ORAL ARGUMENT - 09/06/95
95-0052
BENCHMARK BANK V. CROWDER

LOVE: Good morning your honors. We are truly honored to be here today. My name is Roland Love of the law firm of McCauley, MacDonald, Love & Devin in Dallas. Mr. Trent Gudgel is also with that firm and my colleague. As rookies to this process you can see that we have elected to try to split the argument. We are not married to that. And certainly we will answer questions of the court and present the arguments as time permits.

Initially your honors I want to present to the court basically a restatement of what occurred. The property involved is Frank and Marion Crowder's homestead. There is no issue as to that. The Crowder's operated a small insurance agency with Mr. Frank Crowder as the licensed recording agent. That agency was incorporated in 1983.

SPECTOR: When the original loan was made, the bank knew it was a homestead?

LOVE: Yes, there is no question that the property was homestead.

SPECTOR: At the time of the original loan?

LOVE: Yes.

SPECTOR: And do the papers reflect the Crowder's acknowledging that it was their homestead?

LOVE: The loan file is replete with references to the fact that it was homestead. It is indicated as their address. I don't think there is any issue in this case but that all parties knew that this was the Crowder's homestead.

SPECTOR: So when the loan was made it was clear to the bank that they were lending money...

LOVE: Secured by the homestead of the Crowder's. Yes, your honor. I do not believe that there is any issue as to that in this case. There was notices of tax lien of record as to all property owned by Frank Crowder. Also notices of record of lien as to all property owned by Frank Crowder Insurance Agency, Inc.

SPECTOR: But not property taxes?

LOVE: These were payroll taxes: 940 and 941 taxes. As in the Roger's case, which I am going to get to, it is a federal tax. The Rogers case was a wagering tax; Ingram was a income and a 940 Tax. So taxes under the federal system once that lien is filed attach to all the property interest of the taxpayer. I don't believe that that is an issue here either. I think all parties agree these were 940, 941 payroll taxes for the insurance agency.

As I said Frank Crowder was the sole director; sole shareholder; was the president of the corporation. Marion Crowder was the acting corporate secretary. Mr. Fossee has advised me that one of the exhibits that I handed the court today says that she was the corporate secretary. I do mean to mislead the court. The request for admission 21 was that Marion Crowder was the acting corporate

secretary. The Crowders have always contended that Mrs. Crowder could not be a corporate secretary because she was not a licensed agent.

HECHT: Well to clear it up, you don't contend that she was an officer of the corporation?

LOVE: Yes, we do contend that she was an officer of the corporation simply because there is a law in the insurance code that says an agent that to be an officer he must be an agent, doesn't mean that the corporation was set up with Marion Crowder as its secretary of the corporation. In the record she was the acting corporate secretary of the corporation.

HECHT: And that's the evidence?

LOVE: Yes, your honor. The corporate privileges were lost many times, but particularly ones of reference here are in 1985 when the secretary of state of Texas forfeited the charter of the corporation, and those were not revived until June. During that period there were taxes that were not paid. There were also liens assessed. Somewhere in mid 1985, without resignation Marion Crowder quit working with the corporation, had some illness, and began to stay at home. But under the facts of these cases they should not be determinative of what this court is looking at today. Tax liens were assessed and filed of record as to Frank Crowder and as to the corporation. Both Frank and Marion borrowed money from the bank to payoff the lien held by the IRS. The IRS set the number that was required to payoff the lien, and then of record released those liens. They defaulted on the loan to the bank. They did not tender any money. They did not object to any foreclosure. They did not request any segregation of assets between exempt and nonexempt. Why that becomes relevant here your honors is because there was .85 acres in excess of the urban exemption for homestead. It was a 1.85 acre tract.

The Crowder's filed suit to declare the lien invalid for wrongful foreclosure, and claiming that there was a breach of the deed of trust in the prior sale because the IRS would have had to proceed under judicial foreclosure, and the deed of trust gave them nonjudicial foreclosure privileges.

The district court found that the deed of trust lien was valid. The CA found that the lien was valid, but that it only remained in the hands of the IRS that the bank could not be subrogated to that lien, and that a deed of trust lienholder was subject to the same requirements as a judgment creditor and had to segregate exempt from nonexempt assets before foreclosure. A situation which requires a deed of trust lienholder to be somewhat clairvoyant and would upset foreclosure law in this state.

Our outline of argument is as handed to the court. I think time permitting your honors, the main points that this court needs to address today is the opinion of this court of appeals which finds that there can be no subrogation to a federal tax lien; and then that the deed of trust lienholder must segregate exempt from nonexempt and _____ foreclosure on its lien.

ENOCH: Mr. Love this does not...the IRS didn't transfer this lien to the bank did it?

LOVE: There is no formal transfer documents. The IRS provided the payoff number, filed certificates releasing the liens, that is the only written documentation that accompanies.

ENOCH: Is there any question in this case about when the IRS releases...I mean being subrogated to a lien that has been released; does that pose a problem?

LOVE: Under the principles there is two types of subrogation present here your honor. Under equitable subrogation there would be subrogation when one who has an interest steps forward to payoff the debt of the debtor. That's the American Surety v. NB Ice Cream case, which the Commission

of Appeals has already decided in this state, where corporate income taxes were paid off and the surety was subrogated to the federal government's tax lien in that situation. There was also contractual subrogation whereby the deed of trust, the Crowders agreed that the bank would be subrogated to any liens that were paid off or any encumbrances upon the property that were paid off out of the proceeds of the loan. And that is exactly what happened. All of these loan proceeds went to the IRS to payoff the taxes against the Crowders.

Under the decision as it exists now the only thing a taxpayer can do if he can't pay his taxes is to await foreclosure by the IRS.

SPECTOR: Has the legislature changed that?

LOVE: Your honor the Texas legislature has passed a bill to put out for vote to the public...

SPECTOR: Constitutional amendment?

LOVE: ...constitutional amendment.

SPECTOR: That would allow what you are seeking?

LOVE: Yes. And the legislative history in that is very clear, that the reason for that is this very case. Because the legislature has seen this opinion and has shut down lending within the state an inability of a homeowner to protect his homestead from the IRS tax lien. It also does not say whether it will be retroactive, and it doesn't deal with potentially a situation here where you have an innocent spouse argued by Marion Crowder. The legislation which is pending deals with a tax debt of both spouses. We contend that it was a tax debt of both spouses. But certainly under Rogers in 74.03, there was a lien as to the entire homestead. And the only way to protect that homestead was to borrow money to payoff the tax lien. This was the only way the Crowders could remain in that home that they had had for some 20 years as they contend in the record.

Under the present decision all the Crowders could have done is wait for the IRS to take the property by foreclosure, hope a party doesn't buy it, hope the IRS ends up with it, and hope that they can buy it back and try to create a purchase money lien in that manner. It is illogical. It's a game full of chances, and it runs contrary to the law already existing in this state as exemplified by Staley v. Vaughn out of the CA in Amarillo. In that case Mr. Vaughn had paid off the tax lien, took the note and deed of trust, the taxes were only owned by Cletius Staley in that case. Her husband C.R. Staley signed on the deed of trust. The court found that Mr. Vaughn was subrogated to the federal tax lien in that situation, and that his foreclosure was valid. Staley v. Vaughn is precedent this court writ refused, no reversible error and that situation has been the law of this state for many, many years.

And to distinguish between subrogation as to whether or not it's a state government entity or whether it is a federal gov't entity lies in the face of the supremacy clause in the US Constitution. And also article 1, §1 of our constitution of the state of Texas in which we say that the Texas state constitution is subjected to the US Constitution. Then art. 6, clause 2 of the supremacy clause it doesn't say that this is a right of a sovereign. It says the laws of the United States will be superior to the laws of the states. And in Rogers the US SC so found.

HECHT: If the bank is subrogated to the lien, and there were not a deed of trust would the bank have any greater enforcement rights than the US?

LOVE: Your honor, no it would not. If it is equitably subrogated it steps into the shoes of

the IRS.

HECHT: How does the deed of trust in this case give the bank greater rights if the homestead owner could not have agreed to those absent the tax lien?

LOVE: Your honor I must disagree with one part of your question is that the homeowners could agree to those. What the constitution says is that their property is exempt from forced sale for anything but the three instances: one, including ad valorem taxes. As set out by this court in Matacheck v. Borcheck, and additionally followed in Crytag by the 5th Circuit. Crytag is a bankruptcy case, 155 Bankruptcy 150, and then again in Smart and Diversified. In Diversified there was a vendor's lien which required judicial foreclosure. The court found subrogation, and said that the deed of trust prescribed new terms and conditions for foreclosure of the lien. Our constitution doesn't deal with terms and conditions for foreclosure of the lien. Diversified allowed a nonjudicial foreclosure right to be contractually and privately agreed. Again in the Smart case this court here has said that the deed of trust can prescribe new terms and conditions for foreclosure of the lien. Subrogation is to the security. It permits the debt to be secured by the security, by the lien. The lien is unchanged. These people's position did not change visa vis the lien and their property interest.

HECHT: But these people could not give the bank a lien in the first place absent the tax lien; how can they agree to greater enforcement rights?

LOVE: Because there is no prohibition as a matter of contract between you and me if we have a debt when I renew or extend or otherwise need to revisit that debt we can agree to new rights as between us by a matter of contract as to whether or not how we are going to foreclose that interest. In fact the rights were in some ways expanded. The Internal Revenue Code is a 10 day notice for levy. Under this agreement it became 21 days notice. There was a right to payoff. You can change or change the terms and conditions and deal with how we are going to foreclose on that lien.

The federal tax law created the lien. Be it the supremacy clause in spite of what the Texas constitution says, the federal tax laws created the lien. The bank becomes subrogated to that lien when it pays off that internal tax obligation.

SPECTOR: Without the lien is it your position that a debtor can come to the bank, ask for a loan to pay...you know on April 14 they want to pay their income tax, and they give a deed of trust and that's...

LOVE: They could not do that your honor. It's just the same thing as a mechanic's lien. If I want to go improve my home without the conditions prescribed by the constitution I have to have myself and my wife sign, there has to be a written agreement, it has to be before work commences. In order to have this subrogation to that federal tax lien, created by the federal tax laws, there needed to have been a lien created under those federal tax laws. In this case there was a lien assessed and created. There was even notices filed of the lien. And the lien was as to Frank Crowder and as to Frank Crowder Insurance Agency, Inc.

SPECTOR: And that's in the loan papers as well?

LOVE: The only loan papers here your honor are a note and deed of trust signed by Mary Ann Crowder and Frank Crowder for $52,000 securing the note with their homestead. In the closing file there is a payoff number provided by the IRS and the check written to the IRS to payoff the debt, and subsequently the release of liens of record by the IRS.

Your honor in closing I want to briefly point out to the court, the court needs to understand the right of the individual to restructure his note, the ability to change the payment terms, the ability to change the kind of notice I am going to get. The ability as in Matacheck to turn an obligation for comfort and aid into a monetary amount. Or in Freitag to change the payment structure, to change the interest rate. In Smart they prescribed or in Diversified they turned it in from a judicial foreclosure on the vendor's lien into a nonjudicial foreclosure on the deed of trust lien. Those are not part of what this constitution talks about. Our constitution talks about protection from forced sale.

GONZALEZ: Mr. Love before you sit down. Staley v. Vaughn is not cited by the CA.

LOVE: The CA completely ignored precedent in Staley v. Vaughn.

GONZALEZ: Was Staley v. Vaughn argued and part of the briefing before the CA?

LOVE: Yes, your honor. It was presented to the court and the briefs it was part of the oral argument. And the opinion of the court makes no reference to Staley v. Vaughn.

* * * * * * * * * *

GONZALEZ: Counsel, why isn't Staley v. Vaughn dispositive of this case?

LAWYER: Staley v. Vaughn is light years away from this case. Staley v. Vaughn was decided I think in 1932. The last time...to read the briefs in this case I understand you might think it's the Marberry v. Madison a Texas Jurisprudence. It is simply not. The last time it was ever cited by any court in this state or anywhere else was 46 years ago. The only proposition for which Staley v. Vaughn has ever been decided is for the fact that the supremacy clause allows the United States gov't to get a lien against a homestead. Not that a private party can acquire that lien by way of subrogation. That issue was never joined in Staley v. Vaughn. It was not the point of contention there. It was addressed tangentially in a very glancing way, and a very cryptic way and certainly it was dicta in light of the holding of Staley v. Vaughn. Now in fact to read the briefs for example the Texas Land Title Assn amicus brief says that lenders of all kind corporate and individual, public and private, have been willing to furnish funds to homestead owners to avoid foreclosure of validly existing federal tax liens by taking security of the homestead property under the principles of subrogation honored in Staley v. Vaughn.

Staley v. Vaughn was not breached by Benchmark Bank at the trial court where there was the Crowder's motion for summary judgment and the bank's cross motion. They stumbled upon that case and I think they did stumble upon it. It's an obscure case only in the briefing at the CA. And I think the CA overlooked it for that reason.

Now there are some significant fact differences also in Staley v. Vaughn. _____ Staley owned the property as her separate property. She owned the whole thing - Ms. Staley. Now, yes, as Mr. Love said her husband signed the deed of trust, but the CA in Staley v. Vaughn said that was pro forma. It is undisputed in that case that she owned the whole thing. Quite the opposite situation from this case.

The constitution of Texas says: "No deed of trust on the homestead shall ever be valid except for the purchase money, or improvements." Now what the bank's contention is is that the law under Staley has always been different. That's not true. It never has been different. Moreover, we submit it should not be different as a matter of constitutional law and sound policy, and ever if it were different, even if one could acquire by way of subrogation a federal tax lien to foreclose on a homestead in this case on this record with these facts the bank's foreclosure is still wrongful because it had many deficiencies.

Most egregiously the bank had absolutely no lien rights against Marion Crowder because the IRS did not.

ENOCH: The IRS lien filed against Mr. Crowder would not have attached to real estate owned jointly between Mr. Crowder and Mrs. Crowder?

LAWYER: Well that's precisely right your honor. And I want to show you what the tax lien says and I want to remind you of what §74.03 says, which is attached is an appendix to our brief: "The federal tax liens each and everyone of them filed in this case, and I apologize I know this was minuscule to you, but this is in the record, it says: Notice is given that taxes have been assessed against the following named tax payer. It is always Frank Crowder or his corporation. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer.

ENOCH: And it's your position that...therefore that lien does not attach to any property owned jointly by Crowder against anybody else?

LAWYER: Absolutely not, and that's what the US SC recognized in United States v. Roger. This lien attached to Frank's community property interest in the homestead. In Rogers the court recognized that the innocent spouse has a vested community property estate. And it made a distinction between a forced sale and collection. It said you may force the sale of the homestead including the innocent spouse's interest. But you may not collect from the innocent spouse. Here of course the bank forced the sale and even assuming subrogation were allowed it forced the sale and it collected from the innocent spouse. I think that the word property is thrown around in this case very loosely. Property does not just mean the entire real estate. It means usually in these tax liens it means Frank Crowder's community interest. And in United States v. Rogers a SC case, that rose under Texas law, is very clear about that.

ENOCH: Is there some judgment here that you are appealing from of a monetary amount against Ms. Crowder?

LAWYER: No, your honor. The posture of this case is that at trial court we sued for wrongful foreclosure after eviction from the property. We lost at the trial court on cross motion for summary judgment. The CA reversed. It said the foreclosure in essence was wrongful.

ENOCH: I misunderstood. I thought you said Rogers stood for the proposition that you could take the property from the joint owner personal but you can't collect money from them or something. And you are saying that's what happened here?

LAWYER: That's what happened here. The bank collected all $52,141.51 of its debt plus a little trustee's fees, etc. It collected it by taking the entire property and bidding in the amount of the debt against it. It did not then as Rogers requires it to as §74.03 of the 26 USC requires it to, pay Marion Crowder, compensate her for her interest in the property. Those cases and that statute explicitly require compensation for the innocent spouse. You may force a sale of property that she owns an interest in, but you may not then collect...

ENOCH: That's your argument, the property was really worth more than what the bank bid in for it?

LAWYER: No doubt about that. By a long shot. It's own expert says $365,000.

CORNYN: Counsel the purpose of this constitutional protection is to protect the debtor I presume. Do you agree with that?

LAWYER: I certainly do.

CORNYN: And what holding would best afford the protection to the debtor one that would disallow any loan from a bank and that lien to attach or be subrogated to the IRS lien, or one that would as your opposing counsel says require them to just let the IRS foreclose?

LAWYER: Your honor that's a good question. I think my answer is this, that if this court, I think this court should hesitate to create a constitutional exception. Because the legislature right now is addressing it. But even were this court inclined to do so, I believe that to create an exception that would allow a private party to be subrogated to the rights of the government and then not have constraints similar to what the gov't has, is simply wrong. It is simply wrong. It hurts homestead claimants.

Remember in this case, the property was...if the IRS had foreclosed, if the IRS had done it, then it would have had to go to federal district court. There would have been an equitable proceeding, a judicially supervised sale. The first thing the court would have decided was whether to allow any sale, any forced sale of the property in the first place in view of the innocent spouse problem. And it would have weighed Marion Crowder's interest in the property, it would have weighed the possibility of under-compensation and dislocation costs, and it would have looked at other equitable factors. For example in this case the bank had .85 acres, which is a sizable lot, even by North Dallas standards your honors; .85 acres it could have gone after, it didn't. It went for the whole thing. Certainly if the court had allowed a foreclosure, if the federal district court had allowed the IRS to foreclose there would have been payment to Marion Crowder based on an actuarial calculation that the Roger's case prescribes, and that subsequently cases have adopted of the value of her community property in that homestead.

At a minimum there ought to be some court supervised foreclosure procedure designed to assure that people in their 60s like the Crowders are not suddenly wiped out of their entire retirement equity savings and their homesteads. That at a minimum ought to be done.

HECHT: That can only be argued I take it by analogy because the actual restrictions of the Code could not be literally enforced? You couldn't bring suit in federal court?

LAWYER: Correct.

HECHT: Federal court wouldn't have jurisdiction?

LAWYER: It would not. This court would have to fashion...this is one of the problems of this subrogation argument. You have a statute that contemplates action by a federal sovereign. And what you are now going to try and do is create a state overlay for it if you want to create this right. But I think the only way to do that and honor the homestead protection that this court has recognized for 150 years would be to create some state court procedure that is similar, that offers some sort of protection to the homestead claimant.

HECHT: If that is the result where does that leave the case?

LAWYER: If that is the result your honor that leaves the case I think that leaves it affirmed for the following reasons. Even if you were inclined to create such a right remember the subrogee, the extent of his rights and the measure of his remedies as measured by what the subrogor has. That is black letter law. Black letter Texas subrogation law. What right did the IRS have in this case? It had the right to collect for the value of the property in interest that are actually liable for the debt. It says that at 461 US 691. That's United States v. Rogers. The IRS the court said: We know this is a drastic remedy to go after an innocent spouse. But remember the IRS can collect. The IRS may not ultimately collect as satisfaction

for the indebtedness owed to it more than the value of the property interest that are actually liable for that debt. That's not a new principle by the way. This court exactly 100 years ago in Fairs v. Cockrell said precisely the same thing.

Okay so what could the IRS collect out of this property just from Frank Crowder? From Frank Crowder he was personally liable for $9,000 the day the loan proceeds were advanced. The IRS got a lien to the extent of $9,000 in his homestead. Now there was also a $27,000 penalty assessment against him as a person responsible for making sure that these payroll taxes were withheld. Could that ever be acquired by way of subrogation? Let's assume for a moment it could be. Let's just assume it. Nine plus 27 doesn't get you to 52.

ENOCH: But doesn't that ignore the responsible person provision?

LAWYER: For liability to attach, for a federal tax lien in _____ to attach, the cases are clear: there has to be notice to taxpayer, and a demand for payment. The fact that hypothetically, possibly we disagree. We don't think the facts are there. But even if they were, the IRS never sent Marion Crowder a notice. It never demanded that she pay. The statute says it must give notice in demand.

ENOCH: I thought you were talking about what Frank Crowder individually was liable for. So I am making my reference to Frank Crowder. Wouldn't he as a responsible person be liable for the total amount of that tax lien individually?

LAWYER: No, your honor he is not. And the reason is the taxes that were owed by the corporation have 3 components; he's liable for two of them. Not three of them. There is the employee share of withholding; the employer's share; and then the social security taxes. The employer is liable for the trust fund part, which is the social security taxes and the employee share of the withholding. But not the employer's share. So it is always less, the penalty assessment is always less than the total tax obligation.

Yes, by the way, the bank was subrogated. It was subrogated to the rights the IRS had against the corporation. But it wasn't interested in those rights. It wanted this homestead.

The point I think is that possibly the IRS had some $36,000 or $37,000 it could collect. The bank collected $54,000. Possibly the IRS had a lien against the homestead interest of Frank Crowder. The IRS had no lien, no lien against any community property interest of Marion Crowder in the homestead. It would have had to compensate her to pay her had it foreclosed.

I think that if this court were to examine only a few cases, so many cases have been cited by everyone, but if you only look at a few in my mind anyway the two crucial ones would be The United States v. Rogers case. We have talked about that. You can read Staley v. Vaughn by the way and if you understand it any better than I do, then possibly some enlightment may yet come from Staley v. Vaughn. But I think The United States v. Rogers is clearly a seminal case. It's the 1982 US SC case. But I think also very instructive is the case of Paddock v. Seaman(?). Paddock v. Seaman decided by this court in 1949 and cited by both parties. There this Texas SC said that the foreclosure decree...there was a foreclosure decree because a husband had failed to pay some federal taxes that were due. And the court decreed foreclosure on the homestead property even though there was an innocent spouse. And the Texas SC said, "No, we are invalidating that foreclosure because there is an innocent spouse." The rights of the IRS can only go to the culpable spouse's interest in the property, but not beyond that.

Now subsequent to that in 1982, §74.03 came into existence. It is written much more broadly. It allows the IRS to go get whatever interest the spouse who owes the taxes has. And Rogers in essence overruled this court's work in Paddock v. Seaman. Even though this court was operating

against a somewhat different statutory background. Now there is nothing you can do about the US SC overruling what you do of course. They have the atom bomb. They are the federal government and their's the supremacy clause. However, it is ironic in Paddock this court took pains to protect the interest of the innocent spouse. In Rogers the court said forced sale may still happen, but it acknowledged and it quoted this court. It said, "That's right there is a vested estate for the innocent spouse. We are not going to allow collection against it. We are not going to provide compensation for it. And we are going to create safeguards to assure that all reasonable steps are taken to protect it."

Now what the bank would have you do in this case is to go far, far beyond what Rogers would do, and to go contrary to what I think was the actuating principle of Paddock. It would have you permit subrogation, and collection against not only...against far more than the amount of the property that's liable for the debt of course, and to permit collection from the innocent spouse. Even Rogers did not require nearly so much. Of course it still protected the innocent spouse.

ENOCH: Crowder had the opportunity to get all of this protection didn't he? He had that opportunity to get all the protection you are talking about is what he is entitled to?

LAWYER: I am not certain I understand your question.

ENOCH: He could have allowed the IRS to embark on judicial foreclosure and gone to federal court, and had all of these issues resolved. He could have done that?

LAWYER: And I submit to you that the Crowders would have been far, far better off at the tender mercies of the IRS than they were at the hands of Benchmark Bank. Because I submit to you that no federal district court would have allowed the bank to go take the homestead before at least first segregating off the .85 acres. The federal court would have considered equitable circumstances not before this court. How about the check the Crowders came running in with a few days later, that the bank returned and wrote void on it. Ok, those things would be the kinds of things a court of equity can consider. Yes, they did have that opportunity. I wish they would have let the IRS go ahead and do it because they would be far better off than they are today. But you are exactly right, they did have that opportunity.

In this case the notion that there has always been this right for a third party lender to be subrogated to the rights of the United States sovereign I think is a myth. And I think any honest look at Staley v. Vaughn will bear that out. I think this court then has to write on a blank blackboard and determine what makes sense in the context of subrogation. The Staley v. Vaughn case just doesn't get you there. No case that's been decided in this state has ever really addressed this question. It is for you to look at. There is some constitutional provisions of construction I think that are helpful. This court has always held, it has held this for more than 113 years and it is cited at time, after time, after time since then that in construing the homestead provision you construe it in favor of the exemption and against a forced sale. It has always said that is not for this court to judicially engraft an exception onto the constitution. Even were this court inclined to do it I would urge that it take a look at all the equitable factors that are listed in the US v. Rogers. Finally I would submit that in view of the many deficiencies of the bank's foreclosure here, the Crowders are simply not the appropriate poster children for this campaign to create a new constitutional exception.

* * * * * * * * * *

REBUTTAL

LOVE: May it please the court. By way of rebuttal I would ask the court to not overlook the Ingram part of the Rogers case. I think Ingram is more instructive even in the Rogers part of that case. Ingram involves some income taxes and payroll taxes. In that portion the court found that Ms. Ingram was

only liable for a coupled of hundred dollars of taxes, while Mr. Ingram was liable for several thousands of dollars. Because she was liable for any portion of that tax debt. Even the dissent in a 5-4 case, the Rogers case, it was a 9-0 case on the fact of subrogation being appropriate in that case. The reason I raise that your honor we by no means concede in any way that Marion Crowder is an innocent spouse in this case. But I don't think this court has to really deal with that issue because Rogers in 74.03 clearly create a right of forced sale of the entire homestead. And the only way Mrs. Crowder innocent or not was going to protect herself and her homestead from foreclosure by the IRS was by borrowing this money to payoff that tax lien.

Mr. Fossee has injected new information here in the record at this argument in regarding some check brought into closing. And I do object to that. That is not in the record. And I would point that out to the court. Staley v. Vaughn is not different because there was some separate property because this was a homestead of which the fee was separate property. Because this court has held again and again and knows that the homestead interest belongs to the entire family - husband and wife. The State of Texas creates a property interest - a homestead interest. And C.R. Staley had that interest, and yet, the court in Staley v. Vaughn upheld that foreclosure and that subrogation. Mr. Fossey even agreed that there was subrogation here to the IRS lien against a corporation. Somehow it becomes different when it is subrogation and there is homestead involved. Well Rogers says very clearly: State law creates the property interest; federal law creates the consequences, and sweeps aside state created exemptions. That is the language in the US SC. It is the federal law that determines the lien and the consequences. The consequences _____ on that property interest. So under Rogers the government had the right to force the sale to maximize its tax collecting efforts of the entire homestead. And the Crowders acted to protect that interest.

Certainly there were many attributes that are limitations upon what the federal government can do. And they had the right, the Crowder's had the right to go through that process. But they chose by reason of contract we cannot restrict the citizens of this state the right to contract to make agreement. And they chose to transfer, to payoff that tax so that the bank became subrogated to that lien. They contractually agreed, voluntarily that the bank was contractual subrogated to that lien and prescribed new conditions for perfecting or enforcing payment of the debt. And they have that right as citizens of this state to enter into private contracts.

The Crowders have also seemed to suggest that the amount of the tax debt makes a difference. Where there is no law in this state that requires a creditor to bid in more than the debt. If it had been under-secured, this court needs to think about this, if it had been a $750,000 tax debt secured by a $200,000 piece of property, the issue is no different for this court here today.

GONZALEZ: Mr. Love what was the amount of your original note?

LOVE: Fifty-two thousand dollars. Additionally your honor there has been no claim by Marion Crowder for adjustment of the equities. She could have made that claim in this case. No, she went for a tort claim, for a wrongful foreclosure claim. She has made that choice. The issue of the adjustment of equities is not here before this court.

Finally your honor I would point out to the court that who knows what a sheriff's sale would bring. We keep talking like a sheriff's sale is going to be some kind of magic solution to the problem here. Well that's what would have happened with the IRS, there would have been a sheriff's sale. And for us to speculate what price that would bring is just that - it's speculation. It's just a different way to enforce collection of the debt.

GONZALEZ: I thought Mr. Fossee said that you could not have a sheriff's sale if you have to

apply to federal court for a judicial foreclosure?

LOVE: And that would be the result your honor would be a sheriff's sale - a judicial foreclosure. The court would enter a order, refer it to the sheriff for sale, there would be publication, there would be a public sale. And whatever price it brings would be determined of what would be received in this case. Then the court would determine how the proceeds of the sale would be divided. We don't know what a sheriff's sale would bring in this situation.