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Subrogation of Junior Incumbrancers

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The Subrogation of Junior Incumbrancers of Real Property.

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I

Among the many valuable rules and principles for which our jurisprudence is indebted to the civil law, few are more important than that of subrogation.

This doctrine may be roughly defined as the substitution of one person in the place of a creditor, so that the person thus subrogated succeeds to all the rights and remedies of the creditor in relation to the debt. The principle is invoked for the benefit of one who is himself a creditor of the same debtor, and who pays the debt of the other creditor, the latter's claim

being superior.

The doctrine is peculiarly equitable in its nature, and it was through the agency of equity that our law first received the benefit of its application. Indeed, it still belongs primarily, and in many states exclusively to equity jurisprudence, although recently many law courts have recognized and applied its principles, especially in those jurisdictions where law and equity are administered by the same tribunal. Thus, in Hart v. Western R. R. Co., 13 Met. 99, it was held that an insurance company upon paying the insurance to a person who had suffered injury at the hands of the defendant

was entitled to be subrogated to his right of action against the defendant, even in a court of law. The court in considering the case of Randal v. Cockran, 1 Ves. sr. 98, said, "This was a case in chancery, but where the same principle can be carried into effect in the ordinary forms of proceeding in a court of law, the same principle will be applied." On the other hand, in Springer v. Springer, 43 Pa. St. 518, it was said that subrogation was an equitable remedy and could properly be reviewed in higher courts only by appeal; and the proceedings therein should be in analogy to equity practise, as by petition and answer. This question therefore differs with the jurisdiction.

II

As a general rule it is only where the

person paying the debt occupies the position of surety, or where he is compelled to pay in order to protect his own interests that he is subrogated to the rights of the prior creditor as a matter of course and without special agreement. A mere volunteer under no liability to pay is not entitled to subrogation upon payment of the debt. This is the rule laid down in all the cases and does not seem to have been questioned in any court. But it is perfectly proper and legitimate for a person under no liability concerning the debt to enter into an agreement with the debtor, whereby he advances money to pay the debt, and the mortgage or other security is to be assigned to him for his protection. If, in such case, the mortgage be released and discharged of record, instead of being as-

signed, the person making the advance will be subrogated to the rights of the mortgagee as against the mortgagor and subsequent incumbrancers or aliens with notice. As to whether subrogation will be decreed if the person advancing the money takes a new mortgage upon the property and it proves to be invalid for any reason, the rule is rather more doubtful. Sheldon in his work on Subrogation, § 19, after stating the general rule as above, says: "though if the agreement had been that he should depend upon a new security given to him, he could not be subrogated to the charge which he had paid," citing Small v. Stagg, 95 Ill. 39. Perhaps a stronger case is Banta v. Garms et al., 1 Sandford chan. 383. In this case the plain-

tiff loaned money to the defendant Garmo to pay off a mortgage on lands owned by Garmo, on the security of a new mortgage on the same lands. The old mortgage was paid off and discharged. The other defendants had recovered a judgment against Garmo which was docketed after the first mortgage and on which the land was sold to them prior to the execution of the plaintiff's mortgage, the latter having overlooked this lien. It was held that the plaintiff was not entitled to be subrogated to the old mortgage, the court saying, "No case can be found where a third person after voluntarily and intentionally discharging a lien in which he had no prior interest, and on the faith of another security, has been permitted as against other incumbrancers to revive such lien, on

ascertaining that his own security was worthless".

In Levy v. Martin, 49 Wisc. 198, the plaintiff at the request of the executors advanced money to pay a mortgage held by the defendant, on certain lands of the estate, and also to pay accrued taxes. He took as security a mortgage on the same lands made by the executors in pursuance of a license of the County Court, which was, however, invalid. The defendant also owned subsequent mortgages on the same property, executed by the testator's widow when she had a dower interest therein. He refused to assign the first mortgage to the plaintiff, but discharged it of record. It was held that the plaintiff was

entitled to be subrogated to the defendant's rights under the first mortgage not only as against the heirs, but also as against the defendant's subsequent mortgages. It seems that Levy had no agreement with Martin, the defendant, and had relied on the mortgage executed by the executors. The court based its decision "on principles of natural justice and equity, which are amply vindicated" in preceding Wisconsin cases. These two cases may be reconciled on the principles laid down in quite a number of cases, notably Hutchinson v. Swartswelder, 31 N.J. Eq. 205, and Bruse v. Nelson, 35 Iowa, 157, to the effect that, if a first mortgagee has accepted a new mortgage and surrendered his prior security, in ig-

norance of the existence of an intervening lien, he will, in the absence of laches or other disqualifying circumstances, be subrogated to his first mortgage, especially if the surrendering of the old and the giving of the new were simultaneous and dependent acts. But if he has been guilty of laches, his right to subrogation is gone. If he has surrendered and discharged the old mortgage through fraudulent representations, and innocent third parties have parted with their money in reliance upon the record, the old mortgage cannot be revived to their damage (Vannice v. Bergen, 16 So. 555; Bussey v. Page, 13 Me. 459; Conner v. Welch, 51 Wisc. 431). This last case, Conner v. Welch, lays down the principle broad-

ly that a person's right of subrogation is lost if he has been guilty of negligence and the rights of innocent creditors or assignees of his debtor have intervened. In this class of cases, however is involved the question of the power of equity to grant relief in cases of mistake, upon which subject, as is well known, courts hold widely differing views; so that absolute uniformity in the decisions is not to be expected.

To make out a prima facie case of subrogation, proof of the suretyship or other secondary liability, and of the payment of the debt is sufficient. Nor is it necessary that the surety or person subrogated know of the existence of the securities before paying the debt (Curtis v. Tyler, 9 Paige, 431).

It is enough that the payment was actually made to protect his interests.

The English and the American rules concerning sureties differ somewhat. In England, a surety upon paying his principal's debt receives the benefit of all collateral securities, but he is not subrogated as to the principal debt, contrary to the American rule. The English cases proceed on the ground that the payment by the surety extinguishes the debt and leaves nothing surviving to which he may be subrogated except collateral securities, if there happen to be any. This distinction is rather technical, and leads to still further refinements. Thus, if the person seeking

subrogation is not technically a surety, if he is bound not in the same obligation with the principal but in a separate instrument, though he may be a surety in fact, it is clear that the original debt is not paid, and that subrogation will be enforced as to the original debt as well as to collateral securities. American courts, it is true, hold that the real debtor is not entitled to subrogation; such a thing would be absurd. In Butler v. Seward, 10 Allen, 467, a person had given two mortgages on the same land. The second mortgage was foreclosed, and the land about to be sold, when the mortgagor paid the first mortgage and claimed to be subrogated to its lien, so as to avoid the foreclosure. But the court

refused to allow such claim, as the mortgagor was simply paying his own debt, and the mortgage was thereby extinguished. Our Courts, therefore, distinguish between the <u>real</u> principal debtor and the merely nominal one, and hence they allow a technical surety to be subrogated to the principal debt (Ellsworth v. Lockwood, 42 N.Y. 89). The English courts do allow the surety of a bond and mortgage to be subrogated to the lien of the mortgage, although payment of the bond is equally payment of the mortgage. The reasoning is that the mortgagee's estate is not divested by mere payment, but a reconveyance to the mortgagor is necessary to vest title in him again.

Hence the mortgage survives the payment of the bond and is therefore a collateral security within the meaning of the English rule. In this country, the mortgagee has as a general rule no estate, but merely a lien which is destroyed by payment of the mortgage debt. Subrogation is enforced then, in this case, as indeed in all cases (in this country) concerning sureties, "upon the broad doctrine of equity that the surety upon payment is entitled to all the remedies and securities which the creditor held before payment" (Townsend v. Whitney, 75 N.Y. 425).

III

Let us now examine more in detail some of the special instances of subrogation. By far the most frequent

one is that of a junior mortgagee paying a senior mortgage to prevent foreclosure and consequent damage to his security.

First, we notice that the same general principle as to when subrogation takes place, applies also in this connection. It must appear that subrogation is necessary to protect the junior mortgagee's interest. In Jenkins v. Continental Insurance Co., 12 How. Pr. 66, the plaintiff was the holder of a junior mortgage not due until three years after the suit was brought. The senior mortgagee was not seeking to foreclose, but was simply resting on his rights. It was held that the plaintiff could not claim sub-

rogation, as his interests were not endangered and he was therefore a mere volunteer. Had his mortgage then been due and had he been unable to get the benefit of it without disengaging the property from the prior encumbrance, or had the senior mortgagee commenced foreclosure proceedings, thereby endangering the junior security, he would in equity have been entitled to redeem from the prior mortgage and be subrogated to its lien. Judge Woodruff, who delivered the opinion in this case, distinguished between the right of redemption and the right of subrogation. The former, he said, does not necessarily carry with it the latter. The right of the redeeming party to subrogation

depends upon the relation of the parties to be foreclosed, the particular situation of the party claiming such right, and the circumstances in which the right is sought to be exercised. A mortgagor of several successive mortgages has the right to redeem any one of them, but he cannot claim to be subrogated to them.

A junior mortgagee has the right to redeem not only from a senior mortgage, but also from any paramount liens on the land; as, for example, taxes, or assessments, which constitute prior liens. By paying such to protect his interests, he may hold the land against a senior mortgagee until he has

been reimbursed for such outlays (Pratt v. Pratt, 96 Ills. 184; Fiacre v. Chapman, 32 N.J. Eq. 463). The question whether or not a tenant for years has the same right of redemption as a mortgagee was well considered in Averill v. Taylor, 8 N.Y. 44. It was there assumed that one holding the actual relation of surety for the mortgage debt, although his liability should extend no farther than to a loss of interest in the land, has the right to redeem and be subrogated to the mortgage for the protection of that interest. But the person claiming such right in this case was only the owner of a term for years, while the owner of a mortgage executed before the term for years was seeking to foreclose. It

was argued that a tenant for years has no interest or estate in the land; that he has by contract merely a right to possession and to the enjoyment of the profits for a specified time; that his right to the land is not a lien upon it; that his relation to the lessor is that of landlord and tenant and not that of principal and surety; and finally, that as tenant he cannot dispute his landlord's title, and would therefore be unable to foreclose a redeemed mortgage against the landlord. Judge Morse admitted that at the time when these estates were introduced, they were not technically estates in land; but he claimed that that view is now

obsolete. The statutes speak of them as estates in land and they are generally ranked as such. They may be sold on execution as real estate. Practically, then, they are equal to freehold estates and their tenants are as much sureties as junior ~~mortgagees~~ mortgagees. It was therefore held that, the mortgagor having failed to protect his tenant for any cars, the latter could be subrogated to the mortgage upon paying it. We see the same principle coming in here, that lies at the foundation of the whole subject of subrogation, viz., that a person will be subrogated only when it is equitable and right that he should be. It is for this reason that a person upon being subrogated is

required to pay the entire paramount debt. A tenant for years, for example, might be sufficiently protected by paying merely the interest on the debt, and thus delaying foreclosure until his term had expired. But this would cause delay and damage to the senior mortgagee, and the courts refuse to allow it (Knowles v. Rablin, 20 Iowa, 101). Nor can a junior incumbrancer if his lien covers less land than the senior incumbrance pay a proportionate part of the debt and claim to be subrogated as to that portion. He must pay the whole of the debt or none of it.

A subsequent mortgagee is en-

titled to add to the amount of the incumbrance which he pays all necessary and reasonable expenses incurred in the redemption. Thus if proceedings at law or in equity are necessary to redeem the estate, the person redeeming may hold the property until reimbursed for the costs of such proceedings as well as for the amount of the mortgage. Though the proceedings are beneficial to him, they also ensure to the benefit of the other parties entitled to redeem, who cannot justly complain, therefore, if they are required to bear such expenses (Miller v. Whittier, 36 Me. 577). And it has also been held that if a senior mortgage covers additional property to that covered by a junior mortgage, the junior mortgagee

on being subrogated, may resort to the additional property for his reimbursement; or if the senior mortgage bears a higher rate of interest than the other, the junior mortgagee will be allowed the increased rate on his payment (Mosier v. Norton, 83 Ills. 579).

Although, as we have seen, subrogation will be decreed only when it will not work injustice to other parties, so on the other hand, the other parties may not work any fraud or injustice on the junior mortgagee. A party seeking subrogation is bound only by the record; facts shown by the record cannot be contradicted to his prejudice. New terms and conditions cannot be

incorporated into the mortgage. A senior mortgagee cannot tack to his mortgage another debt due him, but not constituting a lien upon the mortgaged premises (Burnet v. Denniston, 5 Johns. Ch. 35). Or if a mortgagee and mortgagor agree upon a higher rate of interest than the mortgage as recorded discloses, although the mortgagor might be personally bound, any one entitled to redeem and be subrogated to the mortgage, is bound only by the rate in the recorded mortgage. For the same reason it is not allowed a mortgagee to transfer payments made on a mortgage to another account not covered by the mortgage, and thus to prejudice the junior mortgagee (York Co. Savings Bank v. Roberts, 70 Me. 384).

The above rules would seem to be the law. Sheldon states them without qualification. The only authority not in accordance with the rules given above is Jones, who says (Jones on Mortgages, I 588 4), "A surety is not entitled to an assignment from the creditor of a mortgage, upon which the creditor has, after taking it, made a further advance, unless he pays off such advance in addition to the original sum; and the mortgagee not being prevented from making the further advance, it is immaterial that the surety did not know of it, and that it was not contemplated at the time of the original loan." The case of Williams v. Owen, 13 Sim. 597, is cited in support of this state-

ment. These reports, not being accessible, it has been impossible to examine the case; but an old English case would hardly stand in this country against a considerable number of American cases, holding a contrary view. Besides, the passage quoted from Jones does not accord very strictly with the general rule in this country as to the force and effect of official records.

IV

There are other special instances of subrogation, quite similar to that of junior mortgagees, although the persons subrogated are not mortgagees. We will confine our attention to two of the more important of these instances.

First, then, as to the widow of a mortgagor, having dower in the property mort-

gaged. Of course, if the mortgage was executed after the marriage and she did not sign away her dower right, it takes precedence of the mortgage; but if she did sign it away, or if the execution of the mortgage preceded the marriage, the dower is subject to the mortgage. The widow in such latter case, then, may redeem from the mortgage, if that is necessary to protect her dower, and claim the lien of the mortgage, as against the heirs, for her reimbursement. As in the case of junior mortgagees, she cannot pay a proportionate part of the preceding mortgage and claim to be subrogated for that amount, but she must pay the entire sum. If her claim for dower is subject to a prior mortgage but is su-

prior to the claim of a purchaser of the equity of redemption, and the latter redeems from the mortgage, his claim for reimbursement takes precedence of the dower interest. This follows from the very definition of subrogation, viz:, the substitution of one party in the place of another, all the rights of the latter being transferred to the former. But if the mortgage debt has been paid by one bound to pay it, the mortgage is extinguished and the widow has her dower unencumbered, even though she expressly released her right in the mortgage. And it makes no difference that the mortgage was not discharged of record, but was assigned to the party paying it. Thus, if the mortgage be

paid out of the mortgagor's property, or by some one in his behalf, or by his grantee with the stipulation that the latter pay the mortgage as part of the purchase money, the widow will have her full dower. If however, the mortgage be paid by a purchaser of the equity of redemption merely to disencumber the estate and not because of any personal liability cast upon him he is subrogated to the lien of the mortgage and the widow can claim dower only by redeeming from the entire mortgage, unless the mortgage was discharged upon the record instead of being assigned to the purchaser, in which case the widow is liable only to contribute her proportionate share

Such is the Massachusetts rule (McCabe v. Swap, 14 Allen, 188). In New Hampshire, it is held that where the purchaser of the equity of redemption buys in the mortgage, or where the mortgagee buys the equity, the widow is entitled to dower upon contribution only; she is not compelled to redeem the entire debt (Norris v. Morrison, 45 N.H. 490). The rule differs also in New Jersey. In Thompson v. Boyd, 21 N.J. Law, 58, it was held that the purchase of the equity of redemption by a mortgagee did not merge the two estates, that is, that the mortgagee could stand upon his mortgage title and hence compel the widow to pay the entire mortgage debt in order to claim her dower. Judge Nevins in his opinion, said,

"The defendant (the mortgagee) if he purchased anything, purchased the equity of redemption in whomsoever it existed. He did not purchase his own mortgage title — that was already in him, and by agreement he retained it and now holds it uncancelled". It is difficult to refute this reasoning. Why should a mortgagee lessen the security of his mortgage simply by buying in the equity of redemption? The general rule of merger is that two estates will not merge where it is contrary to the interests and intent of the parties. In New Jersey the rule applies whether or not the mortgage was agreed to be satisfied by the holder of the equity (Woodhull v. Reid, 16 N.J.L. 128)

We come now to another class of cases also quite similar to those of junior mortgagees, viz., the cases relating to the rights of the purchaser of the equity of redemption to be subrogated.

As a general rule, a purchaser of the equity, upon paying a prior mortgage is subrogated to its lien and may compel an assignment of it to protect him from another mortgage, subsequent to the one he paid, but paramount to the equity; unless he agreed to pay the mortgage, as part of the purchase price, in which case he has no claim for subrogation. If, however, the mortgage instead of being assigned is discharged upon the record, what is the law? The courts of New Hampshire differ from those of New Jersey on this point. Wilson

v. Kimball, 27 N.H. 300, holds that the purchaser of the equity is not prejudiced by discharging the mortgage instead of taking an assignment, the court saying that "payment of the debt secured by a mortgage shall operate either as a discharge or an assignment, as may best serve the purposes of justice." To the same effect is Robinson v. Leavitt, 7 N.H. 100.

In Garwood v. Admrs of Eldridge, 2 N.J.Eq. 145, the complainant purchased certain real estate subject to two mortgages and a judgment, and applied the entire amount of the purchase money in satisfaction of the mortgages, which were paramount to the judgment, causing the mortgages to be cancelled and discharged

of record. The complainant, it seems, was ignorant of the existence of this judgment. It was held that he could not be subrogated to the mortgages which he had paid. Ignorance of the legal effect of cancelling the mortgages could not avail him; nor could ignorance of the existence of the judgment. And the court lays down the rule (basing it, however, on New Jersey statutes) that a cancellation and discharge upon the public records, of a mortgage duly paid, is an absolute bar of the same, only to be disregarded by equity in cases of fraud, accident, or mistake.

Disregarding statutory qualifications, the New Hampshire rule would appear to be more consonant with those broad and equitable principles, upon

which the entire doctrine of subrogation is based, and hence to be worthy of greater weight and respect.

It has been held that if a purchaser of the equity has paid off a valid mortgage to protect his interest, or the purchase money has been applied in satisfaction of the mortgage, and the sale is afterward avoided, the purchaser is subrogated to the mortgage and may hold the land as against the owner to the extent of the mortgage. Or, if he has paid the mortgage debt and has neglected to record his deed of the equity until a judgment or other lien has come in ahead, he may fall back on the mortgage which he has paid (Sheldon on Subrogation §30).

As a general rule, a purchaser will be subrogated to all his vendor's rights in the property, even though they have not been expressly conveyed to him. A good example of this is found in McSorley v. Larissa et al. 100 Mass. 270, where a person in good faith and for a valuable consideration, bought land from a mortgagee in possession; he was allowed to stand on his vendor's title as against the mortgagor, who was seeking to redeem. So, a purchaser who has been compelled to pay his vendor's debts may be subrogated to the creditor's rights against his vendor. Thus, if purchased land has been taken upon an execution against the vendor, the purchaser is entitled, on paying the debt, to be subrogated to the lien of the judgment against the

against the vendor (In re Gill, 6 Pa. St. 504).

A point which has caused much litigation and upon which different views have been expressed, is as to the respective rights of two or more purchasers of the equity of redemption. If a mortgagor has conveyed parcels of mortgaged property simultaneously, the authorities are agreed that they are equally liable, and neither has precedence. If, then, one parcel be sold under foreclosure, or to prevent foreclosure, the grantee of a parcel redeems from the mortgage, he may compel contribution from the other grantees pro rata. It is also settled that as between the mortgagor and the purchaser of a portion of the property, the part remaining in the mortgagor's hands is to be taken first in satisfying the debt, unless the purchase was made expressly subject to the debt. But

when the various sales have been made successively and to different persons, courts differ. The general rule is that the parcels are liable in the inverse order ~~order~~ of their alienation. In Bates v. Ruddick, 2 Iowa, 423, this question arose and it was decided that subsequent successive mortgagees were all liable to contribution in proportion to the value of the parcels aliened. The court admitted that the decisions are conflicting, but adopted the rule it considered the more equitable. To quote from the opinion, "While the mortgage covers and is a lien upon all the estate alike, yet the mortgagor in addition to his legal obligation is morally bound to pay the debt and divest that which he has sold of any incumbrance. But as between two grantees, purchasing different parcels of the incum-

bered premises at different times, there is no more moral obligation to pay, upon the one, than the other. It is difficult for us to see why the last purchaser any more than the first sits in the seat of the grantor." This decision was approved and followed in Massie v. Wilson, 16 Iowa, 390, and also in later Iowa cases, so that the rule is settled in that state. In Ohio, following the same principle, it was decided that if A has a mortgage upon two lots, and B has a subsequent mortgage upon one, and C a still later mortgage upon the other, B cannot compel A in satisfying his claim, to exhaust first the lot upon which C has a mortgage, but the two lots must contribute ratably (Green v. Ramage, 18 Ohio 428). The rule is followed also in Kentucky, Dickey v. Thompson, 8 B. Mon.

312; Beall v. Barclay, 10 B. Monr. 261; in Massachusetts Parkman v. Welsh, 19 Pick. 231; and probably in other states. This view is supported also by such eminent authority as Judge Story, (Story on Equity, § 1233, a), mainly on the same grounds that influenced the Iowa courts. And Story claims that this is also the doctrine of the earlier and later English cases.

But the weight of authority is in favor of the view that successively aliened parcels are liable in the inverse order of their alienation. This is the rule in Maine (Cushing v. Ayer, 25 Me. 383); and in New York (James v. Hubbard, 1 Paige, 228), although the contrary view was first announced in Cheesebrough v. Millard, 1 John. Ch. 408, which case, however was soon overruled; and in many

other states. The ground upon which these cases proceed is that, after the mortgagor sells a part of the mortgaged premises, the remainder becomes the primary fund for the payment of the debt; in other words, in addition to the lien of the mortgage, there exists another equitable lien, capable of being enforced by the purchaser, viz, the right of compelling the mortgage to be satisfied out of the unsold portion before resorting to that which has been sold; if then another portion is sold, the second purchaser takes subject to the double lien. He of course has the right to resist foreclosure on his purchase until the remainder in the hands of the mortgagor has been applied in payment of the

debt and has proved insufficient; but if it does prove insufficient, his portion must be foreclosed before the first purchaser's. After the first sale, as was said by one of the judges, the double lien exists on the remaining property whether the mortgagor retains possession, or aliens the whole or a part of it

It is indeed difficult to decide which of these two rules is the more equitable and just, and perhaps to this fact may be attributed the nearly equal division of the authorities. In James v. Hubbard, 1 Paige, 228, the rule is put on the ground that "where the equities are equal, and neither has the legal right, the maxim qui prior est in tempore potior est in jure prevails." The second rule (that the portions are

liable in the inverse order of alienation) is, perhaps, open to the criticism of being more technical and refined than the other.

V

There remains for our consideration one more subject which is often of great benefit to junior incumbrancers. This is the doctrine of two funds, or the marshalling of securities as it is generally called. This principle requires that, where a prior creditor has a lien on two funds or two pieces of property, upon one of which there is a subsequent lien, such prior creditor must satisfy his claim first out of the fund or parcel upon which he alone has a lien, so that the junior incum-

brancer may have a chance to satisfy his claim; or, if he does not follow this rule, but resorts in the first instance to the fund liable to both, the junior incumbrancer is subrogated to his lien upon the other fund. Thus in Ramsay's Appeal, 2 Watts (Pa.) 228, where a bank had a judgment against one of its stockholders and also a lien on his shock; the judgment was satisfied out of the debtor's real estate, and other judgment creditors whose lien extended only to the real estate, were subrogated to the lien of the bank upon the bankstock.

But there are many qualifications to this rule. First, it will not be applied if it will work

injustice to the senior creditor. There are many ways in which this might happen. The senior creditor cannot be compelled to restrict himself to only one of the funds unless he can realize from it promptly and efficiently and without litigation (Kidder v. Page, 48 N.H. 480); or unless the fund is shown to be sufficient to meet his demand; if a mortgagee of real property has also certain promissory notes as collateral security, junior incumbrancers, whose lien extends only to the real estate cannot compel him to sue upon the notes before foreclosing his mortgage; nor will the rule be enforced where the fund or property on which the junior

incumbrancer has no lien is itself the subject of a prior incumbrance; and numerous other instances of this rule might be found. In such cases, however, where the senior incumbrancer may rightfully decline to restrict himself to the fund or remedy upon which he only has a lien, and does decline it, the junior incumbrancer has still the right of being subrogated to it (King v. McVickar, 3 Sandf. ch. 210).

Again, the rule will not be applied where it would work injustice to third parties. A good example of this is to be found in the case of Green v. Ramage, given supra, p. 36.

Again, the doctrine is enforced only in cases where the two creditors have the same common debtor.

Thus if A has a claim against B and C, and D has a junior claim against C only, he can't compel A to proceed first against B, unless, at least, special equities are shown to exist between B and C, justifying such a course. In McCloyd v. Galbraith, 32 Penna. St. 103, the owner of certain tracts of land subject to a mortgage, sold some of them, the remaining ones being incumbered by another and subsequent mortgage. The owner of the first mortgage foreclosed on the tracts remaining in possession of the debtor. It was held that the junior mortgagee could not compel the senior mortgagee to proceed first against the alien-

ed tracts, nor could he be subrogated to the senior mortgagee's lien upon those tracts.

If a prior creditor of two funds has actual knowledge of the existence of a subsequent lien under circumstances that would justify marshalling the securities, and releases the fund liable only to him, such release will postpone his claim upon the other fund to the extent of the released fund. So far as the subsequent creditor is concerned, the debt of the prior creditor is pro tanto satisfied by such a release (Washington Building & Loan Ass'n v. Beaghen, 27 N.J.Eq. 98). If however the release were made in good faith and without such knowledge, it will not have such an effect (Cheese-

brough v. Millard, 1 Johns. ch. 409). And even if the senior incumbrancer has knowledge of the subsequent lien, he will not be prejudiced if his rights to the abandoned fund were contested, or if his remedies for its application were not reasonably clear and efficient.

In conclusion it may be asserted that there are few if any branches of our law, which are more essentially equitable in their nature and application, than the doctrine of subrogation. The longer one studies this subject, the more is he impressed with the idea that its corner-stone is equity.