2004

Tracy Loan and Trust Co v. Fracis G. Luke : Brief of Respondent

Utah Supreme Court

IN THE

Supreme Court

OF THE STATE OF UTAH

TRACY LOAN AND TRUST COMPANY, a corporation,
Plaintiff-Respondent.

vs.

FRANCIS G. LUKE AND NELLIE LUKE, his wife; ALICE G. LUKE; L. C. LOHDEFRINCK AND JANE DOE LOHDEFRINCK, his wife; LINUS E. PATTERSON and PETE LENDARIS,
Defendants.

SAID NELLIE LUKE,
Sole Appellant.

NO. 4704

RESPONDENT'S BRIEF

Appeal from Third Judicial District Court of Salt Lake County; Hon. Wm. M. McCrea, Presiding

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POWERS, RITER AND COWAN,
Attorneys for Respondent.

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SUPPLEMENTAL STATEMENT OF CASE

Francis G. Luke and Alice G. Luke were owners in common of the real estate involved in this foreclosure. Nellie Luke, the appellant, was and is the wife of Francis G. Luke. The mortgage in favor of respondent, Tracy Loan & Trust Company, which is the subject of this proceeding, is dated December 1, 1917, and was properly executed by said Francis G. Luke and Nellie Luke, his

wife, and Alice G. Luke. The coupon note in the principal sum of $1300.00 secured by this mortgage was also signed by the said Francis G. Luke and Nellie Luke, his wife, and the said Alice G. Luke. The real property was burdened with a mortgage in the principal sum of $1300.00 in favor of respondent when the same was conveyed to Francis G. Luke and Alice G. Luke. The mortgage of December 1, 1917 was clearly a renewal mortgage, as it is recited therein. The respondent is foreclosing this mortgage dated December 1st, 1917, executed by the parties aforesaid. It is alleged by the respondent in its complaint, and so found by the court, (Findings 9, 10, 11, Abs. 24 and 25) that the notes and mortgage dated December 1, 1920 and the notes and mortgage dated December 1, 1923, evidenced the same indebtedness as the mortgage dated December 1, 1917 in favor of this respondent and are evidences of the various extensions of time granted by the respondent, and the defendants Francis G. Luke and Nellie Luke, his wife, and Alice G. Luke, have at all times recognized and acknowledged said indebtedness and have agreed to pay the same, and that said defendants have paid interest on said mortgage from time to time and have in writing undertaken and agreed to pay said mortgage indebtedness.

The interest of the respondent Nellie Luke was and is that interest created by Section 6406 Compiled Laws of Utah, 1917. She is not and never has been a fee simple title owner of the mortgaged premises. The decree of the District Court in foreclosure, foreclosed not only

the fee title interest of the defendant Francis G. Luke and Alice G. Luke, but also that inchoate right of Nellie Luke as wife of the defendant Francis G. Luke. There is no question but that the mortgage obligation was due and owing by the actual fee title owners of the premises. They have not appealed from the foreclosure judgment. Only Nellie Luke, the wife of Francis G. Luke, has appealed. The fee title owners accepted the judgment of the District Court and by virtue of the sale thereunder, lose all title and interest in the premises.

ARGUMENT

I.

THIS IS AN APPEAL ON THE JUDGMENT ROLL ALONE WHICH CONTAINS NO BILL OF EXCEPTIONS. IN SUCH AN APPEAL THE PRESUMPTION IS THAT THE EVIDENCE JUSTIFIED THE FINDINGS.

McGuire vs. State Bank of Tremonton,
164 Pac. 494
49 Utah 381

Raphael vs. Wasatch and J. V. R.
95 Pac. 1008
34 Utah 97

Ryan vs. Kunkel
90 Pac. 1079
32 Utah 377

The court's attention is directed to Finding of Fact No. 15:

XV.

> That the fee simple to said land is vested in Francis G. Luke and Alice G. Luke * * * and is subject to the prior lien o fthe mortgage in favor of plaintiff, dated December 1, 1917, * * * which said lien of said mortgage has been kept an existing and legally enforceable lien against said land by the written agreements of Francis G. Luke and Nellie Luke. his wife, and defendant Alice G. Luke. That the inchoate interest of defendant Nellie Luke, wife of Francis G. Luke, is subject to the lien of plaintiff's mortgage * * *. That defendant Nellie Luke, wife of Francis G. Luke, did specifically relinquish her inchoate right as the wife of the defendant, Francis G. Luke, in said property, by the execution and delivery unto plaintiff, December 1, 1917, of the mortgage described in paragraph VII hereof.

It will be noticed that the court found that the inchoate interest of the appellant Nellie Luke is subject to the lien of plaintiff's (respondent's) mortgage and that said appellant did specifically relinquish her inchoate right as wife of the defendant Francis G. Luke in said property by execution and delivery unto the respondent of the mortgage dated December 1, 1917. By Conclusion of Law No. 4, Abs. 29, the court specifically concludes that said respondent Nellie Luke renounced her inchoate right in the mortgaged premises by proper written instrument. In view of the type of this appeal, it is submitted to the court that this Finding and Conclusion is conclusive against the appellant. It is presumed that the evidence justified the Finding. This Finding is a complete answer to the argument of appel-

lant that there was no Finding on the Statute of Limitations. The court found that the inchoate right of the appellant Nellie Luke was subject to the lien of plaintiff's mortgage sought to be foreclosed. This was an affirmative Finding. It was not required of the court that it find specifically that the lien of the mortgage was not barred by the Statute of Limitations, inasmuch as this affirmative Finding in itself shows conclusively that the mortgage was an enforcible lien obligation, not only as to the fee title owners, but also as to the inchoate interest of the appellant. In the state of the record and appeal, the appellant cannot question this Finding. It is conclusive against her. The Finding was within the issue raised by respondent's complaint and the answer of said appellant. If the lien of the mortgage had been barred by the Statute of Limitations, then ipso facto it would not have been a lien on the inchoate interest of appellant. Therefore the Finding that said mortgage was an enforcible lien against the inchoate interest of appellant included a Finding that the defense of the Statute of Limitations was not sustained.

II.

THE ISSUE ON THIS APPEAL IS NOT WHETHER THE PAYMENT OR ACKNOWLEDGMENT BY ONE MAKER OF A JOINT AND SEVERAL PROMISSORY NOTE TOLLS THE STATUTE OF LIMITATIONS AS TO ANOTHER MAKER. THE RESPONDENT DID NOT PRAY

FOR A DEFICIENCY AGAINST NELLIE LUKE. NO SUCH DEFICIENCY JUDGMENT WAS ENTERED AGAINST HER. THE ISSUE ON THIS APPEAL IS WHETHER THE LIEN OF THE MORTGAGE HEREIN SOUGHT TO BE FORECLOSED AS AGAINST THE INCHOATE RIGHT OF THE APPELLANT, AS WIFE OF THE DEFENDANT, FRANCIS G. LUKE, WAS RELEASED OR DESTROYED BECAUSE THE PERSONAL OBLIGATION OF APPELLANT ON THE NOTE DATED DECEMBER 1, 1917 AND SIGNED BY HER WAS BARRED.

The solution of the problem in this case will depend upon the proper construction of Section 6406, Compiled Laws of Utah, 1917, reading in part as follows:

> "One-third in value of all of the legal or equitable estates in real property possessed by the husband at any time during the marriage *AND TO WHICH THE WIFE HAD MADE NO RELINQUISHMENT OF HER RIGHTS,* shall be be set apart as her property in fee simple, if she survives him, etc."

The right of the wife in the real property of the husband *DURING THE LIFE OF THE HUSBAND* under this Section, is not a new right, created by statute. The statute simply enlarged the right that had been continuous in the Territory of Utah and in the State of Utah since 1887. When common law dower was reinstated in the Territory it was simply declaratory of a

right that existed. The same pre-requisites which gave and vested the right are necessary under this Section as are necessary under the common law dower as the same is applied in most States of the Union, namely, marriage, siezen by, and death of husband. Moreover, the amount or quantity given to the widow is the same in the one as in the other, the only difference being in the extent of its use. Under the law prior to the enactment of this Section, the use was limited for the life of the widow, while under this Section it is enlarged to a fee simple estate. The one was limited; the other unlimited, and this is the only difference between the right prior to and after the enactment of this Section. The above statement is a paraphrase of the language of the court used in the famous case of

Hilton vs. Thatcher
88 Pac. 20
31 Utah 360.

It is a classic case defining the rights of a wife and widow in the real property of her husband. Our Supreme Court has had occasion to elaborate further its declaration as to the wife's and widow's interest: In

Gee vs. Baum
196 Pac. 680
58 Utah 445.

the Court said:

> "While it is true that under our statute, dower by that name is abolished and the wife takes

> one-third of her husband's real estate in fee if she survives him, yet unless she does survive him she has no interest in his real estate and the interest of the wife although in fee is nevertheless a mere inchoate interest and depends entirely upon the condition that she survive her husand."

In joining with him in a deed of lands to which he holds the legal title, she therefore merely releases her inchoate right and is not a grantor in the sense that she is the owner or joint owner of the title conveyed. In the case of

> H. T. C. Co. vs. Whitehouse,
> 154 Pac. 950
> 47 Utah 323

our Supreme Court held that a wife during the life of her husband had no title to nor possession of her husband's land. Her right is merely an inchoate interest during the life of her husband. It will therefore be seen from these decisions that the appellant Nellie Luke had no title to the mortgaged premises; had no possession of the same, but an inchoate interest only as long as her husband, Francis G. Luke, lived. This inchoate interest would ripen into a fee simple title should she survive her husband, but dieing before her husband, this inchoate interest vanishes. The Supreme Court has said that this interest is not an estate in real property, although it is an interest which the courts will carefully protect. It was this right or interest which the District Court foreclosed as against the appellant. This case was and is before the courts while the husband,

Francis G. Luke, lives. It is apparent, therefore, that if the appellant Nellie Luke did relinquish her right or interest in and to the mortgaged premises, then the judgment of the lower court is correct. If there was no relinquishment by the appellant, the District Court judgment is clearly in error. We are not interested in any personal liability of the appellant. There was no attempt by the respondent to affix a personal liability upon her. All it sought in its proceedings against appellant was to foreclose its mortgage of 1917 against her inchoate interest under Section 6406. The mortgage sought to be foreclosed was executed by the appellant. She was a necessary and proper party to the action. The real question to be answered is this: Was the execution of the mortgage of 1917 by the appellant such a relinquishment of her inchoate interest as Section 6406 contemplates? All other questions in this appeal are irrelevant. This is the question which must be answered by the court.

III.

WHERE A WIFE JOINS IN A MORTGAGE OF THE HUSBAND'S LANDS SECURING EITHER HIS OR THEIR DEBT, PAYMENTS MADE BY HIM OR WRITTEN ACKNOWLEDGMENT OF THE DEBT MADE PRIOR TO BAR OF STATUTE OF LIMITATIONS WILL SUSPEND THE RUNNING OF THE STATUTE AS TO THE WIFE'S INCHOATE DOWER RIGHT IN RE-

SPECT TO FORECLOSURE OF THE MORTGAGE.

It is admitted that the obligation due the respondent was not barred as to the defendants Francis G. Luke and/or Alice G. Luke. They made payments on interest from time to time, and they executed renewal notes and mortgages. At all times the same obligation created by the 1917 notes and mortgage was valid and enforcible as against the husband of this appellant. The theory of respondent's action has been and is that while any personal obligation of the appellant Nellie Luke may have been barred by lapse of time, that she made due and proper relinquishment of her inchoate interest by the execution of the 1917 mortgage to secure the obligation recited therein and that so long as said obligation was due and owing the respondent just so long did this inchoate interest of the appellant stand mortgaged or pledged to the respondent. As before stated, the obligation remained the same throughout the years. The payment of the same was twice extended. It remained a personal and enforcible obligation against the true fee simple owners of the land. The rights of a wife during the lifetime of her husband, in her husband's real property, under said Section 6406, are the same as at common law.

Hilton vs. Thatcher (supra)

and therefore the decisions of other States will be of

great aid and help. The question is not made peculiar to the State of Utah, because of statutory regulation. In the case of

Clift vs. Williams
51 SW. (Ky.)

at page 821, the court said:

> "It is clear that the wife having signed and acknowledged the mortgage and released and waived her dower and homestead right, cannot claim dower in such lands by reason of the statute above, as well as by reason of the fact that the mortgage itself is not barred by limitation. The widow's claim can only come through her husband and her right dates from his death and in no case where she signs the mortgage can she be in a better position than the purchaser with constructive notice."

In this case the court held that payments made on a note secured by a mortgage operate to extend the period of limitation as to the wife of the mortgagor who united in the mortgage.

We quote from

Jackson vs. Longwell
64 Pac. (Kans.) 991

> "The second contention is that inasmuch as the statute of limitations has excused Mrs. Jackson from personal liability on the first note and as the property mortgaged to secure that note was her individual property, therefore no foreclosure could be had of the mortgage which secured that note. We cannot give this contention

our approval. This note in question was a joint and several obligation of both of the defendants. Mrs. Jackson mortgaged her property not only to secure the joint obligation of herself and husband, but the obligation of each severally. The mortgage secured the obligation of the husband as fully as it secured the obligation of the wife. Of course, if the note had been barred as to both, then there would have remained no obligation to enforce; but until the obligation of both was discharged by payment or otherwise, the lien of the mortgage remains enforcible. The statute of limitations having run in favor of Mrs. Jackson discharged her from her personal liability on the note and therefore she sustained the same relation to the note as though she had never signed it; but this in no way affected her agreement that her property should be subjected to the payment of her husband's debt evidenced by the note and the case remained the same as though he only had signed the note when it was made, and both had at that time given a mortgage to secure the note."

In

Perry vs. Horack
64 Pac. (Kans.) 990

the husband and wife executed a mortgage upon their homestead. The husband died, leaving minor children and the mother and children continued to occupy the homestead. No payments were made on the note expressly for the children. Mrs. Horack made payments on her own behalf. The court said the payments by Mrs. Horack certainly kept the note alive and the general rule is that the mortgage lives as long as the note it was given to secure.

"The minors were not parties to the note and mortgage but they inherited the land subject to the lien of the mortgage. * * * Payment by Mrs. Horack kept the debt alive and if we should treat these payments as for herself alone the mortgage would still be enforcible. If she alone had made the note and the children had joined in a mortgage on their property to secure it and the debt had been kept alive by payments of the maker, no one would contend that the mortgage would be barred as to the childen or that it would be affected by the failure to make payments or otherwise acknowledge the existence of the debt."

See also the case of

Investment Securities Co. vs. Manwarren
68 Pac. (Kans.) 68

Here the court said:

"The fact that the property in this case is shown to be the homestead of the mortgagors is not important. It is the creation of the lien on the homestead without the joint consent of both husband and wife which is prohibited by the Constitution. Here such consent was given. The mortgage debt has not been repaid. The husband by payment of interest upon the debt within the statutory period tolled the statute and preserved the cause of action against himself upon the debt and as against both for the foreclosure of the mortgage. The case thus stands precisely in the same attitude as though the wife had not in the first instance executed the note with her husband, but had executed the mortgage securing the same. In such case the right to foreclose the mortgage would scarcely be questioned. * * * While the obligation for the payment of this debt against both husband and wife remained enforcible, a contract for the extension of the time of payment

of the debt was entered into between the mortgagee and the husband alone. It was not the intention of the parties by this extension to create a new mortgage lien on the homestead, neither was it the intention of the parties thereto to change the priority of the mortgage lien nor to re-create a lien by mortgage on the homestead; for none had been lost, destroyed or changed. The wife not being a party to this contract, her obligation for the payment of the debt remained wholly unaffected thereby. It neither operated to afford her a discharge from the obligation to pay the debt nor to release the property pledged as security for its payment. As to her the contract of extension was wholly ineffectual to suspend the running of the statute of limitations upon her obligation for the payment of the debt. Her rights remained the same as though this extension agreement had not been made. It being within the power of the husband to suspend the running of the statute of limitations as against himself upon his obligation to pay the debt by an acknowledgement of a subsisting liability, therefore either by the making of payments thereon or by an acknowledgement in writing of an existing liability as by statute provided for tolling the statute of limitations and as the mortgage remained enforcible so long as his obligation to pay the debt remained enforcible in law it follows and must be held in an action to recover the debt and to foreclose the mortgage the statute of limitations cannot be successfully interposed by either husband or wife to defeat the mortgage lien so long as the right of action to recover the debt may be maintained against either."

We refer to the case of

Skinner vs. Moore
67 Pac. (Kans.) 827

Here payments of interest were made on the note from time to time by the husband without knowledge of the wife. The statute of limitations had not run on the note against the maker (the husband) by reason of interest payments made by him. The court said:

> "A recovery on the note was never barred by the statute of limitations. No one except the husband was obligated to pay the debt evidenced by the note. The mortgage was a conditional conveyance securing the payment of the note so long as it was a valid and existing demand against the maker."

Turning to the Mississippi reports, we find the case of

Smith vs. Scherck
60 Miss. 491

This case involved a mortgage on a homestead executed by both husband and wife. The court said:

> "It remains, despite the statute (the Homestead statute) the exclusive property of the husband where the legal title resides in him but with the limitation upon the jus disponendi by which he is prevented from selling or encumbering it without the conjoint act of the wife. When, however, she gave her assent in the mode appointed by law, it is operative to its full effect and can neither be recalled nor restricted by her. When therefore she joins in a mortgage of it to secure a debt the property quoad the mortgage ceases to be a homestead and is bound as any other property of the husband would be; and as long therefore as the debt is kept alive by him who owes it, the mortgage remains in full force. Having consented that it might be bound for that debt it must so continue until the debt be dis-

charged by valid judgment or by such lapse of time as constitutes a valid bar in behalf of the debtor."

The State of Vermont offers us the case of

Gay's Estate vs. Hassam, et al.
24 Atl. 715

wherein the court said:

"If Naomi B. Hassam (the wife) were a grantee of George P. Hassam, (the husband,) one of the mortgagors, she would be affected by the acknowledgement thus made by him, and she is affected in no less degree by reason of being herself one of the mortgagors. But she claims that in equity she should be regarded as surety for the payment of her husband's note and that under our statute relating to joint contractors she is not affected by the payment or acknowledgement made by him. By joining with her husband in a mortgage of her real estate to secure his debt she did not become a joint contractor. She incurred no personal liability by so doing. The statute referred to has reference to parties incurring a personal liability and has no reference to a right of entry into house and lands."

The Supreme Court of North Dakota in the case of

Roberts vs. Roberts,
10 No. Dak. 531
88 N. W. 290

uses this language:

"By executing the mortgage to secure the debt of her husband she consented that her homestead right should become subject to the payment of his debt without any restrictions unless the debt and mortgage became barred by the running of the statute of limitations. She waived her home-

> stead right with knowledge that the husband had the right to pay the debt and is bound by his acts so long as her rights have not been unlawfully infringed upon. Part payment by the husband in a legal manner during the life of the mortgage is not such an act as discharges the mortgage as to her, although it had the effect of continuing the lien of the mortgage longer than it would otherwise have continued. * * * In this case the debt exists so far as the husband is concerned. So does the mortgage also, each by virtue of the payments made by the husband and were effective in keeping the mortgage in force as to her."

The same court in

> Hanson vs. Branner,
> 204 N. W. (No. Dak.) 856

affirms the Roberts case and after quoting from the Roberts case as we have done, uses this language:

> "There is no construction that can be placed upon this language other than that the partial payments made by the husband extended not only the life of the note but the life of the mortgage as well. There is no difference between the case at bar and the case of Roberts vs. Roberts. The wife in both cases signed with her husband a mortgage upon the homestead. The husband without the knowledge of the wife made partial payments which tolled the bar as to the note and mortgage."

The case of

> Mahon vs. Cooley
> 36 Iowa 479

is in point. The mortgage was upon a homestead. It was executed by both husband and wife. A written ac-

knowledgment was made by the husband alone. The court says:

> "The next question for our consideration involves the power of the husband by reviving the cause of action, without the concurrence of the wife, to keep alive the lien of the mortgage upon the homestead after the expiration of the period of limitation. Defendant's counsel insist that the instrument under which the revivor is claimed to be effected for that purpose so far as the homestead is concerned, should be signed by the wife as well as the husband. * * * The mortgage was executed to secure the debt of which the note is evidence and its lien is not released until payment or other discharge. The evidence of the indebtedness may be changed or it may be transfered to other parties, yet the mortgage will follow it and will be valid as long as the debt can be enforced. It is then but an incident of the debt. Its existence is measured and prolonged by the life of the debt. These are familiar doctrines that do not require for their support the citation of authorities. Whatever may be the wife's interest in the homestead, she conveyed it by the mortgage to secure the debt and it follows from the foregoing rule that the mortgage will bind her interest until the debt is discharged."

We also quote from

37 Corpus Juris—page 1162, Sec. 642.

> "Where a wife joins her husband in a note and mortgage, and mortgages her land to secure it, or mortgages her land to secure his individual note, or joins him in a mortgage of the homestead to secure a note executed by him alone, or their joint note, or joins in a mortgage of the husband's land securing his individual debt for the purpose of relinquishing dower and homestead rights

> payments made by him will suspend the statute as to her in respect of foreclosure of the mortgage."

We also set forth this quotation from

> 17 Ruling Case Law, Sec. 297, page 934
>
> "Thus if a husband and wife execute a mortgage on their homestead to secure the payment of a note made by him only, his payment of interest periodically, though without her knowledge, has been held to stop the running of the statute."

See also:

> Jones on Mortgages, Vol. 2, 8th Ed. Sec. 1536.

Under community property law the husband's acknowledgment of the mortgage debt, without knowledge of the wife, removes the bar of the statute of limitations and keeps the debt alive and the debt being an enforcible claim, the lien of the mortgage remains. In applying the foregoing rule from community property states to the statutes of Utah, with particular reference to Section 6406, and the wife's rights thereunder, the following similarities between the wife's right under community property rules and under Section 6406 should be kept in mind. In both cases:

(a) The wife must join in deed and mortgage to release her rights in land;

(b) Her right remains inchoate during life of husband, but she takes a fee simple interest on his death if she survives him;

(c) Her right is contingent on the fact that she survives him;

(d) The husband can deal with the land as his own except as to conveying or encumbering same, when the consent of his wife is necessary.

With such similarities existing, it is submitted that the authorities hereinafter quoted are in point and are of value to the court in this discussion. In

Cook vs. Stellmon
251 Pac. (Idaho) 957

the court says:

> "The agreement between Stellmon, husband, mortgagor and appellant (the mortgagee) to postpone the date of indebtedness created no further incumbrance on the property than already existing. It neither enlarged nor diminished the original obligation. It simply postponed the time of the debt.
>
> Investment Securities Co. vs. Manwarren
> 64 Kans. 636
> 68 Pac. 68."

See also from the State of Washington:

Catlin vs. Mills
247 Pac. 1013
47 A. L. R. 546.

We respectfully submit that the execution of the 1917 mortgage by the appellant, Nellie Luke, was exactly the kind of a relinquishment Section 6406 contemplates. She mortgaged her inchoate interest to secure a debt, and during the time the debt, which was a joint and several one, exists against any of the makers, the lien of the mortgage operates against this inchoate

interest. It was the joint debt of the three persons who signed the 1917 note and it was the several debt of each of them. It may well be barred as to appellant by lapse of time but the joint and several obligation of Francis G. Luke and Alice G. Luke remained, and so long as this obligation remained enforcible just so long was this inchoate interest of the wife, Nellie Luke, pledged for security. There is no escape from this conclusion under the authorities cited. It will be noted that the premises in question were burdened with a mortgage at the time that Francis G. Luke and Alice G. Luke took title to the same, and the mortgage of 1917 in which the appellant joined specifically recited that it was a mortgage in renewal of the mortgage obligation existing against the premises at the time Francis G. Luke and Alice G. Luke became the owners of same. Nellie Luke did not become an owner of this land. Her interest was that of a wife only. Therefore when she signed the note in 1917 she was not renewing any obligation of her own. She had no title to the land. It was her husband and Alice G. Luke who were the owners and who would naturally be interested in securing an extension within which to pay the mortgage indebtedness. Therefore this case clearly is one wherein Nellie Luke relinquished and released her inchoate dower interest for the purpose of securing the payment of an obligation which was her husband's and if she had never signed the 1917 note, but only the 1917 mortgage (which she did) still her inchoate interest would be subject to the mortgage lien until her husband's obligation was paid or barred by lapse of time.

IV.

THE MORTGAGES AND NOTES SIGNED BY FRANCIS G. LUKE AND ALICE G. LUKE IN THE YEARS 1920 AND 1923 WERE RENEWAL OR EXTENSION NOTES ONLY.

41 Corpus Juris 806
5 Thompson's Real Property, Sec. 4711.

We do not think that this proposition can be questioned. At the time that Francis G. Luke and Alice G. Luke took title to the mortgaged premises, it was already burdened with a mortgage in favor of respondent. (Findings 4, 5 and 6, Abs. pages 22 and 23). At the time of the maturity of this mortgage obligation, the mortgagee naturally required the new owners of the premises, Francis G. Luke and Alice G. Luke, to execute new mortgage papers. This was in 1917 and it was this mortgage that appellant executed, and it was at this time she relinquished her inchoate interest as wife. The mortgages and notes of 1920 and 1923 were under the authorities cited, but extension agreements. The trial court so found. (Findings 8, 9, 10, 11 and 13. Abs. pages 24, 25, 26). These Findings are conclusive upon the appellate court in the present state of the record. Therefore the original obligation assumed by Francis G. Luke and Alice G. Luke in 1917 was kept alive, not only by the execution of these new mortgage extension papers, but by the admitted payment of interest made by them. Nellie Luke had relinquished in 1917 her inchoate inter-

est to assist in securing the payment of this obligation—an obligation which admittedly was valid and enforcible against Francis G. Luke and Alice G. Luke at the time of the commencement of foreclosure proceedings. The conclusion is inescapable that the trial court was entirely correct in making and entering its Finding No. 15 and its Conclusion of Law No. 4. It is submitted that the judgment should in all respects be affirmed.

Respectfully submitted,

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