

1956

Tracy-Collins Trust Company v. Marian Story Goeltz : Brief of Respondent

Utah Supreme Court

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In the Supreme Court
of the
State of Utah

FILED

AUG 8 - 1956

TRACY-COLLINS TRUST COM-
PANY, a corporation,
Plaintiff and Respondent,

vs.

FRANCIS BOYDELL GOELTZ, a
single man,
Defendant,

and

MARIAN STORY GOELTZ, a single
woman,
Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No. 8476

RESPONDENT'S BRIEF

FRANKLIN RITER
Attorney for Respondent

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MARIAN STORY GOELTZ, a single
woman,
Defendant and Appellant.

Case No. 8476

RESPONDENT'S BRIEF

SUPPLEMENTAL STATEMENT OF FACTS

Respondent in order to amplify and make more definite certain facts of this case presents the following supplemental Statement of Facts:

1. *Status of title of mortgaged premises from the year 1936 to the year 1952.*

(a) The defendant, Francis Boydell Goeltz, and the defendant and appellant, Marian Story Goeltz, were husband and wife on July 30, 1936 (date of deed from the Bronsons to Mr. and Mrs. Goeltz), on October 27, 1936 (date of execution of the 1936 mortgage owned and held by Pacific Mutual Life Insurance Co.), and on May 10, 1948 (date of 1948 mortgage involved in this action) (Exhibit 2 P, Entries 54, 55, 65; Appellant's Answer and Counterclaim, par. 2 of Second Defense; R. 12;) Appellant's Answer to Supplemental Complaint, pars. 3 and 4, R. 50, R. 153).

(b) Francis Boydell Goeltz and Appellant were divorced by decree of Third Judicial District Court dated March 31, 1952 (Exhibit 2 P, Entries 77-80). They were thereafter remarried and were again divorced by decree of said Court dated January 15, (Ex. 2 P, Entries 82, 83).

(c) Francis Boydell Goeltz and Appellant obtained title as joint tenants to the mortgaged premises by virtue of a Warranty deed dated July 30, 1936, executed by M. J. Bronson and Alice O. Bronson, his wife, as grantors. This deed was recorded in the office of the Recorder of Salt Lake County, Utah, on July 31, 1936 (Ex. 2 P, Entry 54; Ex. 3 P).

(d) Francis Boydell Goeltz and Appellant owned the mortgaged premises as joint tenants on October 27, 1936, the date of 1936 mortgage owned and held by Pacific Mutual Life Insurance Co. (Ex. 2 P, Entry 55; Ex. 4 P).

(e) Francis Boydell Goeltz and Appellant owned the mortgaged premises as joint tenants on May 10, 1948, date of 1948 mortgage involved in this action (Ex. 2 P, Entry 65).

(f) Pursuant to said decree of the Third District Court dated March 31, 1952 (Ex. 2 P, Entries 77-80) Francis Boydell Goeltz and Appellant on April 30, 1952, quit claimed the mortgaged premises to one Elise Davis (Ex. 2 P, Entry 70, Ex. 7 P) who in turn on April 30, 1952 quit claimed the same to Appellant (Ex. 2 P, Entry 71, Ex. 87). Therefore, from date of acquisition of title from the Bronsons on July 30, 1936, to March 31, 1952 (date of court decree aforesaid) a period of 15 years and 8 months, the title to the mortgaged premises stood on the public records of Salt Lake County, Utah, in the names of Francis Boydell Goeltz and Appellant as joint tenants (Ex. 2 P, Entries 54, 55, 65, 67, 70, 71, 77-80).

2. History of Pacific Mutual Life Insurance Co. 1936 mortgage.

(a) This mortgage was dated October 27, 1936, and was executed by Francis Boydell Goeltz and Appellant, husband and wife, in favor of Respondent (Ex. 13 P and Ex. 4 P). It secured a promissory note signed by Francis Boydell Goeltz and Appellant in the principal amount of \$6,000.00 (Ex. 22 P). The Appellant admitted the execution of this note and mortgage — they were produced by her on demand of Respondent — and she admitted the genuineness of her signatures thereon (Appellant's

Answer to Respondent's Supplemental Complaint, par 4; R. 147; R. 100, 101, 102).

(b) This mortgage was assigned by Respondent to The RFC Mortgage Co. on May 5, 1937, by written assignment bearing said date (Ex. 2 P, Entry 56; Ex. 5 P).

(c) The RFC Mortgage Company assigned this mortgage to Pacific Mutual Life Insurance Co. by assignment dated June 21, 1938 (Ex. 2 P, Entry 60; Ex. 6 P).

(d) Pacific Mutual Life Insurance Co. was the owner of this mortgage on May 10, 1948. The balance due on same amounted to the sum of \$3,224.41 (Exs. 16 P, 18 P, 14 P; R. 73, 74, 75, 76, 77, 107, 108). This amount was paid by Respondent to Pacific Mutual Life Insurance Company, (Ex. 14 P, R. 76, 77, 106, 107) and the payment was part of the 1948 loan in original principal amount of \$7,100.00 (Exs. 9 P, 10 P, 26 D, 27 D; R. 76, 77, 106, 107). The balance of the amount then due on the original \$7,100.00 mortgage in the sum of \$3,851.60 was paid to Francis Boydell Goeltz (Ex. 15 P; R. 76, R. 108).

3. *Negotiation of 1948 Mortgage loan.*

With respect to the 1948 loan Francis Boydell Goeltz, talked with Henry E. Ogaard, Secretary of Respondent about May 10, 1948 (R. 79). In the conversation Mr. Goeltz stated that "he would like to borrow more money for the purpose of remodeling the home." Ogaard explained to him that the only way it could be done would be for Respondent to make a new loan and pay off the old loan — referring to the 1936 mortgage then owned

by Pacific Mutual Life Insurance Co. (R. 79, 80). Respondent could not have made a new loan without paying the Pacific Mutual Mortgage (R. 81). Francis Boydell Goeltz has admitted of record that he executed and delivered to Respondent the 1948 note and mortgage for a good and valuable consideration (Answer of Francis Boydell Goeltz, R. 19, 20).

RESPONDENT'S ARGUMENT

Respondent believes that it can more effectively submit its argument in opposition to that of Appellant by dividing its presentation into two principal parts. Part A will discuss the legal issues involved in this appeal in an affirmative manner setting forth Respondent's theories of the case and demonstrating their validity in sustaining the judgment of the trial court. Part B will analyze the legal authorities cited by Appellant and demonstrate their inapplicability and the erroneous conclusions of Appellant.

PART A RESPONDENT'S CASE AND DEMONSTRATION OF VALIDITY OF JUDGMENT

POINT I.

THE MORTGAGE DATED MAY 10, 1948 (Ex. 10P) IS EFFECTUAL TO BIND THE INTEREST OF DEFENDANT, FRANCIS BOYDELL GOELTZ, IN THE PREMISES DESCRIBED THEREIN AS IT EXISTED ON THE DATE OF EXECUTION OF SAID MORTGAGE BY SAID DEFENDANT.

1. STATEMENT OF FACTS

On the date of the execution of the mortgage dated May 10, 1948, the Appellant and Francis Boydell Goeltz were then husband and wife and owned the mortgaged premises in fee simple as joint tenants and not as tenants in common. (Ex. 3 P—Bronson deed); Ex. 2 P (Abstract of Title Ex. 2 P)). Francis Boydell Goeltz, admits that he executed said mortgage dated May 10, 1948 (Ex. 10 P) and the promissory note secured by said mortgage (Ex. 9 P) and the agreement (Ex. 11 P) (Answer of defendant, Francis Boydell Goeltz).

2. CITATION OF AUTHORITIES

- (a) *A joint tenant may sell and convey his interest in real property held in joint tenancy to a stranger and such conveyance will result in a severance or termination of the joint tenancy and the creation of a tenancy in common between the stranger and the remaining original owner of the property.*

See complete annotation in 129 A.L.R. 814.

Thompson on Real Property (Perm. Ed.)
Vol. 4, pg. 317, Sec. 1780.

Schwartzbaugh vs. Sampson, 11 Cal. App.
(2d) 451, 54 P 2d. 73;

Smith vs. Smith, 290 Mich. 143; 287 N.W.
411; 129 A.L.R. 215;

Coff vs. Youman, 237 Wis. 643; 298 N.W.
179; 134 A.L.R. 952;

Lawler vs. Byrne, 252 Ill. 194; 96 N.E. 892.

“A joint tenancy may be severed, either voluntarily, as by partition of the property, or a conveyance of the interest of any joint tenant, or involuntarily, as by an execution sale of any interest that is subject thereto. However, the mere docketing of a judgment against a joint tenant even though a lien results therefrom, does not result in a severance of a joint estate. Whenever such severance takes place the joint tenancy terminates and the right of survivorship is destroyed. A third person to whom a joint tenant conveys his interest holds it as tenant in common with the other owners, for the rule is that anything which destroys the unity of possession will turn the interest severed from the others into a tenancy in common as regards to remaining joint tenants * * *.”

(14 Am. Jur., Co-tenancy, Sec. 14, pg. 86).

- (b) *A joint tenant of real estate has a right to mortgage his interest in the property without either the knowledge or consent of the co-owner.*

“A joint owner of real estate has a right to mortgage his interest in the property without either the knowledge or consent of his co-owner. A party who holds a deed of trust or lien against the joint owners’ undivided interest in real estate has a right to foreclose his lien on the debtor’s interest in the real property. Where joint tenants have executed a deed of trust or lien to secure the individual debt of one of the joint owners, in a foreclosure proceeding, the joint owners have the right to require the interest of the party who is primarily liable for the debt to be sold before their interest in the property is offered for sale. Any interest in real estate which a person may sell and

convey he may also mortgage. The joint tenancy is severed by the mortgage, at any rate for the time being, and until it is paid or redeemed."

(Thompson on Real Property (Perm. Ed.)
Vol. 4, pg. 4, pg. 317, Sec. 1782).

"A mortgage or pledge of the joint property is not binding on the co-tenants who do not join in its execution, unless by reason of their knowledge and acquiescence they are estopped to deny its validity; and a ratification by such co-tenants will not relate back so as to give the mortgage validity to the prejudice of other creditors. *Such a mortgage will bind the share or interest of the joint tenant who has executed the mortgage. The undivided interest of a joint tenant may be made the subject of a mortgage by him without the consent or concurrence of his co-tenants and to the extent of the mortgage lien the right of the survivors will be destroyed or suspended and the equity of redemption at the death of the mortgagor tenant will be all that will fall to his surviving co-tenants.*" (Emphasis supplied.)

(48 C. J. Sec., Joint Tenancies, Sec. 16, pg. 936);

2 American Law of Property (1952), Sec. 6.10 10;

Joint Tenancies (Ogden), Proceedings of Section of Real Property, Probate and Trust Law (1952) of A B A at pages 17, 18 and 19.

- (c) *In states where a mortgage creates a lien, the execution and delivery of a mortgage by a joint tenant covering his interest in real property effects a severance and a tenancy in common is created*

to the extent of the mortgage lien, and to this extent the right of the survivor is destroyed or suspended and the right of redemption at the death of the mortgaging tenant before issuance of the Sheriff's deed on foreclosure will be all that falls to the surviving tenant.

“Tenants of this kind are said to hold individually and jointly, having one and the same interest, accruing through one and the same conveyance, commencing at the same time, and held by one and the same possession. Upon the death of one joint tenant, there being no severance of the estate, his entire interest is cast upon the survivor or survivors, to the exclusion of the inheritance of the same by his heirs. The interest of the survivor in the realty is consequently increased by the extinguishment of the tenant deceased. It is settled in law that a joint tenant may alienate or convey to a stranger his part or interest in the realty, and thereby defeat the right of the survivor. * * * In the ancient language of the law, joint tenants were said to hold *per my et per tout*, or in plain words “by the moiety or half or by all,” the true interpretation of this phrase being that these tenants were seized of the entire realty for the purpose of tenure and survivorship, *while for the purpose of immediate alienation each had only a particular part or interest.* * * * The interest of each tenant is subject to sale upon execution. Having these rights and powers at least over his interest in the land so held there can be no sufficient reason urged why the power of a joint tenant to mortgage same should be denied. Any interest in real estate which a person may sell and convey he may also mortgage. (Jones, Mortg. Sec. 136). We are therefore of

the opinion that a joint tenant may mortgage his interest in the joint estate in like manner as though he were a tenant in common and to the extent of the *mortgage lien the right of the survivor will be destroyed* or suspended, and the equity of redemption, at the death of the tenant, will be all that will fall to the surviving companion. The right of the tenant to mortgage is supported by the following authorities: *York vs. Stone*, 1 Salk. 158; *Simpson's Lessee vs. Ammons*, 1 Bin. 175. (Emphasis supplied.)

(*Wilkins vs. Young*, 144 Indiana 1; 41 N.E. 68.)

A mortgage was executed by two of three joint tenants. The court held that the mortgage, although only for security, effected a severance of the joint tenancy.

(*Simpson's Lessee vs. Ammons*, 1 Binney (Perm.) 175, 2 American Dec. 425).

3. ARGUMENT

It is manifest that the mortgage dated May 10, 1948 (Ex. 10 P), constitutes a valid and enforceable obligation against Francis Boydell Goeltz, and the lien thereof attached to and bound his undivided one-half interest in the mortgaged premises. The lien of this mortgage continued as against the undivided interest of Francis Boydell Goeltz in the mortgaged premises after he and Mrs. Goeltz subsequently quit claimed the mortgaged premises to Elise Davis (Ex. 2 P Abstract of title; Ex. 7 P Deed from Goeltz to Davis) and after Elise Davis conveyed the mortgaged premises to Mrs. Goeltz. (Ex.

2 P Abstract of title; Ex. 8 P, Deed from Davis to Marian Story Goeltz.)

The promissory note dated May 10, 1948 (Ex. 9 P) is a joint and several obligation. Defendant, Francis Boydell Goeltz, admits his own execution of this note and the mortgage (Ex. 10 P) securing payment of same. Therefore, Francis Boydell Goeltz is liable on this note for the amount which is in excess of the then principal amount of the Pacific Mutual mortgage hereinafter described, which excess amount on date of this mortgage amounted to the sum of \$3,579.44 (testimony of Henry E. Ogaard R. 76), together with interest thereon and reasonable attorney's fees, cost of suit and incurring costs. His undivided one-half interest in the mortgaged premises as it existed on date of execution and delivery of said note and mortgage became and is now subject to a lien for this total judgment obligation.

POINT II.

RESPONDENT IS SUBROGATED TO RIGHTS OF THE PACIFIC MUTUAL LIFE INSURANCE COMPANY AGAINST THE ENTIRE OWNERSHIP AND INTEREST OF THE DEFENDANTS IN THE MORTGAGED PREMISES UNDER THE MORTGAGE DATED OCTOBER 27, 1936. (Ex. 23 P, Ex. 4 P) EXECUTED BY THE DEFENDANTS, WHICH MORTGAGE WAS OWNED BY SAID INSURANCE COMPANY ON DATE OF EXECUTION OF MORTGAGE IN RESPONDENT'S FAVOR (Ex. 10 P) DATED MAY 10, 1948.

1. STATEMENT OF FACTS

On October 27, 1936, the Appellant and Defendant Francis Boydell Goeltz then husband and wife, were the

owners of the mortgaged premises in fee simple as joint tenants and not as tenants in common, (Ex. 2 P. Abstract of Title; Ex. 3 P, Bronson deed; Admission of Francis Boydell Goeltz, Answer of Francis Boydell Goeltz; Testimony of Marian Story Goeltz R. 153.) On that date they borrowed the sum of \$6,000.00 from Respondent and to evidence their indebtedness executed and delivered their joint and several promissory notes in favor of Respondent (Ex. 22 P) and their mortgage securing payment of said note covering the mortgaged premises (Ex. 23 P). This note and mortgage were produced in open court from the possession of Appellant, Marian Story Goeltz. She in her testimony admitted the genuineness of her signature on both of said documents (R. 147), and the witness H. D. Henager testified positively that Mr. and Mrs. Goeltz signed both the note and mortgage in his presence (R. 101, 102). This note (Ex. 22 P) and this mortgage (Ex. 23 P) dated October 27, 1936, for \$6,000.00 were thereafter sold and assigned by the Respondent to The R.F.C. Mortgage Company (Ex. 5 P) which subsequently sold and assigned them to The Pacific Mutual Life Insurance Company (Ex. 6 P). On May 10, 1948 (date of execution and delivery of Exs. 9 P and 10 P) the Respondent did not own or hold any interest either directly or indirectly in said note (Ex. 22 P) and mortgage (Ex. 23 P). It was acting as collection agent only for The Pacific Mutual Life Insurance Company. (Testimony of Henry E. Ogaard (R. 73, 76, 88) and H. D. Henager). There was due and payable to The Pacific Mutual Life Insurance Company on May 10, 1948, on

said note and mortgage dated October 27, 1936 (Exs. 22 P and 23 P) the total sum of \$3,224.41. (Ex. 14 P, check in favor of The Pacific Mutual Life Insurance Company; testimony of Henry E. Ogaard; testimony of H. D. Henager (R. 106). At the time (a few days prior to May 10, 1948), the defendant Francis Boydell Goeltz applied to the Respondent for a new mortgage loan on the security of the mortgaged premises, he talked with witness Henry E. Ogaard. (Testimony of Henry E. Ogaard R. 72). Ogaard informed Goeltz that the only way the then existing mortgage (then owned by The Pacific Mutual Life Insurance Company) indebtedness could be increased was by way of a new loan evidenced by a new note and mortgage in favor of Respondent, the proceeds of which would be used in part to pay the balance then due on the mortgage of October 27, 1936, then owned by The Pacific Mutual Life Insurance Company. Goeltz agreed to this requirement (R. 72, 79, 80). Goeltz at that time stated he wanted funds with which to pay the cost of remodeling the house situated on the mortgaged premises (R. 79), but Ogaard declared to him that the old loan (Ex. 22 P and 23 P) must be paid (testimony of Henry E. Ogaard R. 79). When the note and mortgage evidencing the new loan (Exs. 9 P, 10 P, 11 P) had been drafted, Goeltz first informed Henager that Mrs. Goeltz was unable to appear at the office of Respondent to execute these documents (R. 104). Henager refused to allow Goeltz to take the note, mortgage and agreement from the office to secure Mrs. Goeltz' signature (R. 104). Goeltz then conferred with Jos. E. Benedict, one of

Respondent's officers, and thereupon Benedict directed Henager to allow Goeltz to take the documents out of the office for execution by Mrs. Goeltz. (Testimony of H. D. Henager R. 104, 195); testimony of Jos. E. Benedict R. 165, 169). Goeltz thereupon took the documents from the office and a few days later returned them to Henager (R. 107). On their face they appeared to be properly executed and the mortgage duly acknowledged by both mortgagors R. 105, 116, 117). Thereupon Henager caused two checks to be drawn (R. 107, 108), one in favor of The Pacific Mutual Life Insurance Company for the sum of \$3,224.41 (Ex. 14 P, R. 106) which Henager delivered to Ogaard (R. 107). A second draft for \$3,851.68 was drawn in Goeltz' favor and delivered to him. (Testimony of H. D. Henager R. 107). Ogaard transmitted the check for \$3,224.41 to the payee insurance company. (Testimony of Henry E. Ogaard, R. 75). The evidence clearly proves that the proceeds of the mortgage loan of May 10, 1948, were disbursed in regular and proper manner (Exs. 9 P, 10 P, 11 P, 16 P, 17 P, 18 P) and that Pacific Mutual Life Insurance Company was paid and it received from the proceeds of the May 10, 1948 loan the sum of \$3,224.41 in full satisfaction of the indebtedness due under the mortgage of October 27, 1936 (Exs. 4 P, 22 P, 23 P, R. 75, 76). It was not until June 12, 1951 that Marian Story Goeltz informed Benedict, as an officer of Respondent, that she had not written her purported signatures on the note, mortgage and agreement of May 10, 1948, nor had she authorized any one to sign her name thereto. (Exs. 9 P, 10 P, 11 P; testimony of

Marian Story Goeltz R. 151); testimony of Jos. E. Benedict R. 169, 170)).

2. CITATION OF AUTHORITIES

(a) *Where a loan has been obtained by means of a forged mortgage and the proceeds used to pay off existing encumbrances against the property, the courts, without exception, have held that the mortgagee under the void mortgage is entitled to be subrogated to the rights of the prior mortgagee.*

See Annotation in 43 A.L.R. at pages 1404, 1405;

See Annotation in 151 A.L.R. at page 414;

See Annotation in 70 A.L.R. at pages 1398-1404.

“It is well settled that where the security given for the loan which is used to pay off an incumbrance turns out to be void, although the person taking it expected to get good security, he will be subrogated to the rights of the holder of the lien which the money advanced is used to pay; and that in such case the person advancing the money cannot be regarded as a stranger or volunteer, there being no intervening equity to prevent” (25 Ruling Case Law, 1343).

Newcomber, et al vs. Sibon, 119 Kan. 358; 239 P. 1110; 43 A.L.R. 1387. (Husband forged wife's signature to mortgage.)

Serial Building Loan and Savings Inst. vs. Eberhardt, 95 N.J. Eq. 607, 124 Atl. 56. (Husband forged wife's signature to mortgage.)

Davis vs. Pugh, 81 Ark. 253; 99 S.W. 78. (Husband forged wife's signature to mortgage.)

Zinkeisen vs. Lewis, 63 Kan. 590; 66 P. 644. (Husband forged wife's signature to mortgage.)

"The authorities are in conflict upon the right of one lending money upon the security of a forged or unauthorized mortgage to be subrogated to the lien of the prior mortgage which has been discharged by the money advanced on the void mortgage. However, a majority in number, and in our opinion the better reasoned cases, hold that one lending money upon the security of a void mortgage is entitled to be subrogated to the rights of the mortgagee under the prior valid mortgage which has been discharged with proceeds of the void one." (Landis vs. State, 179 Okla. 547; 66 P. 2d 519; 151 A.L.R. 403.) Home Owners' Loan Corp. vs. Papara, 241 Wis. 112; 3 N.W. (2nd) 730, 140 A.L.R. 1289.

"Subrogation will be allowed to the lender of money on the security of a forged deed of trust or mortgage, or one which is invalid because of the failure of the wife to join. *Mere negligence of the one seeking subrogation in failing to procure a properly executed mortgage will not, at least in the absence of intervening equities, defeat his right of subrogation.*" (Emphasis supplied.)

(50 Am. Jur., Subrogation, Sec. 99, pg. 744). Katschor vs. Ley, 153 Kan. 569; 113 P. 2d 128.

- (b) *"The generally accepted view at the present time, however, is that it is not necessary that there should be an express agreement that the prior lien shall be kept alive for the benefit of one advancing money to pay it, or that it be as-*

signed, but if from all the facts and circumstances surrounding the transaction it is clearly to be implied that it was the intention of the parties that the person making the advance was to have security of equal dignity and position with that discharged, then equity will so decree. In such cases, equity speaking from the standpoint of good conscience, substitutes the person so paying the debt to the place of the original creditor, so far as to enable him to enforce the security for the purpose of reimbursement.” (25 Ruling Case Law, Sec. 24, cited with approval in Martin vs. Hickenlooper, infra.)

“Therefore, whatever may have been the old test of what constituted a volunteer, stranger and intermeddler, we believe that the decided trend of modern authorities is to take a liberal view of the question; and being guided by this modern view we are of the opinion that a volunteer, a stranger, and intermeddler, is one who thrusts himself into a situation of his own initiative, and not one who becomes a party to a transaction upon the urgent petition of a person who is vitally interested, and whose rights would be sacrificed did he not respond to the importunate appeal. If this conception is in keeping with what we believe to be the modern and better view, it is clear that appellant was no stranger, volunteer or intermeddler. If he was not, why should he suffer?”

In this case James executed a mortgage to Schmitt, and then conveyed the mortgaged premises to his daughters subject to the mortgage. James died. One of the daughters was a minor.

Her guardian joined in a mortgage to plaintiff to obtain funds with which to pay the Schmitt mortgage. The guardian's mortgage was void because of lack of statutory authority in the court which authorized the mortgage in the guardianship proceeding. The plaintiff was by this decision subrogated to the rights of Schmitt. (*Laf-franchini vs. Clark*, 39 Nev. 48; 153 P. 250.)

An owner of mortgaged real property died intestate leaving a widow and adult children. The children conveyed their interest in the real estate to their mother. A mortgage on the real property was past due. It was necessary to renew it or secure a new loan to prevent foreclosure. The widow mortgaged the real estate to plaintiff for funds used to pay the mortgage against land at time of her husband's death. Held, as against administrator and general creditors of deceased, plaintiff was entitled to be subrogated to the rights of the holder of original mortgage. (*Federal Land Bank of Wichita vs. Hanks*, 123 Kan. 329, 254 P. 1040.)

"In this case Sutherland loaned his money to the owner of the leasehold estate for the purpose of paying off the lien held by the investment company, believing and expecting that he would get the same security that the company had whose liens he paid, but afterwards learned of the \$1,000.00 mortgage held by the plaintiff. An application of the equitable doctrine of subrogation to the transaction gives to the cross-complainant (Sutherland) the security he was led to believe he was getting, and the same that was held by the creditor whose debt he paid, and the plaintiff is left the same security he had before. Sutherland is substituted for the investment company as creditor and lien holder. * * * Tested alone by

the earlier cases, Sutherland might be regarded as a volunteer, but latterly the doctrine of subrogation has been developed and expanded and given a wider application to business matters. By analogy it has been applied to transactions similar to the one under consideration — to one having no previous interest to protect, who pays off a mortgage, or advances money for its payment, at the instance of the mortgagor and for his benefit, when no innocent party can be injured, believing he is getting security equal to that of the person whose debt he pays. We cannot hold Sutherland a mere volunteer and stranger, officiously intermeddling by paying debts due the Pacific Investment Company.” (George vs. Butler, 16 Utah 111, 50 P. 1032.)

Walker Bros. Bankers was administrator of the estate of one Merriam. Bingham was administrator of the estate of one Crane. Crane in his lifetime became indebted to one McMillan. After McMillan died his heirs pressed the heirs of Crane and Crane’s widow for payment. Crane had borrowed funds from one Norman and deposited shares of mining stock as security for payment. Merriam had signed the note in favor of Norman (along with Crane) as an accomodation maker. Norman did not demand payment of his note at that time. Before Merriam’s death he attempted to negotiate on behalf of Mrs. Crane a settlement of the McMillan debt. Merriam died before completion of negotiations. The bank, after its appointment as Merriam’s administrator and before the appointment of an administrator for Crane’s estate, renewed these negotiations. It finally secured an agreement from Mrs. Crane alone (no administrator having been appointed on her husband’s estate) whereby the shares of mining stock

held by Norman should be sold and from the proceeds the Norman note was to be paid and *also the indebtedness due the McMillan heirs*. This agreement was carried out. The action was brought by the administrator of Crane's estate, when he was appointed, against the bank as Merriam's administrator, to recover certain shares of mining stock held by Merriam at the time of death and the dividends therefrom (and which were held by the bank as Merriam's administrator) to be declared the property of the Crane estate. The evidence showed that these shares of stock belonged to Crane free from claim of Merriam or his administrator, and part of them, at least, had been transferred to Merriam by Crane in fraud of Crane's creditors. The Bank, as Merriam's administrator, having paid the debt owing from Crane to the McMillan heirs asserted the right to be subrogated to the rights of the McMillan heirs against the Crane estate. In denying the right of subrogation the court held that

(1) There was no legal subrogation because neither Merriam nor the bank as his administrator were under compulsion to pay the indebtedness due the McMillan heirs. Merriam's obligation on the joint note of himself and Crane to Norman did not furnish this compulsion.

"Where the person who pays the debt of another stands in the situation of surety or is compelled to pay to protect his own right or property, the right of subrogation is a consequence which equity attaches to such a condition, and the right of subrogation under such circumstances is not a direct result of an agreement. This, in law, is termed 'legal subrogation.' "

(2) There was no *conventional* subrogation because the agreement with the widow of Crane

did not bind the estate, and as a consequence the bank, as administrator, in making payment to the McMillan heirs, did not do so under a valid binding contract.

“Conventional subrogation depends upon a lawful contract * * *. It requires no argument to show that Mrs. Crane’s approval and acceptance of the defendant’s proposal, in so far as it attempted to bind the estate of Elias W. Crane, deceased, is void. (Dunn vs. Wallingford, 47 Utah 491, 155 P. 347.) The agreement does not purport to assign or in any way bind Mrs. Crane’s distributive share of the estate. Whatever may be its affect in that connection is not before us, and we do not attempt to say.” (Bingham vs. Walker Bros. Bankers, Administrator, 75 Utah 149, 283 P. 1055.)

Stoven and wife executed a mortgage in favor of Utah State Land Board, and then conveyed the mortgaged premises to Hickenlooper. Hickenlooper executed a *second* mortgage to Martin. Thereafter Hickenlooper conveyed the premises, subject to the two mortgages, to Fritsch Loan and Trust Co. Some time later Fritsch Loan and Trust Co. executed a mortgage to Zorn and the proceeds were used to pay the mortgage to the State. Martin’s mortgage was of record and unreleased. Martin thereafter foreclosed his mortgage against Hickenlooper, making Zorn a party. Zorn contended that she was subrogated to the rights of the State under its mortgage from Stoven. The trial court found that Fritsch (through its mortgages) agreed that the Zorn mortgage should be a first lien and represented it was such. The Supreme Court (Wolfe, J.) held:

- (1) That there was no *legal* subrogation;

(2) That there was a "conventional" subrogation, writing as follows:

"Without determining that a 'conventional' subrogation will be found in case it appears that the lender 'intended' or 'supposed' he was to be equally well secured, as he would have been had he taken an assignment of the lien his advancements paid off and released (which, if so decided might work a situation where one would be better off by failing to examine a record than had he taken that precaution) suffice it to say that where there is a promise on the part of the mortgagor or his transferee, given to one who pays off a lien, that such lender would be equally in as good position as regards security as the lienholder whose lien his money was intended to discharge and did discharge, he will be considered in equity as an assignee of the lien and especially where assurances are given him that his lien will be and is a first lien. The evidence in this case, we think is amply sufficient to establish such a promise." (Martin vs. Hickenlooper, 90 Utah 185, 59 P. 2d 1139, 61 P. 2d 307; 107 A.L.R. 762.)

3. ARGUMENT

There can be no doubt as to the right of the Respondent to be subrogated to the rights of The Pacific Mutual Life Insurance Company as against the entire interest of the Appellant and Francis Boydeell Goeltz and each of them in and to the mortgaged premises to the extent that the proceeds of the May 10, 1948 loan were used to pay the mortgage indebtedness due on that date from the defendants to The Pacific Mutual Life Insurance Company. This amounted to the sum of \$3,224.41

with interest for May 10, 1948 at 4½% per annum. The obligation owing from Appellant and Francis Boydell Goeltz to the Insurance Company was a joint and several obligation (Ex. 22 P, Ex. 23 P) and admitted by both of them to be a valid claim. Therefore, each of them was liable for the whole amount of the indebtedness. This indebtedness was secured by a mortgage lien (Ex. 23 P) upon the entire premises and the total interests of the Appellant and Francis Boydell Goeltz in the premises were subject to said security lien, the validity of which Mrs. Goeltz frankly admits.

The authorities cited above clearly demonstrate the increasing favor of the modern rule that it is not necessary that there should be an express agreement that the prior mortgage lien should be kept alive for the benefit of one advancing money to pay it or that it should be assigned. The court will consider all of the facts and circumstances of the transaction, and, if from same it is to be implied that it was the intention of the parties that the person making the advance was to have security of equal dignity and position with that discharged, then the person making the advance is subrogated to all of the rights and benefits of the prior mortgage. In this case Ogaard informed Goeltz that the only way in which a new loan could be negotiated would be by way of using part of the proceeds of the new loan to pay the Pacific Mutual mortgage. Goeltz agreed thereto. Here is a situation that even brings the case squarely within the old rule, because this part of the transaction clearly shows that the Respondent not only expected, but de-

manded, a first mortgage lien. The Respondent did not merely "suppose" or "intend" that it secure a first lien mortgage; it actually required such first mortgage lien as security for making a new loan and Goeltz agreed thereto. The facts are stronger for subrogation than those in *Martin vs. Hickenlooper*, supra: (a) in this case no rights of a third party are involved, e.g. Martin, the second mortgagee in the Hickenlooper case (the Respondent is asserting the right of subrogation as to an acknowledged debt under Pacific Mutual's mortgage) and (b) Respondent knew of the existence of the Pacific Mutual mortgage and demanded that it be paid from the proceeds of the new loan as a condition precedent to making the new loan, "the old loan would have to be paid off" (Ogaard's testimony). Whether there is applied to these facts the so-called "old" or conservative rule or the "modern" more equitable rule, the results are the same. Respondent definitely is subrogated to the rights of Pacific Mutual against the two Goeltzes personally and also against the mortgaged premises as an entirety to the extent of \$3,224.41, plus interest at 4½% per annum from May 10, 1948.

POINT III.

A SIGNATURE TO AN INSTRUMENT MADE WITHOUT AUTHORITY OF THE PERSON WHOSE SIGNATURE IT PURPORTS TO BE IS A DEFENSE AVAILABLE TO HIM UNDER SEC. 44-12-4, UTAH CODE ANNOTATED 1953, UNLESS HE IS ESTOPPED, BUT THE UNAUTHORIZED SIGNATURE IS NO DEFENSE TO HIS CO-MAKER WHOSE SIGNATURE IS GENUINE AND VALID.

1. STATEMENT OF FACTS

The signatures of defendant, Marian Story Goeltz, on the promissory note, mortgage and agreement dated May 10, 1948 (Exs. 9 P, 10 P, 11 P) were made without her authority. (Testimony of Marian Story Goeltz (R. 147, 145; testimony of J. Percy Goddard R. 129). The Respondent at time of delivery of said instruments to it had no knowledge that the defendant, Marian Story Goeltz, did not in fact sign these instruments, but was the honest belief that they were her genuine signatures. (Testimony of Henry E. Ogaard R. 63; testimony of H. D. Henager R. 105; testimony of Jos. E. Benedict R. 171, 172, 173.) The defendant, Francis Boydell Goeltz, admits the genuineness of his signatures on these instruments which purport to be his signatures, and that the instruments as to himself are genuine. (Answer of defendant, Francis Boydell Goeltz.)

2. CITATION OF AUTHORITIES

“Where a signature is forged, or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument *or give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.*”

(Sec. 44-1-24, Utah Code Ann. 1953; Uniform Act, Sec. 23.)

“Forgery defined: Every person who, with intent to defraud another, falsely makes, alters, forges or counterfeits any * * * indenture, * * * promissory note * * * or utters, publishes or passes, or attempts to pass, as true and genuine any of the above named false, altered, forged or counterfeited matters * * * knowing the same to be false, altered, forged or counterfeited * * * with intent to prejudice, damage or defraud any person * * * is guilty of forgery.”

(Sec. 76-26-1, Utah Code Ann. 1953.)

- (a) *It is not forgery to write another's name with authority. To establish forgery the proof must show not only the person whose name is signed to the instrument did not sign it, but also that his name was signed without authority. (State of Utah vs. Jones, 81 Utah 503; 20 P. 2d 615.)*
- (b) *An unauthorized signature to a bill or note is a defense available to the party whose name has been written without his authority, but is no defense to a co-maker whose signature is genuine. (10 Corpus Juris Sec., Sec. 493, pg. 1086.)*

“The fact that some of the signatures to a note are forged does not necessarily render the note void against those whose signatures are genuine.” (Joyce Defenses to Commercial Paper (2nd Ed.) Vol. 1, Sec. 192, pg. 192.)

“In an action by a payee against one who has signed a note as surety, it is no defense thereto that the name of one or more of the obligors on such instrument has been forged, though the surety signed the same in the belief

that the signatures were genuine, where it appears that the instrument was accepted by the payee without notice of the forgery.” (Morris Plan Co. vs. Alder, et al., 126 Misc. (NY) 237, 213 N.Y. Supp. 227.)

Plaintiff sued on notes signed by Davis and also purportedly signed by his wife. Davis admitted he signed his wife’s name to the note without authority. He defended the action on the basis of an Oklahoma statute identical with Sec. 23 of the Uniform Negotiable Instrument Act. Held: “Said statute is not applicable in behalf of Davis who did sign the notes.” (Davis vs. Rotenberg, 124 Okla. 74; 254 P. 37.)

Defendant was sued on a note which had been altered and as a defense relied on a statute equivalent to Sec. 23 of the Uniform Negotiable Instrument Act, claiming it released him from liability. The Court said: “* * * the section provides that no rights can be predicated upon such forged or unauthorized signatures, except against a party “who has been precluded from asserting the forgery or want of authority, but goes no further than to make said signature inoperative and to bar enforcement of rights founded thereon. The language is carefully chosen to confine the effect of the section to the specific points covered thereby. It does not purport to declare the instrument void nor the genuine signatures thereon inoperative. It protects the party whose signature has been forged or affixed without his authority, but contains no provisions releasing other parties from whatever liability they have assumed.” (Public Bank of New York vs. Knox-Burchard Mer. Co., 135 Minn. 171, 160 N.W. 667, 668.)

“But it does not follow that proof of one

forged signature on a note must of necessity and in all cases be given affect to avoid the note in favor of those whose signatures thereto are found to be genuine. Such result is not dictated by Code Supp. 1902, Sec. 3060.3 (Sec. 23 N.I. Act). * * * It is the forged and unauthorized signature that is declared to be inoperative." (Beem vs. Farrell, 135 Iowa 670; 113 N.W. 509.)

See also to the same effect as above:

Bentel's Brannon Negotiable Instrument Law
(7th Ed.), Sec. 23, pg. 437;

First National Bank of Durant vs. Shaw, 157
Mich. 192, 121 N.W. 809;

Van Slyke vs. Rooks, 181 Mich. 88; 147 N.W.
579;

Fretwell vs. Carter, 78 S.C. 531; 59 S.E. 639;

Newark Finance Co. vs. Aocella, 115 N.J. L.
449, 180 Atl. 863.

In connection with the application of Sec. 44-1-24, Utah Code Ann. 1953 (Sec. 23 of Uniform Act) above quoted to the 1948 note and mortgage (Ex. 9 P and 10 P) it must never be forgotten that in Utah

"the mortgage follows the debt as a mere incident and shares the immunity of the note from defenses and equities, so that in proceedings to enforce the mortgage nothing can be alleged against it which could not have been set up as a defense to an action at law upon the note." (27 Cyc. 1324.)

The above rule was quoted with approval in *Smith vs. Jarman*, 61 Utah 125, 211 Pac. 962, where the Court

made the classic statement: "the debt is the principal thing." The Court in *First National Bank of Salt Lake vs. Haymond*, 89 Utah 151, 57 Pac. (2nd) 1401, approved *Smith vs. Jarman* stating:

"A mortgage is an incident to the obligation which it is given to secure. Even though the mortgaged property be destroyed the mortgagors and other obligors remain liable for the payment of the debt."

3. ARGUMENT

Francis Boydell Goeltz admitted in his answer that the signatures on the note, mortgage and agreement dated May 10, 1948 (Exs. 9 P, 10 P, 11 P), which purport to be his signatures are in fact his signatures, and that as to himself he executed and delivered these instruments to Respondent.

A casual inspection of the 1948 note (Ex. 9 P) shows that it is a negotiable promissory note (Sec. 44-1-1 to and including Sec. 44-1-6, Utah Code Ann. 1953 (Negotiable Instruments Act)). Therefore, the provisions of Sec. 44-1-1, Utah Code Ann. 1953, as construed by the Courts, sustains the validity of the 1948 note and mortgage against Francis Boydell Goeltz.

POINT IV.

APPELLANT, MARIAN STORY GOELTZ, AS TO RESPONDENT IS ESTOPPED TO DENY THAT THE TITLE TO THE MORTGAGED PREMISES WAS OTHER THAN SHOWN ON THE PUBLIC DEED RECORDS, TO-WIT THAT THE PREMISES WERE HELD IN JOINT TENANCY BY HER-

SELF AND HER THEN HUSBAND, FRANCIS BOYDELL GOELTZ, DURING THE ENTIRE PERIOD RESPONDENT DEALT WITH THEM.

1. STATEMENT OF FACTS

The mortgaged premises were acquired on July 30, 1936, by the Appellant and her then husband, Francis Boydell Goeltz, by warranty deed executed by the Bronsons, which conveyed the same to Appellant and Francis Boydell Goeltz as joint tenants. The title thus acquired stood on the public deed records unchanged from date of acquisition to March 31, 1952, when the premises were awarded Respondent by decree of the Third District Court entered in the first divorce action — a period of fifteen years and eight months. When both the 1936 and 1948 mortgages were negotiated, the public deed records showed that Respondent and her then husband, Francis Boydell Goeltz, owned the premises in joint tenancy.

2. CITATION OF AUTHORITIES

“A mortgagor is estopped, as against the mortgagee from denying that he had at the time of the execution of the mortgage, seisin or such title as the mortgage purports to convey.” (36 Am. Jur. Mortgages, Sec. 240, pg. 811.)

“An estoppel will arise against an owner of real property, where he clothes the person assuming to dispose of the property with apparent title to it or with apparent authority to dispose of it and when the person setting up the estoppel acts and parts with value or extends credit on the

faith of such apparent ownership and authority.”
(19 Am. Jur. — Estoppel — Secs. 67 and 68, pg. 687; Annotation L.R.A. 1918 B, pg. 735.)

- (a) *Where one of two innocent parties must suffer by fraud perpetrated by another, the law imposes the loss upon the party who by his misplaced confidence has enabled the fraud to be committed.*

(19 Am. Jur. — Estoppel — Sec. 67, pg. 695; *Seeger vs. W. T. Rawleigh Co.*, 153 Va. 514; 50 SE 244; 66 ALR 305.)

- (b) *For a wife to permit the record title of her real property to remain in her husband is in itself a representation that he is the owner thereof, and if she acquiesces in his holding of the title for a considerable period of time, she is without further act on her part, estopped to deny his title as against persons who have relied on the appearance which she thus allowed to be created.*

Kinsley vs. Bank, 131 Kansas 448, 292 Pac. 798;

Annotation 76 ALR at pg. 1507;

Duckwell vs. Kisner, 136 Ind. 99; 35 NE 697;

McCormick Harvester, etc. Co. vs. Perkins, 135 Iowa 64, 110 NW 15;

Pierce vs. Hower, 142 Ind. 642; 42 NE 223.

- (c) *The existence of the joint tenancy on the face of the public record between the*

Goeltz prohibited Appellant from introducing evidence to show either her (a) entire ownership of the property or (b) that her interest therein was greater than the title deed from the Bronsons showed on its face because

- (1) Joint tenants hold their property by one title and one right, which consists of four unities: (1) interest (2) title (3) time (4) possession. (14 Am. Jur.—cotenancy, Sec. 7 and 8, pg. 81; Wilkins vs. Young, 144 Ind. 1; 41 NE 68; Swartzbaugh vs. Sampson, 11 Cal. App. (2d) 451, 54 Pac. (2d) 73.)
- (2) Even where one contributes the entire purchase price for land but places it in joint tenancy with another, the rights of each in and to the land are the same and the one who makes the contribution has by that act made an immediate gift to the other. (Mader vs. Stemler, 319 Pa. 374; 179 Atl. 719; Re Cochran 342 Pa. 108; 20 Atl. (2d) 305; 135 ALR 1058.)
- (2) As to one another and *as to third parties*, joint tenants are seized of equal undivided interests in the property. (2 American Law of Property (1952), Sec. 6.10.)

SPECIAL NOTE:

The case of *Garrett* vs.

Ellison, 93 Utah 184, 72 Pac. (2nd) 449, is clearly distinguishable because (a) a tenancy in common was involved; and (b) it was litigation between two tenants in common and did not involve third persons. Hence, the rule that the parol evidence rule does not prevent parties on *one* side of a written contract from showing by parol evidence what the agreement is *between themselves*. (For an annotation on the admissibility of parol evidence to overcome the presumption that tenants in common have equal interests where the title instrument does not disclose the proportionate interests in actions between the tenants or their privies, see. 156 ALR 515.

3. ARGUMENT

The appellant for fifteen years and eight months permitted the title to the mortgaged premises to stand on the public deed records of Salt Lake County in the names of herself and Francis Boydell Goeltz in joint tenancy and thereby she held out to the world and to the Respondent in particular that Mr. Goeltz owned an undivided one-half interest in the same. In the year 1936 she and Mr. Goeltz, her then husband, borrowed from Respondent the sum of \$6,000.00 upon the security of a mortgage on the premises, which mortgage she admits

she executed and which she admits was valid. The status of the title on May 10, 1948 (the date of the mortgage, Ex. 10 P) was exactly the same as it was on October 27, 1936 (the date of the mortgage owned by Pacific Mutual Life Insurance Co., Ex. 4 P). Respondent relied upon this public record as to the status of the title to the property when it made the 1948 loan. It was clearly entitled to do so because of Appellant's acts in regard to the same. Not only did she join her then husband in executing the 1936 mortgage when the title stood in their names as joint tenants, but for a decade and a half thereafter she permitted the public record title to remain in the same status. No clearer case of estoppel *in pais* can be established — an estoppel which denies Appellant's right to prove by extraneous evidence that the ownership of the premises was other than it was on the public records and upon which Respondent manifestly relied in making the 1948 loan. This estoppel operates against Appellant's adverse claim — not at any time asserted by her prior to this law suit — that Francis Boydell Goeltz did not own an undivided one-half interest in the mortgaged premises. The trial court properly excluded evidence in support of such claim as the Respondent was entitled to rely upon the representations made by Appellant through the operation of the public deed records. The authorities cited above support Respondent's position beyond per-adventure.

It is clear beyond argument that as to defendant, Francis Boydell Goeltz, the note, mortgage and agreement of May 10, 1948, (Exs. 9 P, 10 P, 11 P) are binding

upon him and enforceable against him personally and also that the lien of the mortgage (Ex. 10 P) attached to and became an encumbrance upon his undivided one-half interest in the mortgaged premises held and owned by him at the time he executed and delivered these instruments to the plaintiff.

POINT V.

FORM AND REQUIREMENTS OF JUDGMENT.

1. STATEMENT AS TO FORM OF JUDGMENT

Respondent submits that the rules of law above set forth as applied to the ultimate facts which are established by the evidence in this case entitle it to the judgment entered by the trial court awarding it relief as follows:

1. There should be a joint and several judgment against the defendant, Francis Boydell Goeltz, and Appellant, Marian Story Goeltz, for the sum of \$3,224.41, plus interest at $4\frac{1}{2}\%$ per annum from February 1, 1953, both before and after judgment.

Comment: The note and mortgage dated October 27, 1936 (Exs. 22 P and 23 P) were joint and several obligations; hence a joint and several judgments against defendants is proper. Interest on the total principal mortgage obligation (\$6,803.05) was paid to February 1, 1953. (Testimony of Henry E. Ogaard, R. 64, Ex. 12 P, Ex. 13 P). The principal amount of \$3,224.41 is the exact amount paid The Pacific Mutual Life Insurance Com-

pany in satisfaction of its obligation and Respondent is subrogated to the rights of the insurance company under its mortgage for this amount plus interest at the rate of $4\frac{1}{2}\%$ per annum from February 1, 1953, both before and after judgment. A personal joint and several judgment against the defendant mortgagors was proper and is legally sustained.

2. There should be a separate judgment against defendant, Francis Boydell Goeltz, alone for the sum of \$3,579.44, plus interest at $4\frac{1}{2}\%$ per annum from February 1, 1953, both before and after judgment, plus interest at $\frac{3}{4}\%$ per month on delinquent installment of interest, together with attorney's fees in the sum of \$750.00 and Respondent's costs and disbursements, including cost of abstract of title extension and costs on sheriff's sale.

Comment: The defendant, Francis Boydell Goeltz, is alone liable on the note, mortgage and agreement of May 10, 1948 (Ex. 9 P, 10 P, 11 P). The principal amount of judgment against him represents the difference between the total principal amount due plaintiff, viz. \$6,803.85 (testimony of Henry E. Ogaard, R. 64) and the amount of \$3,224.41 paid The Pacific Mutual Life Insurance Company and for which the defendants are jointly and severally liable as above set forth in 1 supra (\$6,803.85 minus \$3,224.41, equals \$3,579.44). Interest on this amount of \$3,579.44 also commences on February 1, 1953, the date to which interest was paid to Respondent. The judgment against Francis Boydell Goeltz will also include costs of abstract of title extension, \$750.00 attorney's fees and costs incurred and to be incurred by Respondent.

These items are authorized by the note and mortgage dated May 10, 1948, *supra*.

3. The judgment should provide that the mortgage of October 27, 1936, and the mortgage of March 10, 1948, be each foreclosed and that the mortgaged premises be sold by and under the direction of the Sheriff of Salt Lake County, Utah, according to the following described formula and process:

(a) All of the right, title, claim and interest of the Appellant, Marian Story Goeltz, in and to the mortgaged premises and all of the right, title, claim and interest of the defendant, Francis Boydell Goeltz, (other than the undivided one-half interest of said defendant, Francis Boydell Goeltz, in and to the mortgaged premises which will be sold under and by virtue of the order of sale issued pursuant to (b) *infra*) in and to the mortgaged premises, should be sold to satisfy the joint and several judgment against Appellant, Marian Story Goeltz, and the defendant, Francis Boydell Goeltz, in the principal amount of \$3,224.41, plus interest as above set forth. A separate order of sale should be issued by the Clerk on this judgment, directing the sale of the respective interests of the said defendants in the mortgaged premises. The Sheriff should be directed to give separate notice of this sale and hold the sale separately. This sale must be noticed and held prior to the sale directed in (b) *infra*. Any party to this action may bid at the sale. The Respondent may use its joint and several judgment against said defendants as cash, after paying the

Sheriff's costs of sale in cash.

(b) The undivided one-half interest in the mortgaged premises of defendant, Francis Boydell Goeltz, should be sold subsequently to the sale directed in (a) supra to satisfy the separate and individual judgment against him in the principal amount of \$3,579.44 plus interest, cost of abstract of title, attorney's fees and costs as above set forth. A separate order of sale should be issued by the Clerk on this judgment directing the sale of said undivided one-half interest of said defendant. The Sheriff should be directed to give separate notice of this sale and hold the sale separately. Any party to this action may bid at the sale. The plaintiff may use its said judgment as cash, after paying the Sheriff costs of sale in cash. This sale should be held second in time.

Comment: The mortgage of October 27, 1936 (the Pacific Mutual mortgage) bound all of the interest of appellant, Marian Story Goeltz, in the premises and all of the interest of defendant, Francis Boydell Goeltz, in the premises.

The execution of the mortgage of May 10, 1948, by the defendant, Francis Boydell Goeltz, had the legal effect, as above demonstrated, of binding his undivided one-half interest in the mortgaged premises as hereinafter identified. As a consequence the individual judgment against him should be satisfied out of the sale of this undivided one-half interest as hereinafter identified.

Equitable considerations dictate separate sales which

will give rise to separate rights of redemption. It must be kept in mind that on the respective dates of the mortgage of October 27, 1936, and the mortgage of May 10, 1948, that the defendants were owners in joint tenancy of the mortgaged premises and that the rights of Respondent under these mortgages are determined as of said dates. Subsequent conveyance of the premises will not affect these rights as the sheriff's sale of the premises carries the respective ownership of the defendants as of said dates.

2. CITATION OF AUTHORITIES

(a) *References to Utah Statutes and Rules of Civil Procedure.*

"Sales of real property under judgments of foreclosure of mortgages are subject to redemption as in case of sales under execution generally * * *" (Sec. 78-37-6, Utah Code Ann. 1953).

"Property sold subject to redemption, or any part sold separately may be redeemed by the following persons or their *successors in interest* (1) The judgment debtor; (2) a creditor having a lien by judgment or mortgage on the property sold, or some share or part thereof, subsequent to that on which the property was sold." (Rule 69 f (1) Utah R.C.P.)

"* * * If the debtor redeems the effect of the sale is terminated and he is restored to his estate. * * *." (Rule 69 f (5) Utah R.C.P.)

"Upon a sale of real property the officer shall give the purchaser a certificate of sale * * *. The real property sold shall be subject to redemption, except where the estate sold is less than a lease-

hold of a two-years unexpired term, in which event said sale is absolute." (Rule 69 f (1) Utah Rules C.P.)

- (b) *Legal title does not pass under mortgage foreclosure sale, and new owner is not substituted until the sale is consummated by a Sheriff's conveyance. The judgment debtor is, in contemplation of law, the owner of the property sold under execution during the redemption period and has right to its use and occupancy. The purchaser's interest is an equitable interest during period of redemption, subject to be lost, cancelled or taken away by the debtor, any redemptioner or their assigns. (Local Realty Co. vs. Lundquist, 96 Utah 297, 25 Pac. (2d) 770, at pg. 772.)*

The above doctrine was cited with approval in Layton vs. Layton, 105 Utah 1; 140 Pac. (2d) 759, 762.

- (c) *When the judgment debtor redeems from the effect of the sale is terminated and he is restored to his former estate. Therefore a subordinate lien is not divested or destroyed by reason of the redemption by the judgment debtor or assigns of the property from a sale under a prior lien. It is revived and becomes effective and may be enforced.*

De Roberts vs. Stiles, 24 Wash. 211;
64 Pac. 795;

Stryker vs. Dunn, 72 Colo. 45; 209
Pac. 644, 645;

Ford vs. Nakomis State Bank, 135
Wash. 37; 237 Pac. 314;

Flanders vs. Aumack, 32 Ore. 19; 51
Pac. 447;

Porter vs. Steel Company, 122 U.S.
267; 7 Sup. Ct. 1206;

Horton vs. Moffat, 14 Minn. 289;
100 Am. Dec. 222;

Freeman on Executions (2nd) Sec.
182;

Curtis vs. Millard, 14 Iowa 128; 81
Am. Dec. 460;

Milhoover vs. Walker, 636 Colo. 22;
164 Pac. 504;

Warren vs. Fish, 7 Minn. 432;

Kilpatrick Bros. Co. vs. Campbell,
48 Idaho 194; 281 Pac. 471;

42 Corpus Juris, pg. 451-453;
18 Cal. Jur. pg. 599, Sec. 815;
19 R.C.L. 655;

Bateman vs. Kellog, 59 Cal. App.
464; 211 Pac. 46, 51, 52;

Kopp vs. Thele, 104 Minn. 267; 116
NW 472; 17 L.R.A. (NS) 981;

Am. Jur., Mortgages, Vol. 37, Sec.
854. pg. 229.

The difference in applicable rule in *Utah* where certificate of sale does *not* pass title and the mortgagor is entitled to possession during period of redemption, and the *Montana* rule where the

certificate passes title and gives the purchaser the right to charge mortgagor for use and occupancy during the period of redemption is illustrated in

Hamilton v. Hamilton, 51 Mont 509;
154 Pac. 723; Dipple v. Nevill, 82
Mont. 280; 267 Pac. 214.

- (d) *Under Rule 69 f (5) Utah R.C.P. the term "judgment debtor" includes "successor in interest," and the effect of a redemption by a "successor in interest" is to terminate the sale and the "Judgment debtor" or his "successor in interest" are restored to the former estate of the "judgment debtor."*

(Bateman v. Kellog, 59 Cal. App. 464;
211 Pac. 46, 51, 52)

SPECIAL NOTE:

The Kansas cases holding that a redemption from a foreclosure sale on a first or prior mortgage by the judgment debtor or successor in interest bars foreclosure on a junior mortgage thereafter are based upon a statute which forbids such foreclosure and declares that the only remedy of a junior mortgagee is by exercise of right of redemption. Hence the rule is not applicable in Utah. (McFall v. Ford, 133 Kan. 593; 1 Pac. (2nd) 273)

Further the *Kansas* and *Montana* statutes expressly forbid the sale of the right of redemption on execution sale.

(Sigler vs. Phares, 105 Kan. 115; 181 Pac. 628; 5 ALR 145; Hamilton v. Hamilton, supra)

The Utah statutes and Rules of Civil Procedure do not forbid the sale of the *right* of redemption by execution.

3. ARGUMENT

Four important facts must be borne in mind: (a) the Appellant and defendant, Francis Boydell Goeltz, owned of record as joint tenants the mortgaged premises on dates of both the 1936 and 1948 mortgages; (b) there are no intervening liens or mortgages between the date of the 1936 mortgage and the 1948 mortgage; (c) the Appellant did not acquire sole ownership of the mortgaged premises until the decree of the Third District Court in the first divorce action dated March 31, 1952—practically four years subsequent to the execution of the 1948 mortgage; and (d) the rights of all parties will, of course, be determined by the status of the property at the time the 1936 and 1948 mortgages were given. The acquisition by Appellant of sole ownership of the property long subsequent to the dates of these mortgages does not affect the rights of Respondent under these mortgages. The subsequent sole ownership by Appellant of the property affects the right of redemption only.

- (a) *The joint and several judgment against Appellant and Defendant, Francis Boydell Goeltz for amount paid Pacific Mutual Life Insurance Co. in satisfaction of the 1936 mortgage is proper.*

The note (Ex. 22 P) is a joint and several obligation of Appellant and Defendant, Francis Boydell Goeltz (Sec. 41-1-18 (7), Utah Code Ann. 1953). Respondent by subrogation succeeded to all rights of the owner of the note (Pacific Mutual Life Insurance Co.) and is therefore entitled to a joint and several judgment against the maker for the amount (\$3,224.41) paid by Respondent in satisfaction thereof, together with interest at 4½% per annum from Feb. 1, 1953—the date to which interest has been paid. No costs or attorneys fees are included in this judgment.

(b) *The several judgment against defendant, Francis Boydell Goeltz, is proper.*

The defendant, Francis Boydell Goeltz, is alone liable on the 1948 note and mortgage for the amounts specifically set forth in Point V. 2. Attorneys fees and costs must be chargeable against him only. From the total amount due on the 1948 mortgage there was deducted the amount of \$3,224.41, for which Respondent secures judgment against Appellant and said defendant, jointly and severally. The balance is charged against Francis Boydell Goeltz alone. The Court in its equitable powers had the right and duty to make this division and apportionment.

(c) *The Court was required to order the mortgaged premises to be sold first to satisfy the joint and several judgment against Appellant and defendant, Francis Boydell Goeltz.*

Respondent, under its subrogation to the rights of

Pacific Mutual Life Insurance Co. under the 1936 mortgage, proceeded in the same manner as the Insurance Company would have done in foreclosing this mortgage. The 1936 mortgage was a first and prior lien on the mortgaged premises and since Appellant and defendant, Francis Boydell Goeltz, were jointly and severally liable thereon, it was proper and necessary to order sold all of their interests in the mortgaged premises as they existed on the date the 1936 mortgage was executed. The Court had no alternative except to order that this sale be held first, with the same consequences as would have resulted had the Insurance Company obtained the judgment and was the successful mortgagee-plaintiff.

It is at this point that the doctrine of *Local Realty Co. vs. Lundquist*, supra, becomes of extreme importance. According to this decision, the effect of a Sheriff's sale in Utah is *not* to vest the successful bidder at such sale with legal *title* to the premises. He secures the right (equitable in nature) upon the expiration of the period of redemption, if no redemption is made, to the Sheriff's deed. It is this deed which conveys the title to the purchaser—not the certificate of sale. The legal title remains in the judgment debtor or successor in interest with the right of possession, rent free, during the period of redemption. The right to redeem from the sale is in the debtor or *successor in interest* exclusively when no judgment creditor or junior mortgagee is involved (Rule 69 f (1), U.R.C.P.), and under Rule 69 f (5), supra, the term "judgment debtor" includes "successor in interest." (*Bateman v. Kellog supra*) (The California statute as

to redemption reads exactly as Rule 69 f (5).)

When the Sheriff's sale under this provision of the instant judgment is held, the successful bidder will receive a certificate of sale, but will not at that time acquire legal title to the premises. The legal title will remain in the judgment debtors (the Goeltz's) or their "successor in interest." The Appellant remained the owner of an undivided one-half interest in the premises. The deed to Davis and from Davis to Appellant did not alter this interest. Appellant acquired by the Davis deed (and the decree of March 31, 1952) the interest of defendant, Francis Boydell Goeltz. As to him and his interest in the premises, Appellant was a "successor in interest". The provision of the judgment under consideration does not and cannot in any respect impair or limit the right of redemption. The right of redemption under this *first* sale will be vested in Appellant and she alone has the right to redeem as defendant, Francis Boydell Goeltz, transferred all of his interest in the premises to Appellant and there are no judgment creditors or junior mortgagees. It will be noted that the doctrine of *Local Realty Co.* was approved in the subsequent decision of *Layton vs. Layton*, *supra*. A deficiency judgment, joint and several, against Appellant and Francis Boydell Goeltz, is proper inasmuch as they are jointly and severally liable on the 1936 note (Exs. 22 P, 23 P).

- (d) *The court correctly ordered that a second and subsequent sale be held covering the undivided one-half interest of defendant, Francis Boydell Goeltz, in*

the mortgaged premises, other than the interest of said defendant sold in the first sale.

Keeping in mind (a) that when the defendant, Francis Boydell Goeltz, executed the 1948 note and mortgage (Exs. 9 P, 10 P, 11 P) the title to the mortgaged premises was vested in Appellant and said Goeltz as joint tenants, and (b) that Respondent's rights under said note and mortgage must be determined by the status of the title on the date of execution and delivery of said note and mortgage, it is manifest that the interest of said defendant, Francis Boydell Goeltz, was burdened and was subject to the lien and claim of said 1948 mortgage when acquired by Appellant under decree of March 31, 1952, and deeds issued pursuant thereto. It has been previously demonstrated that Francis Boydell Goeltz had the clear legal right to mortgage his interest, as joint tenant, in the premises to Respondent. The Appellant could not prevent such action. Therefore, Respondent acquired a lien on his interest, subject to the lien and claim of the 1936 mortgage. As between him and Respondent and as between him and Appellant he owned and held an undivided one-half interest. As to one and another and as to third parties, joint tenants are seized of equal undivided interests in the property (American Law of Property, Vol. II, Sec. 6.1).

The authorities cited above hold that a severance of the joint tenancy is effected by the act of one joint tenant mortgaging his interest to a third person and thereby the joint tenancy is converted into a tenancy

in common. Under this theory when Francis Boydell Goeltz executed and delivered November, 1948 mortgage he effected a severance of the joint tenancy estate to the extent of the mortgage lien (*Wilkins vs. Young supra*) and a tenancy in common of the mortgaged property resulted. Respondent thereby became mortgagee of his undivided one-half interest therein. Even if this theory is not adopted, the 1948 mortgage created a lien on *all* of the interest in the mortgaged premises owned and held by the defendant, Francis Boydell Goeltz, at the date thereof, and that interest was an undivided one-half interest. Under the doctrine of the *Local Realty Co.*, the legal title to the premises, after the first sale will remain in Appellant: an undivided one-half interest in her own right under the Bronson deed and an undivided one-half interest as the grantee of defendant, Francis Boydell Goeltz. However, the undivided one-half interest coming to Appellant from Francis Boydell Goeltz will be subject to the lien of the 1948 mortgage and it is this interest which will be reached by the *second* sale. Upon this *second* sale there will remain in Appellant the full right of redemption from the same as "successor in interest" of the judgment debtor, Francis Boydell Goeltz. (Rule 69 f (1) Ut. R.C.P.; *Bateman vs. Kellog, supra*). It will be observed that the Appellant retains completely the exclusive right of redemption from this *second* sale as there are no judgment creditors or junior mortgagees, and defendant, Francis Boydell Goeltz, by virtue of the decree of March 31, 1952, and deeds executed pursuant thereto was divested

of all of his interest in the premises.

(e) *Exercise of statutory rights of redemption.*

The right of redemption in Utah is, of course, of statutory origin, even though it is now incorporated in the Rules of Civil Procedure. A judgment debtor or redemptioner must bring himself within the classes favored by Rule 69 f (1). Appellant is obviously within the class designated "judgment debtor". After the *first* foreclosure sale Appellant has the exclusive right to redeem from that sale. If and when she makes this redemption the effect of the sale will be terminated and she will be restored to her former estate. The authorities cited in (c) *supra* teach that the subordinate mortgage lien (1948 mortgage) held by Respondent will not be divested or destroyed by reason of the redemption by the judgment debtor or assigns of the property from a sale under a prior lien (the 1936 mortgage). The lien under the 1948 mortgage is revived and becomes effective and may be enforced. The result is that Appellant, after redemption from the *first* sale, holds an undivided one-half interest in the property, free and clear of any lien. (This undivided one-half interest was her own and was not subjected to the lien of the 1948 note and mortgage because she did not execute them.) However, the undivided one-half interest which Appellant derived from defendant, Francis Boydell Goeltz, was subject to the lien of the 1948 mortgage because said defendant while owning the same voluntarily mortgaged it. Respondent therefore is free to resort to this interest to satisfy

its claim under the 1948 mortgage. As above shown Appellant can redeem from this second sale (and she is the only person who can effect redemption) and thereby restore to herself the title to the entire property.

(f) *Disposition of surplus arising from sales.*

The principal argument of Appellant against the validity and correctness of the judgment as it pertains to the foreclosure sale appears to be centered about the disposition of any surplus money which may arise from such sales. Such surplus must be paid into court to await the order of the court (R 198, R 201). There are no judgment creditors or junior mortgagees involved, and defendant, Francis Boydell Goeltz, has conveyed all of his interest in the mortgaged premises to Appellant. Manifestly Appellant and only Appellant will be entitled to any surplus funds arising from the sales. (Am. Jur. Mortgages, Vol. 37, Sec. 873, pg. 249)

PART B

ANALYSIS OF APPELLANT'S LEGAL AUTHORITIES AND DEMONSTRATION OF ERRORS IN ARGUMENT

Respondent hereinafter presents its interpretation and application of the legal authorities cited by Appellant, and demonstrates the errors and defects in the theories and argument of Appellant. (The Points hereinafter indicated refer to Appellant's Points set forth in her brief.)

POINT I.

Stockyards National Bank, etc. vs. Bragg (1926)
67 Utah 60, 245 Pac. 966.

The contention of Appellant that this case falls within the doctrine of the above decision is based upon a clear misunderstanding of the application of the rule there announced. There was no evidence adduced in the Bragg case on the question as to whether the adults' mortgage was given only on the condition that a valid, binding mortgage would be given by the guardian of the minors. The issue was decided on the pleadings (245 Pac. 975) The order of the Supreme Court remanded the action for a new trial with leave to the plaintiff to amend its complaint so as to be able to try on the merits the question as to conditional delivery of the adults' mortgage. The situation thus developed was finally elucidated by the Supreme Court in the case of *Shibata vs. Bear River State Bank*, 115 Utah 395, 205 Pac. (2nd) 253, decided in 1949. The plaintiff in that case had signed the note and mortgage involved, both in the capacity as administratrix of her husband's estate and as an individual. At page 253 of 205 Pac. (2nd) the court wrote:

“Having decided the note and mortgages were invalid and not binding on the estate, the question remains as to whether they were evidence of a valid obligation of appellant, personally. The officer of the bank who negotiated the loan testified that appellant was requested to sign personally as well as in her representative capacity upon the advice of the estate's attorney. He also testified that the bank would not have

made the loan unless the interests of all concerned were included. The facts here are somewhat similar to the situation in the Stockyards case, *supra*. There the plaintiff, who was the obligee, pleads that its assignor agreed to extend the time of a past due obligation only on condition that the interests of both adults and minors in certain Salt Lake City property were validly pledged as additional security for the payment of such obligation. In answer to this pleading the adult owners of the interests in the additional security specifically alleged that they delivered their note and mortgage pledging their interest in the additional security only on condition that the interests of the minors in that security were validly pledged for that purpose. They further alleged that the interests of the minors in that property were not validly pledged and therefore they were also not bound thereby. No evidence was introduced on this question but the trial court on these pleadings, or so its findings were construed by this court, found that the note and mortgage of the adults were delivered conditionally upon the validity of the pledge of the interests of the minors in the additional security. The trial court held that the minors' interests in that property were validly pledged and ordered the mortgage foreclosed. But this court reversed that holding, dismissing the action as to the minors, and also said that on those pleadings and findings the adults were entitled to a judgment in their favor, but remanded the matter for further hearing as to the adults with permission for the plaintiff to amend its pleading.

In remanding the case for a further hearing with leave to amend, the court apparently acted in accord with the equities and the probable facts

of the case. It is hard to believe that a person in the business of loaning money would actually extend the time for payment of an overdue obligation and advance additional money thereon, at a time when the existing security was apparently insufficient upon the delivery of notes and mortgages pledging additional property for the security of such loan, with the understanding that the delivery of such notes and mortgages, even as to the adult mortgagors, was conditional upon the validity of the pledge of the interests of the minors in the additional security. Certainly the obligee would not agree to a proposition that would render the obligation of the adults a nullity merely because the obligation of the minors turned out to be invalid.

In the instant case, the evidence is clear that the bank would not have made the loan unless it thought every one's interest in the land was validly pledged. But it does not follow that the delivery of the note was accepted by it conditionally on the entire obligation being valid nor does it prove a conditional delivery of the note and mortgage on the part of Mrs. Shibata. *The fact that an obligee insists upon having the benefit of all parties interested in the property hypothecated, does not tend to prove that the obligors agreed to be obligated upon condition that all were obligated or none.* Mrs. Shibata understood that she was mortgaging her property to help her son on his loan with the bank. As far as she personally is concerned there is no evidence that she would not have executed the mortgages unless the estate was also obligated. She did not so contend nor plead. She merely pleaded that she did not understand that she was signing real property mortgages and thought that she was

only signing crop mortgages. The court found the evidence against her on this fact. From a reading of the record we cannot say that its findings were unreasonable or not in accord with the evidence. It follows, therefore, from what we have said that the obligation of Mrs. Shibata, personally, is valid and is binding upon her interest in the real property." (Emphasis supplied.)

The instant case is manifestly within the rule of the Shibata case. To paraphrase the court's statement italicized in the above quotation: the fact that Respondent insisted upon having the interests of both Mr. and Mrs. Goeltz in the property hypothecated does not tend to prove that Mr. Goeltz agreed to be obligated upon condition that Mrs. Goeltz was obligated. In this connection it should be noted that in his answer (R. 19, 20) Mr. Goeltz admits he executed and delivered the 1948 note and mortgage in favor of Respondent. There is not a line of evidence in the case that Mr. Goeltz conditioned his execution of the 1948 note and mortgage upon Respondent securing a valid note and mortgage from Mrs. Goeltz.

Further Appellant is by this argument attempting to use a defense which belongs exclusively to Mr. Goeltz. When she denied her signature on the 1948 note, mortgage and agreement her defense stopped. It is none of her concern as to whether Mr. Goeltz delivered the note and mortgage on condition Appellant executed and delivered same. He says he did not, but admits they are his binding obligations. That ends the matter. Not

only do the facts, themselves, deny Appellant's contention, but also the law is against her.

Zinkeison vs. Lewis, 63 Kansas 590, 66 Pac. 644, does not hold that the mortgage to which the husband forged his wife's name was void as to the husband. It sustains the plaintiff's right to be subrogated to the rights of holders of prior liens which were paid with plaintiff's money. The court said:

"The right of subrogation, however, is not founded alone on the notes and mortgages, but is founded on all the facts and circumstances which give rise to the claim of subrogation." (66 Pac. 646)

See also *Kuske vs. Staley*, 138 Kansas 169, 28 Pac. (2nd) 728, wherein the *Zinkeison* decision is cited in support of the right of subrogation even in a case where the mortgage is wholly void because of the forgery of the signature of the lone mortgagor.

Serial Building and Loan Assn. v. Eberhardt, 95 N. J. Eq. 607; 124 Att. 56:

This decision does not in any respect deal with the validity of a mortgage which was executed by the husband but not by the wife. It affirms the right of the mortgagee of said mortgage who advanced money to pay off a prior existing mortgage to be subrogated to the valid lien of such prior mortgage. The Court declared:

"It would be a most inequitable decision that would declare dissolved the lien upon the property in which she (the wife) claims an inchoate right of dower and so defeat that much of the consider-

ation which she and her husband had received upon a valid instrument which no longer exists through no fault of the complainant whose money she had enjoyed."

Davis vs. Pugh, 81 Ark. 253, 99 SW 78, affirms the doctrine of subrogation in a case where the holder of a mortgage *not* signed by a wife pays a prior mortgage. This decision in fact holds that the note signed by the husband alone secured by the subsequent mortgage (the signature of the wife thereto not being genuine) was effective to toll the statute of limitations.

"Appellants insist that the note secured by the old mortgage is barred by the statute of limitation, and that the right of subrogation is also barred. It is sufficient in answer to this contention, to say that the debt was kept alive by the new note executed by Davies, the debtor."

Carey vs. Hart, 208 Alabama 316, 94 Southern 298. The wife's signature was not forged. The mortgages were void "for the reason that they were not signed and separately acknowledged by the wife as the *Constitution and statute* of this State require in the case of conveyance of homestead." A Constitutional and statutory mandate voided the mortgage. Forgery of the wife's signature was not involved in the case.

Home Owners Loan Corporation vs. Papara, 241 Wis. 112, 3 NW (2nd) 730, does not declare that the mortgage in favor of H.O.L.C. (the proceeds of which were used to pay a prior mortgage and delinquent taxes) was void as to the executing tenant in common. Rather

it sustains the right of subrogation against co-tenants who did not execute the H.O.L.C. mortgage and also against the claim of dower of the wife of the executing tenant. (This decision is of particular interest in connection with appellant's claim of negligence on part of Respondent. See Appellant's Point II).

Kaminskas v. Capanskis, 369 Ill. 566, 17 NE (2nd) 558, upholds the right of subrogation against the inchoate dower claim of the wife of the mortgagor who did not sign the refunding mortgage. The validity of the refunding mortgage was not in issue except as to its effect upon the wife's right of dower. It was not void.

Hall vs. Marshall, 139 Mich. 123, 102 NW 658, upholds the right of subrogation in favor of a refunding mortgage against the claim of mortgagor's widow that she held a homestead in the mortgaged premises. The wife did not execute the refunding mortgage. By a Michigan *statute* a mortgage on a homestead was void if not executed by both husband and wife. The court held that the evidence did not establish that the widow held a homestead in the mortgaged premises.

Krost v. Kieg,..... Mo., 46 SW (2nd) 866. Although the refunding notes and mortgage were spurious and forged, and therefore void, the court allowed the intervenor which held these void notes and mortgage to be subrogated to rights under a prior valid mortgage. The refunding notes were void because the signatures of *both* mortgagors had been forged. There was no valid signature on them.

POINT II

Home Owners Loan Corporation vs. Papara, 241 Wis. 112, 3 NW (2nd) 730. A quotation from the opinion will suffice:

“Respondent argues that the doctrine of subrogation is inapplicable in this case by reason of the negligence on the part of the plaintiff in failing to take steps to obtain a properly executed mortgage. Even in the case of negligence, however, one who is not a volunteer is entitled to equitable assignment in the absence of intervening equities. *Iowa County Bank vs. Petty*, 1927, 192 Wis. 83, 91, 92, 211 NW 134, 137: ‘* * * From the very nature of this doctrine of subrogation its mantle must many times, like the garment of charity, cover and wipe out a number of sins of omission or commission. The doctrine of subrogation rests upon the theory of unjust enrichment * * *.’ In the instance case those having an interest in the property, Tony’s wife and co-tenants, as well as Tony, alike received the benefits of the H.O.L.C. loan, the payment of an existing mortgage valid as against their interest * * * ; and none of them has changed nor been induced to change his position by reason of the satisfaction of Building Loan Association mortgage. * * * In this situation any negligence on the part of plaintiff in failing to safeguard against any defects in the execution of the mortgage cannot bar it from the right of subrogation.”

Home Owners Loan Corporation vs. Collins, 120 N. J. Eq. 266, 184 Atl. 621.

Negligence on the part of the mortgagee in guarding against defects in execution of his mortgage will not bar him from the right of subrogation to valid prior

liens which were paid with proceeds of his mortgage.

Hughes v. Thomas, 131 Wis. 315, 111 N.W. 474,
11 L.R.A. (N.S.) 74

The negligence of the mortgagee (the proceeds of his mortgage were used to pay a prior valid mortgage) in securing only the signature of the life tenants to his mortgage, did not bar his right of subrogation.

The question as to whether the negligence of the person advancing funds used to discharge a prior lien can arise only when there are *intervening* liens. *There were no intervening liens in this case.* (Ex. 2 P). Appellant has, therefore, misapplied the doctrine of negligence. Even where there is an intervening lien subrogation is allowed. (Am. Jur. Vol. 50—Subrogation, Secs. 107-109, pgs. 750-752.) Oppositely the rule is clearly established that

“Mere negligence of the one seeking subrogation in failing to procure a properly executed mortgage will not, at least in the absence of intervening equities, defeat his right to subrogation.” (Am. Jur. Vol. 50, Sec. 95, pg. 744)

POINT III

41 *C.J.S. Sec. 251, p. 735*

“With some qualifications, the general rule is that property purchased with money from a wife’s separate estate becomes her separate property, and as such is not liable to her husband’s creditors for his debts, even though the property it taken in the joint names of husband and wife or in the husband’s name, in the absence of

a showing of the wife's intention to make a gift to him."

The following decisions are cited by the editor of the above excerpt supporting the rule there elucidated:

Gooch vs. Weldon Bank & Trust Co., 176 N.C. 213, 97 S.E. 53. This was an action between the wife and the husband's administrator wherein the wife asserted that the deceased husband had taken possession of and managed her separate estate, selling certain property and reinvesting the proceeds. *The rights of third persons were not concerned.* The court rightfully upheld the wife in her contention, as the North Carolina Constitution had emancipated married women and they retain title to their own separate property upon marriage.

Commercial Bldg. Co. vs. Parslow, et al., 93 Florida 143, 112 Southern 378 is another case cited in support of the above quotation from C.J.S. This was a direct attack by remaindermen (two of whom were married women) against the ultimate grantee of the life tenant who had asserted complete and exclusive ownership of a parcel of land under the will of her father which devised to her a life estate with remainder on her death to nephews and nieces, two of whom were the married plaintiffs. The court recognized the ownership under Florida's constitution of the separate property by the two married (women) remaindermen and held that because of their emancipation under the Florida law they were guilty of laches in not prosecuting their suit earlier after they had knowledge that the life tenant had as-

served a title antagonistic to them. This was a "straight line" attack on the title of defendants who were not third parties dealing with the title but were direct ultimate grantees of the premises from the life tenant.

Kranjcec vs. Belimat, 114 Montana 26, 132 Pac. (2nd) 150. It will suffice to quote from the decision itself to prove its irrelevancy in this case:

"We think that if the plaintiff had shown that the wife's permitting the title to the property to remain in the husband had injured the plaintiff he might have been entitled to prevail under the rule followed in such cases as *Terrill vs. Wheeler*—*Motter Mer. Co.* 147 Okla. 77, 294 Pac. 644 and *War Finance Corp. vs. Erickson*, 171 Minn. 276, 214 N.W. 45, but no such showing was made here although fraud was alleged. * * * *nor is there any suggestion that the plaintiff was misled and extended credit to her husband by reason of the title to the lots being in the husband at any time.*" (Emphasis supplied.)

Roberts vs. Farley, 290 Ky. 516, 161 SW (2d) 930 follows the exact pattern of the Montana case summarized above. The executing creditor of the husband extended no credit to him on the strength of the belief that the husband owned the automobile which was in fact owned by the wife.

Travelers Insurance Co. v. Beagles, 333 Mo. 568, 62 SW (2d) 800 is an example of the decisions which are cited in support of the quotation from C.J.S., *supra*. This case holds that a married woman in Missouri under the emancipation act can convey her separate property

without the consent or signature of the husband so as to bar his claim of courtesy.

If Appellant's counsel in the instant case had continued his study of 41 C.J.S.—Husband and Wife—and had turned to Sec. 267, pg. 747 of the same volume he would have found this statement of the law:

“Where the wife has permitted the husband to hold title to her separate property, or deal with it as his own, she is estopped to claim it against persons who have extended credit to, or otherwise dealt with the husband in reliance on his apparent ownership.”

The principle thus set forth is confirmed in *Terrell vs. Wheeler-Motter Mer. Co.* and *War Finance Corp. vs. Erickson* cited in *Kranjcec v. Belimak*, supra. The *Terrell* case (per syllabus by the Court) holds:

“Where a married woman permits title to her land to remain in her husband's name for such length of time and under such circumstances and with knowledge actual and constructive of such facts as would make it inequitable for her to assert her rights, she will be estopped as against the right of her husband's creditors, who, without negligence and while in good faith, were misled thereby to his damage in the extension of credit to the husband.”

The *War Finance Corporation* case, referred to supra contains the following cogent declaration:

“The case is that of a trusting wife who has long permitted her husband to manage as his own her property, to hold himself out to the business world as the owner of it and who has been

satisfied with that appearance of things until beset by financial reverses. Then as to those who have relied upon the apparent condition of things, it is too late for the wife to assert her separate ownership. 12 R.C.L. 599.”

This rule applies on a foreclosure of a mortgage where the mortgagee relied upon the husband's treatment of the property as his own. (*Rathbone v. Rathbun*, 35 SW (2d) (Mo. App.) 38.

In addition to the C.J.S. citation (41C. J.S. Sec. 251, p. 735) Appellant cites the following decisions in support of Point III: *Wallace vs. Riley*, 23 Cal. App. (2nd) 669, 74 Pac. (2nd) 800; *Long v. Duprey*, 52 NY (2nd) 93 (sic); and *Moskowitz vs. Marrow*, 251 NY 380, 167 NE 506. These cases interpret and pass upon California's and New York's statutes governing so called “joint tenancy” bank accounts. The parties thereto were either the original tenants or the executor or administrator of the deceased “tenant” and the surviving tenants. In such actions evidence as to the “arrangements” between the joint owners other than evidenced by the bank deposit agreement was held admissible under the statutes. Manifestly the decisions have no relevancy in the instant case, inasmuch as they involve *inter sese* quarrels between the tenants or between a surviving tenant and the deceased tenant's personal representative.

POINT IV.

O'Reilly vs. McLean, 84 Utah 551, 37 Pac. (2d) 770 and *Meagher vs. Dean*, 97 Utah 173, 91 Pac. (2nd) 454,

treat of facts which put a grantee or mortgagee on notice as to defects in title to real property being purchased by him or mortgaged to him. The effect of actual notice of existence of a prior mortgage was considered in the *O'Reilly* decision and of possession by a third person in the *Meagher* case. They have no bearing on the present litigation because (a) Respondent is asserting no claim through the unauthorized signatures of Appellant; (b) if there were negligence on the part of Respondent in failing to safeguard against defects in execution of the 1948 mortgage, this fact cannot bar its right of subrogation under the 1936 mortgage owned by Pacific Mutual Life Insurance Company (see authorities cited *supra*) and (c) the defendant, Francis Boydell Goeltz, was on date of the 1948 mortgage a joint tenant of the mortgaged premises with Mrs. Goeltz and therefore was equally in possession of the premises with her.

POINT V

Fidelity Trust and Savings Bank vs. Williams, 285 Ill. App. 139, NE (2nd) 739, demonstrates the established rule of law that "retention of possession by the grantor of the property conveyed is notice of his or her interest in the property, and to those claiming under the grantee". It has no bearing on this case for three reasons: (a) Respondent's right to be subrogated to the rights of the Pacific Mutual Life Insurance Company under the mortgage of 1936 is based upon a mortgage acknowledged by Appellant to have been executed by her; (b) the title to the mortgaged premises at the time of the nego-

tiation of the 1948 mortgage was in and the premises were occupied jointly by Appellant and her husband, Francis Boydell Goeltz, and had been since the time it was acquired by them from the Bronsons, and (c) Respondent claims no rights in the mortgaged premises under the *unauthorized signature* of Appellant on the 1948 note, mortgage and agreement.

POINT VI

Respondent has heretofore demonstrated that it is entitled to be subrogated to the rights of Pacific Mutual Life Insurance Co. under the 1936 mortgage. Under Point II, Part A, it has discussed the case of *Martin vs. Hickenlooper*, *supra*. The assertion of Appellant that she must have *agreed* to allow Respondent to be subrogated to the rights of the 1936 mortgage is, of course, erroneous as the authorities clearly prove. Hickenlooper does not sustain such position. In all of the "wife forgery" cases there was obviously "non-agreement" by the wife. The modern and enlightened doctrine of subrogation is not based on contract, but

"Being founded on principles of natural reason and justice, and being one of benevolence of the law, it is a highly favored doctrine, and one which has been most liberally dealt with in the courts. Perhaps no doctrine of equity jurisprudence is more beneficial in its operations, and perhaps none stands in higher favor." (Am. Jur. —Subrogation—Vol. 50, Sec. 15, pg. 693)

Hickenlooper allowed subrogation against Martin, a junior mortgagee. It was in this connection that the court

discussed the question of subrogation on the part of the refunding mortgagee, and even then concluded that

“Indilgence in searching the record will not prevent equity from applying the doctrine unless it is culpable or unjustifiable negligence. * * * .”
(59 Pac. (2nd) 1152)

In connection with Hickenlooper, Appellant has cited two other cases of which brief mention will be made. The first is

McCollam v. Lark, 187 Ga. 292; 200 S.E. 276, recognizes the right of subrogation by a refunding mortgagee even against an intervening lien. There was no issue of negligence of the refunding mortgagee raised in this case. Involved was the right of subrogee to claim superior legal position against a lien which in previous litigation had been declared junior to the lien to which the refunding mortgagee succeeded.

The second case cited is *Wilkin v. Gibson*, 113 Ga. 290; 38 SE 374, which involves the rights of a junior lienor against a refunding mortgagee. Stated otherwise, the junior lienor claimed that the refunding mortgagee was negligent. The discussion of the Court involved this issue. It is obvious the case has no application. No intervening or junior lienor is present in the instant case.

POINT VII

Appellant has hereinbefore fully discussed the method and order of sale of the mortgaged property under Part A, Point V—Form and Requirements of Judgment.

CONCLUSION

Respondent respectfully submits that it has demonstrated that the trial court committed no error in its disposition of this action and that the judgment entered by it should be affirmed with costs against Appellant.

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