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# Priority of Assignee of Part Interest in Chose in Action

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# PRIORITY OF ASSIGNEE OF PART INTEREST IN CHOSE IN ACTION

IT was inevitable that the economic depression of the last decade should generate legal problems of first magnitude in the wake of the financial disaster. This not only resulted from governmental efforts, by new and untried experiments, to deal effectively with the situation—as in the case of new labor laws, new security laws, and the like—but, more important, in the view of the common law, from the evaluation and satisfaction of the conflicting claims of investors to the steadily shrinking values of corporate and individual wealth. Here, as in the case of its long history of trial and error, inclusion and exclusion, the genius of the common law was again found equal to its historic role.

A substantial number of investors, who found the value of their securities in a precarious condition as the depression developed, were those who had put their savings in bonds, certificates and other securities protected by mortgages on real estate. The genius of American finance had developed new forms of security, hitherto unknown in the banking world, which were sold to hundreds of thousands of investors in amounts aggregating billions of dollars.[1] In legal effect, these new securities sold by mortgage guaranty companies —that is, companies organized to guaranty the payment of mortgages—were assignments of part interests in the mortgages owned by the guaranty companies to the investors. Thus, a small investor with but two or three thousand dollars at his command might buy a part interest in a large mortgage securing a debt of several hundred thousand dollars, or even more. Needless to say, neither the investor, nor those who sold the guaranteed certificates, gave any thought to the conflicting legal relations that might arise should the time come when the decline in realty values would render the proceeds of these mortgages insufficient to pay off the entire indebtedness. Such a possibility may well be said not to have been within the contemplation of the parties. And it is precisely because this unforeseen possibility occurred that many

[1] Finkelstein and Clarke, *Mortgage Banks* (1937) 12 ST. JOHN'S L. REV. 52, 53, 54.

legal problems arose, among those, the specific one discussed in these pages.

It frequently happened that the mortgage guaranty company, in selling participations in the mortgage, would retain a part interest in the mortgage for itself. This would arise either because the market would not absorb the entire mortgage, or because, to satisfy occasional customers, the guaranty company was compelled to repurchase participation certificates previously sold to investors. But, whatever the cause, the fact remains that when collapse overtook the guaranty companies, there were many mortgages in which the companies held interests, either which had not been previously sold, or which had been reacquired by them. These company held interests aggregated many millions of dollars. At once the claim was made by the representatives of the investors, that where the proceeds of the mortgage were insufficient to pay the entire indebtedness, the interest owned by the guaranty company was subordinate to the certificates held by the public. To sustain this position, reliance was had on a principle of the common law: that when a person assigns a part interest in a chose in action, the assignee is entitled to priority of payment and if the full amount is not collected, the assignee must be paid off first, and the assignor receive only what is left. This principle, established in the days of more simple problems, was the basis of the claim that the certificate holders at large were entitled to priority over the issuing guaranty companies.

This principle of the common law was, however, not as firmly established as those who propounded it asserted. It had, to be sure, been accepted by a number of text writers. Thus, Pomeroy, in his *Equity Jurisprudence,* declared: [2]

> "When the mortgagee assigns one or more of the notes, and retains the remainder of the series, it is generally held that the assignee is entitled to priority of lien as against the mortgagee, with respect to the note or notes so transferred; and this rule operates without regard to the order in which the notes held by the two parties mature."

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[2] POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1203.

Again, Professor Wiltsie, in his work on *Mortgage Foreclosures,* expressed the view that: [3]

> "irrespective of the time of maturity of several notes secured by a mortgage, it may be stated as the general rule, that where a person owning all or several of the notes transfers a less number for value to a third person or persons, retaining some, all transferees are entitled to receive full satisfaction of their notes out of the proceeds of sale before the payment of the notes still owned by the transferror."

And, in Jones on the *Law of Mortgages of Real Property,* the view is expressed that: [4]

> "Where a holder of a mortgage assigns a part of it, although he warrants only the existence of the debt at the time of the transfer, it would be contrary to good faith to permit him, after receiving the money for this part of the claim, to come into competition with his assignee, if the property prove insufficient to pay the claims of both."

The text writers, however, were not unanimous in their views on this subject, and Professor Walsh,[5] in his book on *Mortgages,* expressed a contrary view, holding that the better considered cases give parity to the assignor with his assignee, so that where a part interest in a mortgage or other chose in action is assigned, the proceeds, if not sufficient to pay the claim in full, are divided *pro rata* between the assignor and the assignee.

In examining the decided cases upon which these text writers rely, we find, in veritable fact, a conflict of view. Whereas the largest number of cases appear to support the proposition that the assignee of a part interest in a chose in

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[3] WILTSIE, MORTGAGE FORECLOSURES (4th ed. 1927) p. 374.

[4] JONES, LAW OF MORTGAGES (8th ed. 1928) § 2189. See also 3 TIFFANY, REAL PROPERTY (2d ed. 1920) 2551–2; (1936) 10 TULANE L. REV. 304.

[5] WALSH, MORTGAGES (1st ed. 1934) § 64.

action is entitled to priority over his assignor,[6] in a number of jurisdictions well reasoned cases hold to the contrary.[7]

The New York court had not had frequent occasion to pass upon the point, but in the case of *Fullerton* v. *National B. & T. Ins. Co.*,[8] had declared:

> " * * * the case may be regarded in the aspect most favorable to the appellants, as one where part only of

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[6] Cullum v. Erwin, 4 Ala. 452 (1842); Griggsby v. Hair, 25 Ala. 327 (1854); Alabama Gold Life Ins. Co. *et al.* v. Hall, 58 Ala. 1 (1877) (quoting Cullum v. Erwin, *supra*, with approval); Knight v. Ray, 75 Ala. 383 (1883); Brewer v. Atkeison, 121 Ala. 410, 412, 25 So. 992 (1898); Farmers Savings Bank v. Murphree, 200 Ala. 574, 76 So. 932 (1917); Hand v. Kemp, 207 Ala. 309, 310, 92 So. 897 (1922); Irwin v. Citizens Bank of Hattiesburg, *et al.*, 209 Ala. 211, 95 So. 897 (1923); Collins v. Forman, 230 Ala. 370, 161 So. 238 (1935); North American Life Assurance Co. of Chicago v. Collins, 237 Ala. 17, 185 So. 375 (1938); Kissimmee Everglades Land Co. v. Carr, 88 Fla. 387, 102 So. 335 (1924); McClure v. Century Estates, Inc., 96 Fla. 568, 588, 120 So. 4 (1928); Hall v. University Realty Co., 97 Fla. 639, 121 So. 808 (1929); Miami Oil Co. v. Florida Discount Corp., 102 Fla. 209, 135 So. 845 (1931); Maryland Casualty Co. v. Orr, 109 Fla. 184, 147 So. 271 (1933); Roberts v. Mansfield, 32 Ga. 228 (1860); Berry v. Smith, 97 Ga. 782, 25 S. E. 757 (1895); Berry v. Van Hise, 148 Ga. 27, 95 S. E. 690 (1918); Ottauquechee Sav. Bank, *et al.* v. Elliott, 172 Ga. 656, 158 S. E. 316 (1931); Georgia Realty Co. v. Bank of Covington, 19 Ga. App. 219, 91 S. E. 267 (1917); Kuppenheimer v. Chicago Title & Trust Co., 163 Ill. App. 127 (1911); Robbins v. Slavin, 292 Ill. App. 479 (1937); People's Nat. Bank of Monmouth v. Johnson, 271 Ill. App. 507 (1933); Lake View Trust & Sav. Bank v. Rice, 279 Ill. App. 53B (1935); Wilber v. Buchanan, *et al.*, 85 Ind. 42 (1882); Parkhurst v. Watertown Steam Engine Co., 107 Ind. 594, 8 N. E. 635 (1886); Richardson v. McKim, 20 Kan. 346, 351 (1878); Louisville Title Co.'s Receiver v. Crab Orchard Banking Co. *et al.*, 249 Ky. 736, 61 S. W. (2d) 615 (1933); Dorman *et al.* v. Banker's Trust Co., 259 Ky. 430, 82 S. W. 494 (1935); Meriwether v. New Orleans Real Estate Board, 182 La. 649, 162 So. 208 (1935); Ventriss v. His Creditors, 20 La. Ann. 359 (1868); Barkdull v. Herwig, 30 La. Ann. 618 (1878); Abney & Co. v. Walmsley, 33 La. Ann. 589 (1881); LaPlace v. LaPlace, 43 La. Ann. 284, 8 So. 914 (1891); Gumbel v. Boyer, 46 La. Ann. 1499, 16 So. 465 (1894); Fandal v. Baer, 14 Parish of Orleans App. 117 (La. —); Salzman v. Creditors, 2 Rob. 241 (La. 1842); Bryant v. Damon, 6 Gray 564 (Mass. 1856); Foley v. Rose, 123 Mass. 557 (1877); Anderson v. Sharp, 44 Ohio St. 260, 6 N. E. 900 (1886); Lawson v. Warren, 34 Okla. 94, 124 Pac. 46 (1912); Mothersead v. Wiley, 114 Okla. 105, 243 Pac. 718 (1926); Cannon v. McDaniel, 46 Tex. 303 (1876); Whitehead v. Fisher, 64 Tex. 638 (1885); Douglas v. Blount, 22 Tex. Civ. App. 493, 55 S. W. 526 (1900); McClintic v. Wise's Adm., 25 Grat. 448 (Va. 1874) (the rule in this case has been changed by statute); Jenkins v. Hawkins, 34 W. Va. 799, 12 S. E. 1090 (1891); Thomas v. Linn, 40 W. Va. 122, 135, 20 S. E. 878 (1894).

[7] Dixon v. Clayville, 44 Md. 573 (1875); English v. Carney, 25 Mich. 178 (1875); Wilcox v. Allen, 36 Mich. 160 (1872); Jennings v. Moore, 83 Mich. 231, 47 N. W. 127 (1890); Pugh v. Holt, 27 Miss. 461 (1854); Trustees of Jefferson College v. Prentis, 29 Miss. 46 (1855); Green v. Morris, 117 Miss. 635, 78 So. 550 (1918); Blair v. White, 61 Vt. 110, 17 Atl. 49 (1889); Bartlett v. Wade, 66 Vt. 629, 30 Atl. 4 (1894); Fair v. Hartley, 81 P. (2d) 640 (Utah 1938).

[8] 100 N. Y. 76, 2 N. E. 629 (1885).

> a debt has been assigned, the assignor reserving the other part to itself. In such case it is obvious the parties must either share pro rata in the security, or one must have priority over the other. It seems most reasonable that in the absence of a plain declaration to the contrary, it should be applied first to the payment of that part of the debt which was assigned."

The problem was first squarely presented to the Court of Appeals in a mortgage certificate case, *Title Guarantee and Trust Company* v. *Mortgage Commission of the State of New York*,[9] which resulted from the submission of a controversy upon an agreed statement of facts to the Appellate Division in the first instance. In that case, it became necessary for the court to deal with this principle of law in its bare essentials. The case involved the relative rights of the Title Guarantee and Trust Company in certain mortgages, participations in which had been sold to the public. The Title Guarantee and Trust Company had retained an interest in its mortgages, consisting both of unsold portions of the mortgages and reacquired certificates. The plaintiff had not guaranteed the payment of these certificates, but the payment had been guaranteed by its affiliate, Bond and Mortgage Guarantee Company. The agreed statement of facts was silent with respect to the relationship between the plaintiff and its affiliate.

The Court of Appeals was thus presented with the problem of determining whether it would follow those states in which it had been held that the assignee was entitled to priority, or whether it would follow those states where parity was allowed. The court said:[10]

> "Under the decisions in this State, it appears well established that the owner of a mortgage who assigns a part of it does not, as a matter of law, in the absence of an agreement to the contrary, postpone his interest to that of his assignee."

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[9] 273 N. Y. 415, 7 N. E. (2d) 841 (1937).

[10] *Id.* at 423.

With regard to the above quoted statement from the *Fullerton* case, the Court of Appeals expressed the view that: [11]

> "the statement must be considered in the light of the facts which, as shown by the quotation, involved a trust relationship, a relationship, as a result of which, the assignor was equitably not entitled to enforce his legal claim before full satisfaction of the interest of the vendee."

The implication, of course, was that in the instant case there was no fiduciary relationship between the Title Guarantee and Trust Company and the certificate holders. Considering the weight of authority in other jurisdictions, the Court of Appeals had this to say: [12]

> "An examination of the authorities in other jurisdictions leaves doubt as to just where the weight of authority may rest as between the two rules, one requiring a preference to assignees of a part of a security, the other requiring *pro rata* distribution between an assignor and assignees. Many cases cited as authority for one or the other rule will be found to be based on facts indicating intention for or against preference which makes them of little aid. The States in which it has been asserted that the assignee takes priority are not in accord as to what is to be the basis of priority, in some it being held that assignees take preference according to the due date of the obligations and in others according to the date of the assignments. They are in accord only in holding that where there is an assignment of a part of a security, it is an assignment *pro tanto*."

And finally, the court concluded with these words: [13]

> "We believe that in this State the courts are committed to the proposition that in the absence of an agreement or proven intent to the contrary, the ex-

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[11] *Id.* at 424.
[12] *Id.* at 426.
[13] *Id.* at 428.

istence of a trust relationship or proof of some equitable reason why priority should exist in favor of an assignee, the assignor of part of a mortgaged indebtedness who has not assumed a liability as guarantor is entitled to share *pro rata* with his assignee in the proceeds of insufficient security."

It will be seen from an examination of this statement that the Court of Appeals definitely aligned this State with the views of those jurists who held with the views expressed by Professor Walsh, and those other jurists who had held that the mere assignment of a part interest in a mortgage without more confers upon the assignee no priority over the assignor. To this general rule, there were, however, three exceptions:

1. Where the assignor guaranteed the payment of the debt to the assignee;

2. Where a trust relationship existed between the assignor and the assignee; and

3. Where the agreement between the assignor and the assignee expressly conferred priority upon the latter.

In these three cases, the assignee of a part interest in a chose in action was said to have priority over the assignor. It was not long before an extrapolation of the principles of the *Title Guarantee and Trust Company* case found its way into the opinions of the New York courts dealing with cases arising under one or more of the exceptions. In the main, it may be said that the views found to have been expressed by Mr. Justice Frankenthaler at *nisi prius* have been upheld by the Court of Appeals.

In one of the earliest cases, in which the decision of Mr. Justice Frankenthaler was affirmed without opinion by both the Appellate Division and the Court of Appeals, Mr. Justice Frankenthaler said: [14]

[14] *In re* 545 West End Avenue (Lawyers Mortgage Co.), 157 Misc. 813, 814, 284 N. Y. Supp. 740 (1936), *aff'd without opinion,* 248 App. Div. 715 (1st Dept. 1936), *aff'd without opinion,* 272 N. Y. 554, 4 N. E. (2d) 733 (1936).

> "that the rights of the mortgage company and the certificate holders must be determined in accordance with the terms of the agreement between them. In the instant case this agreement is embodied in the certificate issued by the mortgage company to the investors in this mortgage. Each certificate reads: 'Lawyers Mortgage Company (hereinafter termed 'The Company') in consideration of the sum of
> Dollars, receipt of which is hereby acknowledged, has assigned and transferred and by these presents does assign and transfer unto hereinafter termed 'The Assured', an undivided share or interest to the extent of said principal sum in a certain Bond of , * * * and Mortgage securing said Bond made by to Lawyers Mortgage Company recorded,' etc."

It should be noted that this opinion of Mr. Justice Frankenthaler was written before the decision of the Court of Appeals in the *Title Guarantee and Trust Company* case. With prophetic anticipation, the learned Justice concluded: [15]

> "In the instant case there is no affirmative evidence of an intent that the shares retained shall share *pro rata* with those assigned."

He accordingly decreed that the certificate holders had priority over the mortgage company. The same conclusion was reached by the court in *Matter of New York Title & Mortgage Co. (Series FW-1)*,[16] decided at the same time, and likewise affirmed without opinion by the Appellate Division and the Court of Appeals.

So much stress had been placed by the courts, both at Special Term and on appeal, upon the precise words of the certificate which constituted the agreement between the mort-

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[15] *Id.* at 815.

[16] 155 Misc. 651, 280 N. Y. Supp. 745 (1935), *reargument*, 157 Misc. 271, 283 N. Y. Supp. 553 (1935), *aff'd without opinion*, 248 App. Div. 715 (1st Dept. 1936), *motion for leave to appeal granted*, 248 App. Div. 815 (1st Dept. 1936), *aff'd without opinion*, 272 N. Y. 556, 4 N. E. (2d) 734 (1936), *motion for reargument denied*, 275 N. Y. 531, 11 N. E. (2d) 733 (1937).

gage company and the certificate holder, that a multiplicity of cases were presented to the courts seeking an interpretation of the meaning of individual certificates.[17] On the one

[17] Lawyers Mortgage Co. (Simon Borg), 151 Misc. 744, 272 N. Y. Supp. 390 (1934), *aff'd,* 242 App. Div. 617 (1st Dept. 1934); Lawyers Title & Guaranty Co. (5101–5113—13th Avenue, Brooklyn), N. Y. L. J., July 17, 1935, p. 168, col. 7; Lawyers Mortgage Co. (1254 Sherman Avenue), N. Y. L. J., July 20, 1935, p. 207, col. 4; National Mortgage Corp. (Series NM), N. Y. L. J., Nov. 16, 1935, p. 1890, col. 4, N. Y. L. J., Nov. 20, 1936, p. 1776, col. 4; Lawyers Title & Guaranty Co. (236 West 70th Street), 157 Misc. 516, 294 N. Y. Supp. 208 (1935), 164 Misc. 292, 298 N. Y. Supp. 666 (1937); Lawyers Westchester Mortgage & Title Co. (Matter of Hill, Series No. 6-6481), N. Y. L. J., Feb. 28, 1936, p. 1056, col. 2; New York Title & Mortgage Co. (Series B-11), N. Y. L. J., March 12, 1936, p. 1277, col. 1; New York Title & Mortgage Co. (Series N-9; 310 West 85th Street), N. Y. L. J., March 13, 1936, p. 1299, col. 2, *rev'd on reargument,* 163 Misc. 196, 296 N. Y. Supp. 273 (1936); Lawyers Mortgage Co. (30 Clarke Place), N. Y. L. J., April 28, 1936, p. 2156, col. 1, N. Y. L. J., Nov. 6, 1936, p. 1554, col. 3; People *ex rel.* Van Schaick, Matter of Frisch, N. Y. L. J., June 5, 1936, p. 2879, col. 1; New York Title & Mortgage Co. (Series F), 163 Misc. 37, 296 N. Y. Supp. 557 (1937), *reargument,* N. Y. L. J., March 10, 1937, p. 1224, col. 5; New York Title & Mortgage Co. (Series A-1), N. Y. L. J., Oct. 26, 1936, p. 1370, col. 3; Lawyers Mortgage Co. (1823–31 White Plains Rd.), N. Y. L. J., Nov. 5, 1936, p. 1530, col. 2, *reargument,* Nov. 15, 1936, p. 1858, col. 2; Lawyers Title & Guaranty Co. (465 Ocean Avenue), 162 Misc. 184, 294 N. Y. Supp. 397 (1937); Bond & Mortgage Guarantee Co. (Guar. No. 210669, 200 Marcy Place), 253 App. Div. 876 (1st Dept. 1938), *motion for leave to appeal to Court of Appeals denied,* 254 App. Div. 656 (1st Dept. 1938); Lawyers Mortgage Co. (1158 Boynton Ave.), N. Y. L. J., Feb. 17, 1937, p. 824, col. 5; Lawyers Mortgage Co. (1235 Stratford Ave.), N. Y. L. J., Feb. 20, 1937, p. 893, col. 6; New York Title & Mortgage Co. (381–3 Park Ave.), 163 Misc. 318, 296 N. Y. Supp. 644 (1937), *aff'd,* 254 App. Div. 722 (1st Dept. 1938); New York Title & Mortgage Co. (Series F-1), N. Y. L. J., March 11, 1937, p. 1224, col. 6; New York Title & Mortgage Co. (Series C), N. Y. L. J., March 11, 1937, p. 1224, col. 6; Lawyers Mortgage Co. (3169–75 Grand Blvd.), N. Y. L. J., March 27, 1937, p. 1520, col. 5; New York Title & Mortgage Co. (Series B-1), 163 Misc. 42, 296 N. Y. Supp. 550 (1937); New York Title & Mortgage Co. (Series C-3), N. Y. L. J., April 12, 1937, p. 1814, col. 1; New York Title & Mortgage Co. (Series F-1; C), N. Y. L. J., May 12, 1937, p. 2385, col. 1; New York Title & Mortgage Co. (Series Q-1), N. Y. L. J., June 11, 1937, p. 2947, col. 3; New York Title & Mortgage Co. (Series C-3), 166 Misc. 147, 2 N. Y. S. (2d) 154 (1938); Lawyers Mortgage Co. (1470 Midlan Avenue), N. Y. L. J., Aug. 7, 1937, p. 344, col. 5; Lawyers Title & Guaranty Co. (Forshay), 169 Misc. 266, 7 N. Y. S. (2d) 354 (1938), *aff'd,* 254 App. Div. 653 (1st Dept. 1938), *motion for leave to appeal to Court of Appeals denied,* 254 App. Div. 675 (2d Dept. 1938), *motion for leave to appeal to Court of Appeals granted by Court of Appeals,* N. Y. L. J., July 8, 1938, p. 65, col. 4, *aff'd without opinion,* 279 N. Y. 571 (1938); Bond & Mortgage Guarantee Co. (223 Second Avenue), 169 Misc. 196, 7 N. Y. S. (2d) 254 (1938), *aff'd,* 255 App. Div. 765 (1st Dept. 1938); State Title & Mortgage Co. (25–61—43rd Street, L. I. C.), N. Y. L. J., Nov. 13, 1937, p. 1630, col. 7; Lawyers Title & Guaranty Co. (Chase Nat. Bank, Matter of Mortgage Commission), 165 Misc. 590, 1 N. Y. S. (2d) 264 (1937); National Mortgage Co. (1601–5 Atlantic Avenue), N. Y. L. J., Jan. 13, 1938, p. 190, col. 6; Home Title Ins. Co. (Matter of Mortgage Commission, 1259 East 13th Street, Bklyn.), N. Y. L. J., March 12, 1938, p. 1047, col. 6, *aff'd,* 255 App. Div. 635 (2d Dept. 1938); Lawyers Title & Guaranty Co. (1189 Cromwell Avenue), N. Y. L. J., April 1, 1938, p. 1581, col. 1; Lawyers Mortgage

hand, the rehabilitator of the mortgage companies, as representative of all of their creditors, was steadfastly attempting to urge upon the court that the express language of the certificates rendered it necessary to hold that the mortgage company was entitled to parity; on the other hand, the Mortgage Commission and the trustees for the certificate holders were, with equal steadfastness, attempting to interpret the language of these certificates to show that there had been no express reservation of parity on the part of the mortgage companies and that, therefore, under the rule of the *Title Guarantee and Trust Company* case, the certificate holders were entitled to priority. Here, as elsewhere, in the problem of interpretation of the language of contracts, the courts were in actual fact being called upon to determine the meaning of language when applied to a state of facts which was not present to the minds of the contracting parties when the contract was initially drawn. As in so many other cases, the courts found themselves stepping warily in order to avoid passing from the realm of interpretation into that of creation and, as we shall see, they did not invariably achieve complete success.

In order to demonstrate the pitfalls to which the court was exposed, it is only necessary to compare the decision of the Court of Appeals in *Matter of The Title and Mortgage Guaranty Company of Sullivan County (Series S-2)*[18] and *Matter of New York Title and Mortgage Company (Series C-2)*.[19] In both cases, the problem was the one we are al-

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Co. (Matter of Mortgage Commission), 168 Misc. 810, 6 N. Y. S. (2d) 605 (1938); Guaranteed Mortgage Co. of N. Y. (80 Riverside Drive), N. Y. L. J., May 24, 1938, p. 2509, col. 4; Lawyers Mortgage Co. (Matter of Mortgage Commission), 168 Misc. 762, 6 N. Y. S. (2d) 605 (1938), *aff'd*, 255 App. Div. 840, 8 N. Y. S. (2d) 661 (1st Dept. 1938); Union Guarantee & Mortgage Co. (165 Bennett Ave.), N. Y. L. J., Dec. 15, 1938, p. 2155, col. 1; Bond & Mortgage Guarantee Co. (327–333 East 57 St.), N. Y. L. J., March 13, 1939, p. 1152, col. 2; Lawyers Mortgage Co. (Mort. No. 51179), N. Y. L. J., May 8, 1939, p. 2120, col. 6; New York Title & Mortgage Co. (Series C-2, 383 Park Ave.), N. Y. L. J., May 24, 1939, p. 2390, col. 6; Lawyers Mortgage Co. (731–735 West 183 St.), N. Y. L. J., May 24, 1939, p. 2390, col. 6; Lawyers Title & Guaranty Co. (Pink v. Thomas), N. Y. L. J., July 17, 1939, p. 127, col. 1, *aff'd*, 257 App. Div. 354 (1st Dept. 1939); Union Guarantee & Mortgage Co. (3110–12 Wilkinson Ave.), N. Y. L. J., June 14, 1939, p. 2747, col. 7; National Mortgage Co. (209–19 Monroe St.), N. Y. L. J., June 30, 1939, p. 3022, col. 1.

[18] 275 N. Y. 347, 9 N. E. (2d) 957 (1937).

[19] 278 N. Y. 488, 15 N. E. (2d) 430 (1938), *motion for reargument denied*, 278 N. Y. 718, 17 N. E. (2d) 138 (1938).

ready familiar with, of determining whether the certificate holders were entitled to priority over the mortgage company in the insufficient proceeds of the mortgage. In both cases, the interpretation depended upon the precise meaning of the contract which was contained in the certificate. In both cases, the court at Special Term had held that the certificate holders were entitled to priority. Yet the Court of Appeals distinguished the two cases from each other and awarded priority to the certificate holders in the S-2 decision and parity to the mortgage company in the C-2 decision. In order to form an opinion with respect to the soundness of either of these two cases, it will be necessary to compare the two contracts that were before the court.

| *Relevant Provisions of Certificate in Series S-2* | *Relevant Provisions of Certificate in Series C-2* |
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| 1. "The Company guarantees to the holder, the successors, legal representatives and assigns of the holder, hereby and by the policy aforesaid, payment of the principal and interest of this certificate at the times hereinabove stated * * *." | 1. "That there shall be no preference or priority in favor of any share in the deposited bonds and mortgages, * * *." |
| 2. " * * * this certificate shall be a coordinate lien with all other certificates of said mortgage now or hereafter issued and any share retained by the Company". | 2. "The Company guarantees to the registered holder hereof payment of the principal sum hereby secured, * * * and any interest at the rate aforesaid * * *." |
| 3. " * * * the Company shall have the right without expense to the holder hereof to collect the amount so due, and out of the proceeds of such collection to retain so much as may remain after paying to the holder hereof whatever may be due to such | 3. "The Company may be the holder or owner or pledgee of one or more of said certificates." |

| *Relevant Provisions of Certificate in Series S-2* | *Relevant Provisions of Certificate in Series C-2* |
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| holder of principal and interest on this certificate as herein provided." | |
| 4. "In the event of the payment of a part of said principal sum secured by said mortgage, the Company shall have the right to retire any certificates to an equivalent amount or to hold the amount so paid for the benefit of the holders of the certificates of said mortgage." | 4. "There shall be no preference or priority in favor of any share in the deposited bonds and mortgages * * * or of any certificate of interest representing the same, as against any other share or certificate, whether held by the Title & Mortgage Company or whether held by any other holder, but each share shall participate equally with any other share with the deposited bonds and mortgages * * * and the proceeds thereof, save as otherwise provided in said certificates." |
| | 5. "The Company guarantees to the holder hereof the payment of the principal and interest of the deposited bonds and mortgages * * * to an extent sufficient to pay the principal and interest of all certificates issued under said agreement." |

It will be seen from a comparison of the provisions of the contracts in the S-2 case with those of the C-2 case that both contracts result in conflicting inferences. In each contract there are provisions which seem to imply that parity between the mortgage company and the certificate holders was intended. On the other hand, each of the contracts also

contains provisions from which a contrary inference must be drawn.

Thus, in S-2, there is, first of all, the provision for guaranty which, under the rules above stated, would imply priority for the certificate holders. Then there is provision number 2, from which one could easily infer that parity for the mortgage company was intended, as it is expressly stated that all the certificates shall be of coordinate lien regardless of whether they are publicly held or retained by the company. At the same time, provision 3 seems to impose an obligation on the company to pay the certificate holders before they realize any funds for themselves; and the same may be said about provision 4.

In the C-2 case, a similar difference of interpretation will flow from several of the paragraphs. Thus, paragraph 1 would seem to imply that the parties intend parity. On the other hand, as stated in the *Title Guarantee and Trust Company* case, the inference from the guaranty provided in paragraph 2 would lead to the conclusion that priority for the certificate holders over the mortgage company was intended. Again, paragraph 5, as was strongly urged by Professor Michael F. Dee, would lead inevitably to the conclusion that the parties intended payment to be made to the certificate holders out of the mortgages deposited as collateral for them before any payment could be realized by the company. On the other hand, paragraph 4 gives the contrary implication, as, indeed, does paragraph 3.

Faced with this duality of meaning and interpretation flowing from different paragraphs in the same contract, the Court of Appeals had held, in the S-2 case, that the certificate holders were entitled to priority, but in the C-2 case, that the company was entitled to parity. It is difficult, on strictly logical grounds, to sustain the difference in decision in these two cases, but it is not unknown in the history of the common law that courts of last resort have felt that a line of decisions, having gone too far in one direction, needs to be arrested in order to prevent radical applications of fundamental principles and to preserve the elements of primary doctrine.

There are a number of situations in which the Court of

Appeals has not yet interpreted the precise language of the contract. Nor has there been any definitive determination of a proposed distinction between the position of the mortgage company with respect to an unsold portion of a mortgage and with respect to a repurchased portion of a mortgage.[20] As to these matters, final determination lies in the future.

In spite of the vast importance of these decisions to many hundreds of thousands of certificate holders, involving millions of dollars of their funds, the history of this doctrine portends more for the future than it does for the past. In the first place, it renews confidence in the orderly development of the common law and in its ability to meet new conditions as they arise. It titivates our courage as we face the legal problems of the future. Again, these decisions are another illustration of what the law students are apt to overlook in the busy necessity of assimilating first principles, *viz.,* that behind every decision of the courts stand the social and economic forces of the day. It is in the background of these problems and their solution that the court molds the principles of the common law to meet the exigencies of each moment as they arise. And finally, from this small bud in the forest of legal rules and principles, we gather renewed realization that the better rule emerges in that system of law where each of the claimants presses his interest to the utmost and an impartial tribunal is empowered to weigh and evaluate the differences between them and to accord the maximum satisfaction to each.

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[20] Pink v. Thomas, 257 App. Div. 354 (1st Dept. 1939).