is carefully drafted to cover such expenditures and provided the privilege is not abused by attempting to secure coverage which is too broad in its scope.

Optional advances. The final type of mortgage to secure future advances is one wherein the mortgagee may make the advance solely at his option or discretion, and the advance is not for the protection of the security. In cases of this type the problem of priority is largely one of notice,[51] but in many instances the courts also will examine the extent to which the option may be exercised.

Unlike the obligatory type, in the optional form the mortgagee is not contractually bound to make advances, and consequently the mortgagee is not liable to the mortgagor in the event he decides not to make any further loans. In the older English cases it was held that the mortgage to secure optional future advances would be given priority for all advances actually made regardless of whether or not the mortgagee had notice of the intervening encumbrance or second mortgage.[52] This identical treatment of the obligatory and optional advance was followed for almost a century and a half before a distinction was finally drawn in the case of the latter. In *Hopinson v. Rolt*,[53] decided in 1861, the previous doctrine was modified and the mortgagee was given priority only as to the optional advancements which were made without notice of the second mortgage. This distinction placed the burden upon the intervening party to inquire of the mortgagee to determine the amount of advances which had actually been made,[54] and to give him actual notice that a new lien would intervene if he desired to make any subsequent advances. This view requiring notice has been followed by the English courts to date, and has likewise been adopted in

51. In dealing with the problem of priority, it is assumed that the first mortgage covering future advances is properly recorded or that the subsequent lienor has actual notice. Unless there is notice of the first mortgage, the subsequent lienor, if he is in the protected class of lienors, will have priority. See, *e.g.*, Griffith v. State Mutual Building and Loan Ass'n, 46 Ariz. 359, 51 P.2d 246 (1935); Berry-Beall Dry Goods Co. v. Francis, 104 Okla. 81, 230 Pac. 496 (1924).

52. Gordon v. Graham, 7 Vin. Abr. 52, pl. 3, 2 Eq. Cas. Abr. 598 (1716).

53. 9 H.L. Cas. 514 (1861).

54. Everist v. Carter, 202 Iowa 498, 210 N.W. 559 (1926); Ackerman v. Hunsicker, 85 N.Y. 43 (1881); Patch & Co. v. First Nat. Bank, 90 Vt. 4, 96 Atl. 423 (1916).

virtually every jurisdiction of this country.[55] As to advances made subsequent to receipt of notice of the second lien, these courts grant priority to the intervening encumbrancer.[56]

In all probability this same general approach will be followed by the Missouri courts when the issue presents itself. There are only a handful of cases in Missouri involving the law on future advances, and the opinions often pass over many of the more significant problems. One important issue which has remained unsettled by these cases is the problem of priority now under discussion.[57] At this point a brief survey of these Missouri cases will help in attempting to arrive at tentative answers to these problems.

The landmark Missouri case on future advances is *Foster v. Reynolds*,[58] which involved a deed of trust for future advances. This is the only Supreme Court opinion dealing directly with the priority of the security for advancements, and consequently it is cited as authority in the later cases in the field of chattel mortgages as well as mortgages or deeds of trust on real property. It appears certain that the courts of Missouri will not attempt to draw a distinction between chattel and real estate transactions; the decision should be equally applicable in both situations.

In the *Foster* case the plaintiff conveyed certain real estate by a deed of trust to secure the payment of a note as described therein, in the amount of $2,625. The defendant-mortgagee attempted to foreclose under the deed of trust, but the plaintiff-mortgagor sued to enjoin the foreclosure and in this suit alleged that he had never received the $2,625 from the defendant and that in fact only $700 had been advanced. The defendant contended that at the time the instrument was executed it was not known how much money the plaintiff would need, so the parties agreed upon the recited sum which was thought to be sufficiently large to cover and include any amounts which might be required by subsequent arrangements. However, the circuit court excluded this evidence as violating the terms of the mortgage, and since the plaintiff did not owe the amount of the note, a perpetual injunction against the foreclosure of the property was granted.

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55. But see note 67 *infra*.
56. See, *e.g.*, notes 58-60, *infra*.
57. Another important problem of a practical nature, concerning the proper method of releasing such instruments of record, has also apparently gone unnoticed, but this phase shall be taken up elsewhere.
58. 38 Mo. 553 (1866).

On appeal the Supreme Court of Missouri reversed this decree and remanded the case, following the theories and authorities urged by the appellant-mortgagee. The court concluded:

> "We are not aware that the precise point has been adjudged in our courts, but the cases are very numerous showing that a mortgage or judgment may be given to secure future advances, or as a general security for balances which may become due from time to time from the mortgagor or judgment debtor; and this security may be taken in the form of a mortgage . . . for a specific sum of money sufficiently large to cover the amount of the floating debt to be secured thereby. . . ."[59]

The court then held that parol evidence would be admissible to show this intention and amount, even though the mortgage is recorded and shows a different and greater sum upon its face.

In deciding the *Foster* case the court settled the question of the validity of mortgages for future advances between the parties to the transaction. This same doctrine was followed in the dicta of several later cases,[60] but it was not until twenty-nine years later that the courts were forced to deal with the question of the validity of the mortgage against a subsequent encumbrancer. This was the case of *Smith-Wallace Shoe Co. v. Wilson,*[61]

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59. *Id.* at 557.

60. In Sparks v. Brown, 33 Mo. App. 505, 508 (1888), the court stated that "where a mortgage appears upon its face to secure an absolute debt . . . parol evidence (is) admissible to show that the note and mortgage were in fact given to secure a contingent liability of the mortgagee as the mortgagor's surety to an amount not greater than said debt." The court also stated that, "In the absence of fraud . . . such a mortgage (is) valid against a subsequent mortgage."

Russell v. Letton, 56 Mo. App. 541, 548 (1894). "It is a matter of common occurrence to execute notes and mortgages to secure existing indebtedness or even to secure future advances or contingent liabilities; and so long as the purposes thereof are honest in fact, they are upheld."

Williams v. Alnutt, 72 Mo. App. 62, 64 (1897). "It has long been the well recognized law in this and other jurisdictions that though a mortgage upon its face should appear to be for the payment of a specified sum of money, it may be shown by parol evidence that it was not intended to secure the payment of that sum, but as a security for advances or for a balance due from time to time. . . ."

Benjamin Holmes v. Strayhorn-Hutton-Evans Commission Co., 81 Mo. App. 97, 101 (1899). A chattel mortgage providing that future transactions by which the mortgagor should become indebted to the mortgagee should be based upon the same security, is valid and comprehensive enough to cover any transaction by which the mortgagor becomes indebted to the mortgagee.

61. 63 Mo. App. 326.

which was decided in 1895, and, although it does not purport to give an answer to the priority of an intervening lienor over advances subsequently made, it does squarely hold that a mortgage is not void by reason of the inclusion therein of an optional future advance clause.

In the *Wilson* case the defendant had executed a mortgage for all his stock of goods and fixtures to the Kidder Savings Bank. This mortgage recited a consideration of $2,360 and contained the usual chattel mortgage provisions except: 1) there was a *provision for future advances of money to replenish the stock*; 2) there was no statement as to when the principal debt of $2,360 would be due; 3) there was a provision covering after-acquired property; and 4) it permitted the mortgagor to retain possession of the stock of goods with a power of sale thereover, but with a full accounting of the proceeds. The plaintiff commenced his action by attaching the stock of goods and fixtures, and alleged that the chattel mortgage was fraudulent. The trial court held the mortgage to be "fraudulent in law upon its face." From this decision the defendant appealed.

This holding was reversed and the case remanded upon appeal to the Kansas City Court of Appeals, on the ground that none of the mortgage provisions was of such effect as to render the mortgage void upon its face as a matter of law. With reference to the first clause, the court stated that a valid chattel mortgage may be given to secure future advancements:

> "If such a mortgage is not void, but creates a valid equitable lien, it is not consistent with reason to say that the giving of such mortgage was a fraud in law. The mortgage being valid for the purposes for which it was given, the mortgagor does not subject himself to an attachment for executing it. It is not only valid between the parties, but as against creditors having notice thereof. . . . And in our opinion, such a mortgage, duly recorded, would be constructive notice, as in ordinary chattel mortgages."[62]

62. *Id.* at 330. Also *cf.* Rice v. Davis, 99 Mo. App. 636, 74 S.W. 431 (1903) where the same view was taken. The court also added that "it is also well settled that a single mortgage may secure indebtedness of the mortgagor to several creditors, so, if a part of the note or claims secured by the mortgage are assigned, the assignees become interested in the mortgage to the extent of their claims. . . ." The clause involved here which was held valid to secure future advances was "that any future transactions by which the first party may become indebted to the second party during the existence of this mortgage are to be based upon the same as security."

In *White v. Meiderhoff*,[63] decided in 1926, it was held that a mortgage absolute on its face but in fact given to secure future advances would be valid against subsequent attaching creditors and that the advances actually made by the mortgagee previous to the attachment would be given priority.

These few cases represent substantially all of the law on future advances in Missouri. Although they are few in number, they consistently deal with the problem in accordance with what appears to be the majority views. However, the important problem of the effect of the recorded junior encumbrance upon the advances thereafter made by the mortgagee is still not definitely settled in that the question has never directly confronted our courts. When the occasion to answer this issue arises, it is the writer's belief that the Missouri courts will follow the majority view as it has in all the other problems in future advances, and that it will hold that unless the mortgagee making the voluntary advances has actual notice of the subsequent lien, he will be protected as to those voluntary advances.[64]

A statute was passed in Missouri in 1945 as a part of the "Savings and Loan Act" which gives these associations the power to make advances within certain prescribed limits and for specified purposes.[65] This statute

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63. 281 S.W. 98 (Mo. App. 1926). Here the mortgage was on a growing crop and the future advances were to cover the costs of harvesting the crop. It could be argued in this situation that the future advances were merely to preserve the security in that the crop would be worthless unless or until it had been harvested. This type of advancement is discussed elsewhere, see notes 49 and 50 *supra*, and is generally given absolute priority over all subsequent encumbrancers even to the extent of the advances made after the intervention of a junior lien. However, this argument was apparently overlooked by the counsel in this case and was not discussed by the court.

64. The majority rule is that this notice must be actual. However, a rather substantial minority hold that constructive notice to the mortgagee is sufficient, and it is believed that Missouri will follow this latter rule if it is chosen on its merits. This will be discussed in the treatment of priorities, but it is mentioned here to indicate that it is the author's opinion that Missouri will follow the minority rule in this respect.

65. MO. REV. STAT. § 369.365 (1949), provides:

"An association shall have power:

(1) To make without limitation any advances necessary to protect the security of any loan or the priority of lien thereon which shall hereby be and stand secured by such first lien irrespective of intervening liens; and

(2) If it holds a recorded first lien on a home property, to make an additional loan or loans, not exceeding in the aggregate one thousand dollars and which hereby shall be and stand secured by such first lien for the improvement, equipment or furnishing of such home property; and

(3) To make any further advances for any purpose, to the extent authorized by the instrument evidencing a recorded first lien on home property."

purports to secure such advances by a first lien provided the statutory requirements are met. This act probably codifies existing but undeclared common law of Missouri, but it may change such undeclared common law for this particular type of lender.[66]

Notice, actual or constructive. The courts of other jurisdictions do not agree as to what type of notice is sufficient. Although three states have adopted the older English view which gives absolute priority without regard to notice,[67] the remaining jurisdictions which have considered the problem all have made some type of notice requirement.

The prevailing view requires that actual notice be given to the mortgagee in order to intervene,[68] and that constructive notice of the interven-

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66. It could be contended that both the legislature and the drafters of this law were under the impression that in absence of such a statute, subsequent advances would not be given priority over intervening lienors. However, there are no cases construing this particular statute, and it is doubtful whether the statute is of much significance, at least at the present time, in determining whether or not the advances are enforceable against intervening creditors in other security fields or in the savings and loan field, in absence of this special statute. As a practical matter, the drafters were probably uncertain of the existing law and procured the enactment of the statute merely to clarify their position by an express statutory authorization. There is no reason to suppose that the passage of the law was an indication that the courts of Missouri would hold contrary to decisions in other jurisdictions.

67. Lovelace v. Webb. 62 Ala. 271, 280 (1878); Bullard v. Fender, 140 Fla. 448, 192 So. 167 (1939); Witczinski v. Everman, 51 Miss. 841 (1876); Poole v. Cage, 214 S.W. 500 (Tex. Civ. App. 1919); First Nat. Bank v. Zarafonetis, 15 S.W.2d 155 (Tex. Civ. App. 1929).

68. See, *e.g.*, Shirras v. Caig, 7 Cranch 34 (U.S. 1812); Farmers Union Warehouse Co. v. Barnett Bros., 223 Ala. 435, 137 So. 176 (1931); Tappia v. Demartoni, 77 Cal. 383, 19 Pac. 641 (1888); Atkinson v. Foote, 44 Cal. App. 149, 186 Pac. 831 (1919); Everist v. Carter, 202 Iowa 498, 210 N.W. 559 (1926); Bunker v. Barron, 93 Me. 87, 44 Atl. 372 (1899) where the court held the notice must be "direct and personal"; Finlayson v. Crooks, 47 Minn. 74, 49 N.W. 398 (1891); Axel Newman Heating & Plumbing Co. v. Sauers, 234 Minn. 140, 47 N.W.2d 769 (1951); Robinson v. Williams, 22 N.Y. 380 (1860); Ackerman v. Hunsicker, 85 N.Y. 43 (1881) and Rochester Lumber Co. v. Dygert, 136 Misc. 292, 240 N.Y.Supp. 580 (Sup. Ct. 1930), held that docketing was insufficient, and in *In re* Harris' Estate, 156 Misc. 805, 282 N.Y. Supp. 571 (Surr. Ct. 1935), the mere filing was considered to be ineffectual to constitute notice; Union Nat. Bank v. Moline, Melburn & Stoddard Co., 7 N.D. 201, 73 N.W. 527 (1897), where the court stated that the notice must be "Brought home" but that such notice could be imputed to the bank though the knowledge of one of the bank's officers, McDaniels v. Colvin, 16 Vt. 300, 306 (1844), where the court required that subsequent encumbrancers, in order to protect themselves, must not only give "notice to the first mortgagee of their interest", but they must also at least intimate "that no further advances are to be made on the security of the mortgage, as against them. . . . Something more than a mere knowledge in the mortgagee of such subsequent interest of the creditor . . . is necessary." This view is much stricter than the requirements imposed in other jurisdictions. However, in Patch & Co.

ing lien through recording will not suffice.[69] However, the minority view which merely requires constructive notice[70] should not be disregarded, for it represents a rather substantial minority and seems to be gathering strength in recent years.[71]

It is apparent that there is considerable conflict between the three possible views concerning notice; sometimes the courts within a single jurisdiction will disagree. It is impossible to reconcile the theories and difficult to make a choice on the basis of their relative merits. For this reason, the rationale which supports each view becomes important and is worthy of examination.

In support of the rule which gives absolute priority to the advances without regard to notice of the intervening lien, the courts adopting it have contended that, since the original mortgage contemplates future advances, it would be unfair to allow subsequent parties to defeat this expectation when they supposedly have record notice of the rights of the mortgagee.[72] Such reasoning would seem to be unsound. It is conceded that this approach facilitates the use of optional advances, but what becomes of the mortgagor and of the property secured? The mortgaged property becomes virtually unsaleable; no one would risk purchasing the property or extending credit on it where the mortgagee at his whim could make future advances to the mortgagor and wipe out the interest of the purchaser or

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v. First Nat. Bank, 90 Vt. 4, 96 Atl. 423 (1916) it was also stated that the intervening encumbrancer must make a specific objection to any enlargement of the original security interest by the mortgagee; Elmendorf-Anthony Co. v. Dunn, 10 Wash.2d 29, 116 P.2d 253 (1941); 4 POMEROY, EQUITY JURISPRUDENCE § 1199 (5th ed. 1941).

But *cf.*, Hurst v. Flynn-Harris Bullard Co., 166 Ga. 480, 143 S.E. 503 (1928). Here actual possession of the susequent purchaser was deemed insufficient to charge the mortgagee with notice to defeat the priority for the later advances.

69. *E.g.*, Farmers' Union Warehouse Co. v. Barnett Bros., 223 Ala. 435, 137 So. 176 (1931); Union Nat. Bank v. Moline, Melburn & Stoddard Co., 7 N.D. 201, 73 N.W. 527 (1897).

70. Ladue v. Detroit R.R., 13 Mich. 380 (1865); Swift Lumber Co. v. Elwanger, 127 Neb. 740, 256 N.W. 875 (1934); Miss. Valley Trust Co. v. Cosmopolitan Club, 111 N.J. Eq. 277, 162 Atl. 396 (1932); Spader v. Lawler, 17 Ohio 371 (1848); Ter-Hoven v. Kearns, 2 Pa. 96 (1845).

In many other cases the requirement of notice is cautiously stated by announcing that the advances will take priority unless the mortgagee has "notice" of the intervening lien, omitting to use the expression "actual notice". For a collection of cases, see 138 A.L.R. 580.

71. See GLENN ON MORTGAGES Vol. 3, § 401, p. 1610 (1943).

72. See Lovelace v. Webb, 62 Ala. 271 (1878); Bullard v. Fender, 140 Fla. 448, 192 So. 167 (1939); Witczinski v. Everman, 51 Miss. 841 (1876); Poole v. Cage, 214 S.W. 500 (Tex. Civ. App. 1919); Waldo, *The Effect of After Acquired Liens Upon Mortgages for Future Advances*, 22 FLA. L. J. 58 (1948).

second mortgagee.[73] Neither would a subsequent creditor have any satisfactory method of protecting himself against the mortgagor if the courts permit additional indebtedness to later attach to the property with absolute priority. Another major criticism is that the mortgagor will be unable to obtain loans from other sources; thus, in many cases where he has no other security to offer, he will be subjected to the mercy and caprice of the mortgagee. It is certainly more reasonable to allow a subsequent encumbrancer to enter into the security scheme provided notice is actually or constructively communicated to the senior lienor.

However, in jurisdictions where there must be notice of an intervening lien, the reasons supporting each of the two schools of thought concerning the type of notice required seem persuasive. Indeed, it is difficult to make a choice and assert that one of them is superior to the other.

The adherents of the rule requiring actual notice contend that the necessity of a title search for intervening liens would impose an undue burden upon the mortgagee, especially where advances are made at frequent intervals. Such a burden would defeat the principal objective of advance financing which is designed to allow an economical and flexible means of making optional advances.[74] These proponents further argue that the inconvenience to the intervening lienor is very slight in that he will generally make a search of the record anyway, so that the only additional burden imposed is that of communicating the actual notice to the mortgagee.

In spite of the merit of these contentions, it would seem that the minority rule requiring only constructive notice is more consistent with the purpose of recording statutes. It should be kept in mind that the actual notice theory was developed before the origin of a recording system and, in that early period, actual notice was the only practical method of receiving notice. But today recording has been substituted for actual notice with reference to other problems. The arguments in support of the constructive notice rule seem to be based on a sensible and practical approach. In reality, the burden placed on the first mortgagee in searching the record before making a new advance is not substantial and, as a practical matter,

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73. See Jones, *Mortgages Securing Future Advances*, 8 TEX. L. REV. 371, 381 (1930).
74. See Ackerman v. Hunsicker, 85 N.Y. 43, 47 (1881).

good business judgement would indicate the need for a search of the record in most cases to determine the present financial status of the mortgagor before any new advances were made.[75] Furthermore, the mortgagee would only need to make a check of the record back to the date of the mortgage or the last recorded advancement.[76]

Professor Garrard Glenn states in his treatise on *Mortgages*:

> ". . . as the mortgagee is not bound to make the later advances, but does so in his own discretion, it is only fair to require him to search the record for intervening liens. If none appear of record, he may safely make the advance,—provided, of course, that he has no actual notice of liens that are not of record. But it is to liens of record that he should direct his attention, because they will prevail over the new advance. This rule, supported by diligent reasoning in a few early cases, has gained strength in later years. It has a good deal of justice in its support. Since the mortgagee can suit his own pleasure about making a fresh loan, it seems only right to require him to look at the record before he impairs an intervening security."[77]

It is urged that this rule should be given careful consideration in jurisdictions which have not heretofore chosen between a requirement of actual or constructive notice. It being impossible to predict which type of notice will be required in Missouri and in other states where the rule has not yet been established, it is recommended that in such states the prudent lender should search the record for intervening liens before any advances are made.[78]

In many states, a compromise is reached by statutes which give absolute priority without regard to notice for advances within a limited amount;[79] Missouri has such a statute which is applicable to one type of

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75. See Note, 65 HARV. L. REV. 478, 488, n. 67 (1952); Note, 38 MINN. L. REV. 507, 517 (1954); but *cf.* 3 POMEROY, EQUITY JURISPRUDENCE 2388, n. 2 (3rd ed. 1905).

76. See Ladue v. The Detroit & M. R.R., 13 Mich. 380, 408 (1865).

77. 3 GLENN, MORTGAGES § 401 (1943).

78. See Note, 38 MINN. L. REV. 507, 522 (1954).

79. *E.g.*, GEN. STAT. OF CONN. § 1271 (1951 Supp.), permitting mortgages to secure optional future advances for purposes of repair, improvements, or construction. Such advances are treated with the same priority as if they were made at the time the mortgage was executed, provided they do not exceed the loan authorized in the instrument.

lender.[80] Such laws are desirable in that they permit a certain amount of flexibility without destroying or unduly restricting the availability of loans to the mortgagor from other sources. Other statutes attempt to clarify general priority problems[81] rather than confer limited, absolute priority. All such legislation which aids in defining limitations in the use of future advances should be encouraged in order to increase the use and effectiveness of advance financing, provided the maximum amounts prescribed therein are high enough in view of present high price levels.[82]

Other Security Devices to Secure Future Advances

The foregoing discussion dealt only with the use of mortgages and deeds of trust, real and chattel, to secure future advances. However, it should be noticed that other types of security devices are available for the same purpose.

In Missouri there are two statutory devices which expressly cover future advances: the Accounts Receivable Act of 1943, *Missouri Revised*

Ill. Rev. Stat. §§ 30-37a (1949), expressly granting absolute priority for obligatory advances, and also allows priority for optional advancements without regard to notice provided the advances are made within eighteen months of the recordation of the original mortgage.

Kent. Rev. Stat. § 382.520 (1952), allows banks, trust companies and building and loan associations to make loans up to $2,000 over original amount, if terms of the mortgage provide therefor.

Flack's Code of Md., Art. 66, § 2 (1951 ed.). The amount of advances and the time in which they are to be made must be stated in the mortgage; future advances up to $500 may be made at option of mortgagee for paying cost of repair, alteration, or improvement, provided the original debt is not increased.

Mass. Ann. Laws § 183.28a (1950): outstanding advances are limited to $1,000 or up to the original amount of the mortgage, whichever is less.

Pub. Laws of R.I., c. 3018 (1952); where the stated amount of future advances is given in the mortgage, the property is security for all loans up to the maximum amount, provided the stated maximum doesn't exceed by more than $3,000 the total principal amount of the loans. Such mortgages have priority except against attachment, execution, or *lis pendens*.

See also, Vt. Rev. Stat., tit. 11, c. 128, § 2712 (1947).

80. Mo. Rev. Stat. § 369.365 (1949) confers limited priority to savings and loan associations. See note 65 *supra*.

81. Cal. Civ. Code § 2884; Gen. Stat. of Conn. § 1271 (1951 Supp.); Ill. Rev. Stat. §§ 30-37a (1949); Kent. Rev. Stat. § 382.520 (1952); Md. Code Ann., Art. 66, § 2 (1947 Supp.); Mo. Rev. Stat. § 369.365 (1949); Sess. Laws of Mass., c. 438 (1946); Sess. Laws of Mont., c. 150 (1949); Baldwin's Ohio Code, § 1311.14 (1953); Pub. Laws of R.I., c. 3018 (1952); Vt. Rev. Stat. c. 128, § 2712 (1947).

82. *E.g.* Md. Ann. Code, Gen. Laws, Art. 66, § 2 (1947 Supp.), where the maximum amount is set at $500 which is too restrictive in view of present day costs of alterations and improvements.

Statutes, Sections 410.010 *et seq.* (1949), and the Factor's Lien Act of 1945, *Missouri Revised Statutes,* Sections 430.260 *et seq.*[83]

The Missouri Accounts Receivable Act deals with "commercial factoring" or assignments of accounts receivable, provided the blanket notice requirement is complied with, and gives such assignments priority over all creditors and subsequent assignees of the assignor.[84] The statute covers an assignment when it is given as "security for the payment to the assignee thereof of any or all *indebtedness* theretofore, contemporaneously therewith, or *thereafter incurred* by the assignor to the assignee."[85]

The Missouri Factor's Lien Act is not limited, as the title might suggest, to "factoring" or "factor's liens" in the usual sense. A chattel mortgage covering a shifting stock of goods with a power of sale in the mortgagor is generally ineffective in Missouri as against creditors of the mortgagor,[86] so that the Factor's Lien Act provides a much more effective security device. "Factor", as defined by this act, includes anyone who "advances money on the security of merchandise."[87] Such a person is granted a continuing lien on the goods if the blanket notice and recordation provisions are complied with as set out in the act.[88] The "lien shall secure the factor for all loans and advances",[89] resulting in an effective security device in an area difficult to cover prior to the adoption of the act, and permits the lien to secure the "factor" for all loans and future advances.[90]

No decisions have been reported to date construing either the Factor's Lien Act or the Accounts Receivable Act. However, if the requirements and provisions are carefully followed, it would appear that there exist two additional, specialized security devices which will permit the making of

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83. For a brief analysis of both of these acts, see Pyatt, *Legislation,* 17 Mo. L. REV. 86 (1952).
84. MO. REV. STAT. § 410.020 (1949).
85. MO. REV. STAT. § 410.010 (1949).
86. A properly drafted chattel mortgage covering a shifting stock of goods is not void *per se.* However, by permitting the mortgagor to retain possession of the goods with a power of sale, the parties take the risk of having the mortgage set aside as fraudulent to purchasers and creditors, MO. REV. STAT. § 428.080 (1949), especially where the mortgagor has the use of the proceeds of such sale either by the face of the mortgage or by the conduct of the parties. See, *e.g.,* Embree v. Rorry, 152 Mo. App. 257, 133 S.W. 83 (1910).
87. MO. REV. STAT. § 430.260 (1949).
88. *Id.* § 430.270.
89. *Id.* § 430.270, para. 1.
90. *Id.* § 430.270, para. 1 and 2(3).

future advances and which will adequately protect the priority of the person making such advances.

Release of Mortgage Securing Future Advances

The problem of providing for an effective release of mortgages securing future advances is one which has apparently gone unnoticed in the many jurisdictions where a release can be given by the mortgagee or note holder without regard to whether or not such person is the holder of record.

In the states permitting such a release, Missouri being among them, a number of problems arise where subsequent advances have been made and additional notes executed and delivered. What effective manner can be employed to release these mortgages? Will the record be cluttered or burdened by requiring that each advancement be placed upon the record, and will such a requirement destroy much of the flexibility and utility of a future advance clause? How will the title examiner be able to determine the true status of the property?

This problem does not exist in a number of states where the statute requires that the mortgagee or note holder appear of record.[91] In these jurisdictions all that is necessary to obtain an effective release is for the mortgagee or note holder of record to execute a proper release or acknowledgement of satisfaction.

The method of release in Missouri, where the note holder does not appear of record, and where the note holder named in the deed of trust is often a straw party, is quite different. The basic method of release is the production and cancellation of the note in the presence of the recorder, with a marginal release by the recorder on the record of the deed of trust.[92]

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91. See, *e.g.*, Ill. Rev. Stat., c. 95 §§ 9-11 (1949).

92. Mo. Rev. Stat. § 443.060 (1) (1949), which provides: "If any mortgagee . . . receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage . . . on the margin of the record thereof, or deliver to such person a sufficient deed of release of the mortgage or deed of trust; . . . that when any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. . . . (T)he note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record and attested as above provided."

In general, see Mo. Rev. Stat. §§ 443.060—443.170 (1949).

A similar method is provided where there are several "named" notes.[93] A deed of release alone is not sufficient, although such a deed may be used in addition to the production and cancellation of the notes;[94] with only a deed of release there is no way to determine whether the deed was made by the note holder. There also is provision for release by way of affidavit where the note is lost or destroyed, but if the affidavit is false there is not an effective release.[95]

A marginal release upon production and cancellation of the described note is not sufficient in the case of a mortgage to secure future advances because there is no way for the recorder to know whether there are additional notes, unproduced and uncancelled, not appearing of record, and therefore the recorder's certificate is meaningless. Perhaps a recorded affidavit that there were no future advances made, or stating that the additional notes produced covered all of the future advances, would be sufficient, but this might not satisfy a title examiner.[96]

The solution to the release problem requires that a suitable procedure for release be specially provided in the original, recorded mortgage instrument. It appears that there are at least three possible methods by which this could be accomplished.

1. The parties could agree in the original mortgage that a release can be effected and the mortgage absolutely discharged by a quitclaim from the holder of record. This is the method mentioned above which is accomplished in a number of states by statute, but it does not seem to be the most desirable procedure to follow under the business practices in a state which has laws similar to the one in Missouri. The major objection is that this would force each additional assignment or negotiation of the original note, as well as each later advancement, to be recorded. This would be especially undesirable and troublesome in chattel mortgages where, in practice, a number of finance companies may hold different notes which

93. MO. REV. STAT. § 443.100 (1949), which provides: "In cases where a number of notes are named in any mortgage or deed of trust, on payment of any one or more of such notes, the maker thereof may present the same to the recorder, and the recorder shall cancel the same and make a memorandum of such presentation and cancellation on the margin of the record of such mortgage or deed of trust."

94. MO. REV. STAT. § 443.060(1) (1949).

95. MO. REV. STAT. § 443.060 (1949). See Mo. Title Examination Standard No. 12.

96. *Cf.* authorities cited *supra* n. 95.

are secured by the same chattel. There is also the further problem that a recorder might refuse to record the quitclaim, relying on the provisions of *Missouri Revised Statutes,* Section 443.060 (1) (1949), which provides that "no full deed of release shall be admitted to record unless the note or notes are so produced or cancelled."

2. The parties could stipulate in the original mortgage that for each advance an additional or supplementary instrument be recorded to make the advance secured by the mortgage. Such supplementary instrument would set out the book and page of the original recorded mortgage, the name of the present holder and mortgagor, and the amount of the advancement. This procedure would be practical, however, only in cases where it is desirable to record all advancements as made. It is often the case, especially where smaller advances are given, that the interest earned on the loan will not warrant the cost of recording an additional instrument; however this cost could be shifted to the borrower. In other instances the recording is omitted relying on the personal credit of the mortgagor or because the lending institution is insured against losses from a failure to record.

3. The final method of release, which the author strongly recommends, is one whereby the original mortgage does not require either that the holder appear of record or that each advancement appear of record. Rather, the only stipulation would be that unless such future advances appear of record, the deed of trust or mortgage may be effectively released by presentation to the recorder of the note described in the original instrument and by presentation of any other notes for advancements described in subsequently recorded instruments.

This would serve as the most practical method to obtain an effective release in that it most fully accomplishes the objective of the advance financing mortgage by placing the burden on the holder of recording, if he desires, and at the same time providing a flexible and inexpensive method of making future advances. By employing this technique, if the holder of the original note and the holders of additional notes for future advances are the same person (which is generally the case), it would not be necessary to record advances unless desired, and yet an effective release of the entire indebtedness, or a part thereof, can be made by presenting only the notes which appear of record. On the other hand, if holders of the various notes are not the same person, it would place the burden on each different holder

to see that at least one of the notes which he holds appears of record. In the following and final section of this article, a sample form will be presented which is designed to provide for a release in this manner.

Recommendations and Suggested Forms

No single form of universal application is possible. Nor is it possible to present a form which will cover every situation in a given jurisdiction. Consequently, the forms to be suggested below are drafted with reference and consideration to the more frequently employed security instruments in Missouri, and should be adapted to meet special problems.

It should not be a difficult task to revise these instruments so that they will meet the various requirements of form in other states. The drafter should bear in mind, however, that the provisions incorporated in the suggested forms are far from being inclusive. Many variations are possible, as would appear from the foregoing discussion, because of the many types of future advances, the different limitations in time and purpose, the notice requirements of various states, and other statutory and judicial rules with reference to future advances.

Following are two sample forms, a deed of trust of land and a chattel mortgage, which may be used in Missouri:

DEED OF TRUST

THIS DEED, etc. (date, parties, residence, etc.)

WITNESSETH, etc. (usual granting clause wherein the party of the first part conveys real property, described therein, to the trustee to secure an indebtedness owing to the party of the third part).

TO HAVE AND TO HOLD, etc. (habendum and trust clause).

WHEREAS, etc. (usual description of the note, setting out the amount, interest, due date, etc.).

WHEREAS, the said Party of the Third Part may hereafter during the continuance of these presents make further advances represented by promissory notes to the said Party of the First Part, any such additional promissory notes made and delivered by the Party of the First Part to the Party of the Third Part, in consideration of the making of such further advances by the Party

of the Third Part prior to the cancellation or release of this deed of trust, shall be secured hereby and collectible with, as part of, and in the same manner as the aforementioned Note, provided the aggregate amount of said initial indebtedness and further advances do not exceed the sum of .....DOLLARS[97] ($.....), plus any advances necessary for repairs and replacements to the premises, and for the protection of the security, together with interest and costs.

WHEREAS, Party of the First Part covenants and agrees to pay all taxes, assessments, liens and charges levied on said premises before any penalty for non-payment attaches thereto; . . . (usual provisions here concerning abstinence from waste, repair, and insurance) . . ., and in case of failure to do so, the legal holder of said Note or notes may pay such taxes, assessments, or other liens and charges upon said premises, make such repairs and effect such insurance and the amounts paid therefor with interest thereon from the date of payment at the rate of —— per cent per annum, shall be collectible with, as part of, and in the same manner as said Note and any additional notes given for further advances as made under the provisions herein.

Now, if the said Note and interest be paid when due and payable, and if said additional note or notes which are hereafter made in consideration of any further advances, and interest thereon, likewise be paid when due and payable, and said covenants be faithfully performed as aforesaid, then this deed shall be void, and the property hereinbefore described shall be released at the cost of the Party of the First Part in the manner and under the terms of the following agreement:

> The parties to this deed of trust covenant and agree that a release of this deed of trust can be effected by a presentation to the recorder of only the Note herein described and of any note or notes given in consideration of further advances under the provisions of this deed of trust and which are represented by a subsequently recorded instrument, setting out the names of the parties, a description of the note, the book and page number wherein this deed of trust is recorded, and the amount of each advancement. This is not to be construed to mean that all further advancements must be recorded or that this deed of trust can be released only by the holder of

97. This clause may be deleted so as to provide for unlimited advances.

record; the intention of the parties to this agreement is that a release of this deed of trust can be effected, in whole or in part, by a presentation merely of the Note and notes which appear of record by the holder thereof without regard to any other note or notes, made in consideration of further advances, which do not so appear of record.

Now, if default be made in the payment of said Note, or in the payment of any subsequent note or notes executed and delivered as herein provided, or if default be made in the payment of interest on the said Note or notes, when either becomes due and payable, or if any of the aforesaid covenants be not kept and performed by the Party of the First Part, then this deed shall remain in full force . . . (then follow the customary deed of trust provisions for sale by the trustee, the notice, method, time, place, etc., of the sale, the priority disposition of the proceeds thereof, successors in interest, etc.).

Where good business practice permits, the mortgagee should place upon the record a supplemental agreement indicating that advances have been made,[98] in accordance with the special agreement in the above deed of trust form. This is absolutely necessary where the special release provision is used in the original mortgage or deed of trust. A subsequent agreement may take the following form:

KNOW ALL MEN BY THESE PRESENTS:

Pursuant to the provisions of a deed of trust recorded at Book ...., Page ...., in the Office of the Recorder of Deeds, ... County, Missouri, (name of mortgagee or holder of note) has made an additional advancement of .....DOLLARS, ($.....), paid to (mortgagor), as evidenced by a promissory note (usual description of the note, setting out date, parties, amount, interest, due date, etc.), said advancement being secured by the lien of the original deed of trust and under the terms thereof.

(Mortgagor)

(Acknowledgment)

CHATTEL MORTGAGE WITH POWER OF SALE
KNOW ALL MEN BY THESE PRESENTS:

That I the undersigned (mortgagor) of .....County, Missouri, in consideration of the sum of (amount of present loan)

DOLLARS ($.....), and of any sum or sums of money subsequently advanced, said future advances not to exceed in the aggregate the sum of .....DOLLARS ($.....),[98] to me paid or to be paid by (Mortgagee) of .....County, Missouri, do hereby Sell, Assign, Transfer and Set Over unto the said (mortgagee), his Executors, Administrators and Assigns, the following described personal property, to wit:

(Description, location of chattels, covenants of ownership and freedom from encumbrances; warranty to defend; covenant to insure, care for; right to inspect, etc.)

UPON CONDITION that if I pay to the said (mortgagee), his Executors, Administrators and Assigns, the sum of ..... DOLLARS ($.....), agreeably to my promissory note(s) of even date thereon from ....., 19.... at the rate of .... per cent per annum, and also any notes made subsequent to this date, the total of such additional notes not to exceed ..... DOLLARS[99] ($.....), and any further advances made by the said (mortgagee) for the protection of the security, then this conveyance shall be void, otherwise to remain in full force and effect; and in case default be made in the payment of the debt or debts above mentioned, or any part thereof, or if the interest due thereon, on any day when the same ought to be paid, or if any covenant hereof be not faithfully performed, then the whole sum shall at the election of the said holder of the above described note or notes, become immediately due and payable, and such future advances and interest shall be equally secured with and have the same priority as the original indebtedness.

(Usual provision for sale upon default, notice, allocation of proceeds, etc.)

Again, where desired, the provision similar to the agreement in the deed of trust sample form can be inserted and the supplemental agreement may be used when each advancement is made. In Missouri, typically chattel mortgages will be filed rather than recorded, but the practical effects are the same. Where the lender is content to rely on the integrity and personal responsibility of the mortgagor the additional steps which must be made

98. This procedure is in accord with the actual practice of a number of large financial institutions. See Architectural Forum, Nov., 1945, p. 10.
99. See note 97, *supra*.

for the special release provisions and the additional costs incurred thereby may be omitted.

As was pointed out above, many variations can be used, particularly in regard to limitations in time and amount. The clauses employed in the above forms place a limitation on the aggregate amount of future advances to be made.[100] They can be further limited by setting forth a future date upon which the last advancement can be made secured by the original instrument.

However, in view of the established validity of mortgages to secure future advances, it does not seem absolutely necessary that these restrictions be made a part of the instrument; in all probability a mortgage securing optional future advances without any such limitations of time or amount will be treated equally as valid as the limited form. However, the continued use of optional future advances will depend somewhat on the measure and manner in which they are employed; the use of clauses which are too broad[101] will tend to cause our courts to frown on all future advances and may hamper the acceptability of these mortgages in general.

A number of other refinements may also be introduced into these forms depending on the needs of the particular situation or the desires and business practices of the lender.[102] Provisions for the order of application of payments may be used, applying the payments first to the discharge of the indebtedness created by the latest advancement, in point of time, and then to discharge the principal or original obligation. In this manner that part of the debt with the most doubtful priority of security is paid off first.

Another refinement is the enlargement of the mortgage to cover both chattels and real property. The utilization of this so-called "package mortgage"[103] securing future advances has great promise and should substantial-

100. A desirable substitute of this clause, setting a limit on the aggregate amount of advances, which permits greater flexibility and protection, is: ". . . shall be equally secured with and have the same priority as the original indebtedness to an aggregate amount outstanding at anytime which, when added to the balance due on the original indebtedness, shall not exceed the amount initially secured hereby."

101. See note 39, *supra.*

102. See note 8, *supra.*

103. See note 6, *supra.*

ly improve the chances of many persons to purchase their own fully equipped homes.[104]

Conclusion

In view of the rapidly increasing use of these mortgages to secure future advances, it is highly probable that legislative changes and additions will be effected in many states to define and control the use of future advances, and for this reason it is strongly urged that one keep abreast of the state laws to determine if any change has been made. When no statute exists and where the cases do not clearly set out whether actual or constructive notice of intervening liens is sufficient to cut off the priority as to future advances, it is suggested that two steps be taken to insure full protection of the advancement for the mortgagee.

First, a thorough search of the record should be made by the mortgagee before each advancement is made. This does not place any substantial, additional burden on the mortgagee, and for this reason it is anticipated that many courts will adopt the constructive notice rule.[105]

Advance financing should, in the future, open up a wider avenue of loans to those provident lenders who forsee the many advantages afforded. Again it is cautioned that the technique should not be employed in the extreme form, but should be used equitably for the mutual benefits to be derived by both borrower and lender. It is further hoped and suggested that, where necessary, legislation will be passed to increase the effectiveness of these transactions, to protect the rights of subsequent parties, and to insure that such mortgages are employed in a fair and responsible manner.[106]

104. A recent innovation in Missouri is a widely promoted package mortgage to secure the purchase price of a new car and a house.

105. See note 78, *supra*.

106. See 8 ST. JOHN'S L. REV. 340, 345-346 (1934) for suggested legislation to simplify the problem of priorities and to provide additional safeguards.