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MORTGAGES - SUBROGATION OF A VOLUNTEER

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MORTGAGES — SUBROGATION OF A VOLUNTEER — After the marriage of the plaintiff to Victor Scheutz the latter's mother conveyed certain property to Victor and his sister, Viola, subject to an outstanding mortgage which the grantees assumed. Immediately after the completion of this transaction Victor and Viola, with plaintiff joining to release her dower, executed deeds of reconveyance to their mother. Thereafter Victor, Viola, and their mother, and plaintiff used the premises as a summer cottage until 1939, when plaintiff was granted a divorce. In 1932 upon request by the mortgagee for part payment of

the mortgage debt plaintiff paid it in full. In this action, instituted subsequent to the divorce, plaintiff seeks to be subrogated to the lien of the mortgagee. *Held*, plaintiff was a volunteer and may not invoke the relief sought. *Schuetz v. Schuetz*, 237 Wis. 1, 296 N. W. 70 (1941).

It is generally said that one who is only a volunteer cannot invoke the aid of subrogation, for such a person has no equity.[1] While payment of a debt secured by a mortgage extinguishes the mortgage so far as the mortgage creditor is concerned, it does not necessarily have that effect as regards the person making the payment. In favor of the latter the courts will frequently apply the equitable doctrine of subrogation, under which one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other,[2] and to demand indemnity from the fund out of which payment should have been made.[3] One who invokes the right of subrogation must (a) occupy the position of a surety, or (b) have made payment under an agreement with the debtor or creditor that he should have security therefor, or (c) stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected.[4] The plaintiff in the principal case attempted to qualify under the third class.[5] Generally speaking this consists of those who, while not legally bound to pay, might have suffered a loss if the obligation had not been discharged and hence paid the debt in self protection.[6] The mere fact that a person pays the debt of another does not entitle that person to a lien held for the enforcement of the obligation.[7] Equity will relieve only those who cannot relieve themselves.[8] Thus where a person was under no compulsion to pay the debt and could have made an agreement for security, he cannot claim subrogation in the absence of further facts according this right. Consequently it is not surprising to find statements by almost all the courts to the effect that a mere volunteer is not entitled to subrogation.[9] Plaintiff in the principal case attempted to escape the

[1] Campbell v. Foster Home Assn., 163 Pa. 609 at 636, 30 A. 222 (1894).

[2] Stowers v. Wheat, (C. C. A. 5th, 1935) 78 F. (2d) 25; Solliday v. John B. Colegrove & Co. State Bank, 274 Ill. App. 493 (1934); 5 TIFFANY, REAL PROPERTY, 3d ed., 564 (1939).

[3] Allen v. Williams, 33 N. J. Eq. 584 (1881); Darst v. Thomas, 87 Ill. 222 (1877).

[4] 2 JONES, MORTGAGES, 8th ed., § 1113 (1928).

[5] In this class are included subsequent encumbrancers paying off a prior encumbrance, Dunlop v. James, 174 N. Y. 411, 67 N. E. 60 (1903), and owners of property, or of equities or partial interests therein, paying off prior encumbrances. Davis v. Wetherell, 13 Allen (95 Mass.) 60 (1866); Kopp v. Thele, 104 Minn. 267, 116 N. W. 472 (1908); Ohmer v. Boyer, 89 Ala. 273, 7 So. 663 (1890).

[6] 5 POMEROY, EQUITY JURISPRUDENCE, 2d ed., § 2344 (1919).

[7] The Thrift v. Michaelis, 259 N. Y. 302, 181 N. E. 580 (1932); Carter v. Witherspoon, 156 Miss. 597, 126 So. 388 (1930).

[8] 5 POMEROY, EQUITY JURISPRUDENCE, 2d ed., § 2344 (1919).

[9] Smith v. Sprague, 244 Mich. 577, 222 N. W. 207 (1929); Marshall & Ilsley Bank v. Hackett, Hoff & Thiermann, 213 Wis. 426, 250 N. W. 866 (1933); Mosher v. Conway, 45 Ariz. 463, 46 P. (2d) 110 (1935); Miller's Appeal, 119 Pa. 620, 13 A. 504 (1888); Finegan v. Mayor of City of New York, 4 App. Div. 15, 38 N. Y. S. 358 (1896); Pollock v. Wright, 15 S. D. 134, 87 N. W. 584 (1901).

application of this rule by showing that in paying off the mortgage she was acting under a reasonable and bona fide belief that she had some interest in the property and had to pay the mortgage in order to protect that interest. She was unable to prove either the reasonableness or good faith of this belief on her part but the court indicates that had she been able to do so she might have prevailed. This is in accord with the better view on the subject. In some courts it is apparent that an undiscriminating adherence to the maxim that subrogation will not be granted a "volunteer" has led to a failure to recognize the subjective elements, and has permitted results which defeat the doctrine of subrogation.[10] Thus where attempts have been made to extend the doctrine beyond payments to protect actual interests of the payor many courts have denied relief.[11] Since subrogation is a device to promote justice and is resorted to wherever equity and good conscience demand,[12] the artificial restrictions of the volunteer rule should not be applied to preclude relief in cases where one pays the debt of another under a reasonable belief that such action is necessary to protect an interest which in fact is nonexistent.[13] No new burden is created by allowing subrogation in such a case, and the principal debtor should not be allowed to escape his obligation at the expense of an innocent third party.

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[10] See McWhorter v. Bank of Menlo, 160 Ga. 894, 129 S. E. 433 (1925); Charnock v. Jones, 22 S. D. 132, 115 N. W. 1072 (1908); Deavitt v. Ring, 76 Vt. 216, 56 A. 978 (1903); Brown v. Rouse, 125 Cal. 645, 58 P. 267 (1899); Kleinmann v. Gisselmann, 114 Mo. 437, 21 S. W. 796 (1892); Wadsworth v. Blake, 43 Minn. 509, 45 N. W. 1131 (1890); Dawson v. Lee, 83 Ky. 49 (1885).

[11] Clingman v. Hopkie, 78 Ill. 152 (1875); Dawson v. Lee, 83 Ky. 49 (1885). Also see SHELDON, SUBROGATION, 2d ed., 369 (1893).

[12] Lossman v. City of Stockton, 6 Cal. App. (2d) 324, 44 P. (2d) 397 (1935); Commonwealth ex rel. v. Federal Land Bank of Louisville, 226 Ky. 628, 11 S. W. (2d) 698 (1929); Bell v. Greenwood, 229 App. Div. 550, 242 N. Y. S. 149 (1930); Commonwealth Bldg. & Loan Assn. v. Martin, 185 Ark. 858, 49 S. W. (2d) 1046 (1932); Gadsen v. Brown, Speers Eq. (S. C.) 37 (1843).

[13] Detroit & Northern Mich. Bldg. & Loan Assn. v. Oram, 200 Mich. 485, 167 N. W. 50 (1918); Paton v. Robinson, 81 Conn. 547, 71 A. 730 (1909); Overturf v. Martin, 170 Ind. 308, 84 N. E. 531 (1908); Fowler v. Parsons, 143 Mass. 401, 9 N. E. 799 (1887); 5 TIFFANY, REAL PROPERTY, 3d ed., 573 (1939); 2 JONES, MORTGAGES, 8th ed., § 1120 (1928).