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Subrogation

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S u b r o g a t i o n

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Of the many ways which equity has provided to bring about justice and right without regard for form few are of equal importance with those equitable principles embraced in the rules by which the administration of the doctorine of subrogation is guided.

Subrogation was adopted by equity from the civil law and though it comes primarily and strictly only within the jurisdiction of equity, yet of late its principles have been administered by courts of the common law.

Subrogation may be defined as the substitution of a third person, who has discharged the obligation of another, in the place of the original creditor to whose rights and privileges, derived from the relation existing between the original parties, he succeeds.

The principles are so broad and far reaching as to include all cases where one party has discharged the obligation of another, who has been primarily liable, and who should have discharged such obligation. It is not, however, every one who may pay the debt of another and become subrogated. In order to succeed to the rights of the original creditor, the one dischargin the obligation must be a party in interest. His relation to the debt or contract must be such that he must discharge it in order to preserve some right, or protect some interest of his own. A stranger to the relations subsisting between the original parties would have no right to be subrogated. (Shinn vs. Budd 14 N. J. Eq. 234) It is not necessary, however, in order to entitle one to such rights that he should know

of the existence of any security, or he may even be subrogated if the security is given after his substitution in the place of the original creditor.

Subrogation should not be confounded with the assignment of a debt or obligation. In the case of assignment, the obligation is kept alive while subrogation only takes place upon the discharge of such obligation. In the case of assignment of a claim, the assignee may be a stranger to the original transaction, while to be subrogated the one succeeding to the rights of a creditor must be a party in interest.

The intent with which an obligation was discharged by a third person will many times show whether he should be subrogated. If one merely advances money to another to discharge a debt and it turns out to be a mere loan,

then the one making such loan would not succeed to any rights beyond those created by making such loan, but if money is advanced for the purpose of discharging an incumbrance and not as mere loan, and it is actually so applied, then the person making such advance will be subrogated to the rights of the creditor whose claim has been discharged.

The right to be subrogated does not depend on privity nor is it confined to cases of suretyship. . Its principles are applied in order to indemnify one who has discharged the obligation of another, and in order to bring about such indemnity the one making such discharge is entitled to succeed to all the securities and remedies which the original creditor possessed.

It is equitable and in accord with good conscience

that one who is liable on debt should be the one, eventually, who shall discharge such debt.

The subject of subrogation may be treated conveniently under two heads as divided by Sheldon in his work on subrogation - first in regard to the subrogation of persons holding successive claims on the same property, and secondly the subrogation of sureties, joint debtors and of parties to bills and notes.

In the case of persons having successive claims on property, as for instance where there are two mortgages on one piece of property, if the interest of one of the parties demands that the other incumbrance should be paid, then the one making such discharge of the other incumbrance may,in equity,look to the incumbered property for reimbursement.

A mortgagee can not refuse to allow a junior incum-brancer to be subrogated to his rights, if the relations are such as to demand for the protection of the junior incumbrancer that such subrogation should take place.

One whose rights or interests would be destroyed or seriously injured or impared would have a joint right to demand to be subrogated upon an offer to discharge the claim of the first mortgagee.

Subrogation in equity proceeds upon the theory that it is necessary to the protection of the rights of the party who seeks it.

A junior mortgagee may demand to be subrogated when in equity and good conscience he should be in order to protect his interests in the mortgaged premises, but where the junior mortgage is not yet due then such

junior incumbrancer can not insist upon his right to pay the senior mortgage, and upon succeeding to the rights of the senior incumbrancer unless he first shows conclusively that his rights would be seriously prejudiced by a refusal of such demand. 12 How. Pr. 66 (N. Y.) After a decree of foreclosure has been rendered, the junior mortgagee having been joined, he can not demand a stay of proceedings in order to be allowed to be subrogated, unless he can show that from the peculiar circumstances of his position the enforcement of the mortgage would work him an injury. Looked at in the light of a mere junior mortgagee he has a sufficient opportunity to protect his rights by purchasing at the mortgage sale.

Where one party has advanced money to pay off a mortgage debt under an agreement with the owner of the

mortgaged premises that he shall succeed to the mortgage to be held by him as security for his advances, but the mortgage is discharged instead, yet as against subsequent parties in interest he is intitled to be subrogated to the rights under the mortgage. King vs. McVicker 3 Sandfords Ch. 192 (N. Y.) In such a case, if a new security was given, he would not be entitled to be subrogated. Nor if a third party, at the request of the mortgager, pays a debt, but takes no assignment of the mortgage the one making such payment is not subrogated to the rights of the mortgagee as against a subsequent incumbrancer; nor will he be subrogated to the benefit of the mortgage as against others who are secured by it by his giving to the mortgagor money wherewith to make a payment to other incumbrancers. In case a third mort-

gage is held by three persons and one of them holds a first and second mortgage on the same premises, if such person attempts to foreclose the first and second mortgages, the others may join in a bill to redeem the first two and if he refuses to contribute to the payment of the first two, yet the other parties might upon payment of such mortgages become subrogated to his rights under such mortgage and succeed to such rights against him as he had originally had against them. Saunders vs. Frost 5 Pick (Mass.) 259.

If a man purchase realestate and pays off an incumbrance on it to save the property so purchased, he may become subrogated to the lein as against those who may have a better title than his own to the property, but which title is subject to the lein to which he became

subrogated. Should mortgaged property be sold under a decree of foreclosure and the sale has been ratified by the court decreeing the sale, but upon appeal the proceeding is opened and the decree renewed and the mortgaged premises are again ordered to be sold under the mortgage debt, then the original purchaser, if he has paid his purchase money and it has been applied in payment of the mortgage debt, is entitled to be subrogated to the position of the creditor originally holding the security and to be treated as assignee of the mortgage to the extent of the payment which he has made.

There is a well known maxim of equity to the effect that he who comes into equity must do so with clean hands, and this maxim, as applied to the doctrine of subrogation, may be illustrated by the following case:

If a vendor seeks to rescind a contract of sale and to recover the property by reason of the fraud of the vender, he will not be obliged to reimburse the fraudulent venrer for his expenditures made in his attempt to carry out the fraud not even though he will reap the benefit of such expenditures by the discharge of the lein upon the property which they have paid. Guckenheimer vs. 81 N. Y. 394. The case of Simmonds vs. Lyle 32 Gratt. 752 is illustrative of how a widow may become subrogated to the vendors lein on property in which she may have dower. In this case the widow was entitled to dower, but had not yet procured it to be set aside. Remaining in the mansion house of her deceased husband, she paid a balance of the purchase money and also taxes assessed upon the property, and

upon this showing it was held that she was entitled to b ecome subrogated to the leins existing upon the property for the purchase money and also for the taxes which she had paid, excepting such part as she was under obligation to pay as doweress.

The rules of Massachusetts which apply to the cases of subrogation in connection with dower as set forth in the case of McCabe vs. 14 Allen 188 - 190 are as follows:

"First, where a purchaser pays off a mortgage to which the right of dower would be subject, merely to clear the estate of the encumbrance, and not by virtue of any obligation to pay the mortgage debt and take an assignment or conveyance of his interests from the mortgagee, he may stand on the mortgage title, if he please, and then no dower can be assigned without payment of

the whole mortgage debt by the demandant."

"Second. If in such case the mortgage be discharged then he will be held to have redeemed and the widow will take her dower in the equity or by contribution, as she may elect, under General Statutes."

"Third. But if the mortgage debt be paid by the debtor or from his property or in his behalf, then the payment will be treated as a satisfaction and discharge of the mortgage and the widow will be remitted to her full right of dower."

Fourth. "The payment will be held to be made in behalf of the debtor when there is an obligation imposed by the grantor upon the purchaser to assume and pay the debt as his own; or when the grantor furnishes the means for the payment, as where, by the terms of the conveyance

the entire estate is sold, and the seller leaves a sufficient part of the purchase money in the hands of the grantee for the purpose. In such cases, if the purchaser takes an assignment of the mortgage to himself, he will not be allowed to set it up, but the legal title thus acquired will be held to merge in the equity."

The doctrine of two funds gives rise to the application of the principles of subrogation as follows:

In the first place the doctrine of two funds is where one creditor holds security upon two funds or estates and is at liberty to resort to either for payment, and another creditor holds a security on one of these two estates; in such a case equity will compel the senior creditor to exhaust his remedy against the estate not covered by the security of the junior credi-

tor before demanding payment from the estate on which the two leins exist.

But in case the senior incumbrancer does not exhaust his lein as above stated then the junior incumbrancer may be subrogated to the security of the senior incumbrancer or any balance then remaining after the full payment of the prior lein of which the senior creditor might and should have availed himself. Thus in the case of Ramsey's Appeal 2 Watts 228 (Pa.) a bank held a judgment against one of its stockholders for which in addition to its judgment lein upon his real estate it has also a lein upon his stock. Under such circumstances, when the bank collects its judgment out of his real estate the other judgment creditors who are thus deprived of the opportunity to collect their judg-

ments out of the property thus levied on by the bank, may, nevertheless, be subrogated to the rights which the bank held so as to enable them to hold the debtors bank stock. Before one creditor can be subrogated to the rights of another, the claim of the latter must be discharged so that he shall have full satisfaction from trouble or risk of loss.

We shall now leave the branch of this subject included under the head of successive leins, and go to the division in which subrogation takes place in cases of suretyship.

If a surety pays the debt of his principal such surety becomes subrogated to all the securities rights and equities which the original creditor held against the debtor; it is not necessary to the enforcement of

this claim to be subrogated that the surety shall be bound in one and the same instrument as the principal. This right will be transmitted to the sureties assignees or to his creditors when the principal demand has been so used as to destroy their subordinate leins upon his property and to his grantees who have lost the property conveyed by him to them in consequence of its being taken upon the principal obligation.

The creditor must do nothing to defeat this right of the surety. If he takes property from the principal debtor as a security for the debt he must hold such property for the benefit of the surety as well as for himself.

The following is a paragraph quoted from Lord Brougham in Hodgson vs. Shaw, 3

"The rule is undoubted and is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high; and the right results more from equity than from contract, or quasi contract, unless in so far as the known equity may be supposed to be imported into any transaction and so to raise a contract by implication. The doctrine of the court in this respect was luminously expounded in the argument of Sir Samuel Romilly Lord Eldon, in giving judgment, sanctioned the exposition by his approval. A surety will be entitled to every remedy which the creditor has against the principal

debtor; to enforce every security and every means of payment; to stand in the place of the creditor not only through the medium of contract but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him though there was no stipulation for that and to avail himself of all these securities against the debtor."

If the surety pays the debt of his principal the relation of creditor and debtor between the original the parties is at an end, but upon such payment the surety is entitled to have all the securities held by the original creditor against the debtor, turned over to himself and he may use them against the debtor for his own satisfaction as fully as the creditor could have done.

This change which takes place is in the nature of a purchase by the surety of the creditor.

If any question is raised as to whether the conduct of the surety has been such as to keep alive the securities the courts will declare a presumption existing in favor of the one who does the acts shown to have been done connected with the transaction in hand. In case the sureties of a trustee are compelled to answer for his breach of trust they are subrogated to both the rights of the trustee and the cestui qui trust trust against any of those who are in the wrong. Thus "The guardian of an infant wrongfully assigned a bond payable to him in an official capacity and the sureties on his official bond having made up the loss, it was held that they could recover from the assignee of the bond just as the ward could have

done."

If the sureties of a guardian have been compelled to make good the loss to the ward by guardians misconduct such sureties become subrogated to the rights of the ward against the estate of the guardian.

If the seller of property has the right to rescind the sale upon non-payment of the purchase price a surety of the purchaser who should pay the debt will be subrogated to this right of the seller.

After the sureties have been compelled to pay the debt and have established their claim against the purchaser who is their principal, they will be subrogated to all the creditors rights in equity and may maintain a bill to set aside any conveyance which the original creditor could have so avoided. But by 32 Mo. 232 the

endorser of a note given for supplies to be taken on board a steam boat does not acquire, by paying the note, the right to have lein on the boat, which the original vendor had.

No private arrangement among the co-sureties as to the manner in which the debt shall be borne will affect their right to be subrogated. If one of the sureties upon a note, given on a debt which is also secured to the creditor by a mortgage, should agree to pay the whole debt in behalf of all the sureties then the surety so paying would be subrogated to the rights of the mortgage as fully as if no such agreement had been made.

If one person secures the payment of another by a mortgage upon his own property and if the debt is satisfied out of the property of such surety then he will be

subrogated to the rights and securities which the original creditor held; such security may be created by the same instrument with which the property of the principal debtor was encumbered. But the subrogation of a surety will never be carried any further than is necessary to indemnify him for any payment he may have been compelled to make in behalf of the debtor. He will be indemnified for the actual cost to him and no further.

A surety may waive his right to be subrogated, where by any act of the surety or by any holding out by him it is not understood that he is a surety he is considered to have waived his rights as surety.

It is considered that it would not be equitable to allow a surety who is endebted to his principal, to be subrogated to rights against such principal unless the

surety first satisfies the debt which the principal holds against him.

Where ever the creditor shall have in his possession any property of the principal which the creditor might, without making himself in any way liable, apply to the discharge of the debt, then the property so held should be thus applied and in case of failure on the part of the creditor to so apply such proceeds the surety is thereby discharged from such a part of the debt as such property would have amounted to. The property must be such as the creditor might have a lein on for the debt, to which the surety, on payment by him, can be subrogated In illustration of this principle it was held that when a bank held the note of its debtor and subsequently sufficient funds of such debtor came into the bank that

by the failure of the bank to apply such proceeds to the payment of the note the sureties to the note were discharged.

If in the prosecution of a legal remedy against the principal, one becomes a surety, incidental to such prosecution, and is obliged to pay the debt he becomes subrogated only as to rights against the debtor; as to any prior surety he stands in the position of the debtor and will not be subrogated to the rights of the creditor against any prior sureties, but the prior surety if compelled to pay the debt will be subrogated to rights ag against the subsequent surety.

Quoting from Shelton: "In New York it is maintained that a surety upon the performance of his contract is entitled to the original evidences of the debt held by

the creditor and to any judgment in which the debt has been merged; the right of the surety is not only that of subrogation pure and simple, but also a right to an assignment from the creditor and though performance of the conditions of the suretyship discharges the obligatin so far as concerns the existence of any interest of the creditor therein, yet the original debt is kept alive for the benefit of the surety for the purpose of enforcing his rights and interests against the principal debtor. A surety paying a judgment against himself and his principal has the right to have it assigned to himself and may then enforce it against the principal or against his estate. This rule was originally restricted to equity, but is now applied also at law."

In a case where a surety receives a mortgage from

the principal debtor to secure him, if he should be obliged to pay the debt of the principal and the original debt is discharged and the surety is no longer liable, then the mortgage given for his indemnity is discharged.

We shall now enter upon a brief discussion of the subrogation among joint debtors.

Where there are several joint debtors each one of them is looked upon as principal for that part which he is to pay, and surety for that part which as co-debtor should be held liable for. Upon payment of the whole debt by one of several joint debtors the one making such payment will be subrogated to the rights of the creditor for enforcing the payment of the proportionate shares of each debtor.

Where there exists a mortgage upon the premises of two or more co-tenants and one of the tenants pays the entire mortgage debt he is entitled to have the lein kept alive in his favor and he is entitled to be subrogated to the rights of a mortgagee as against his co-tenants. Any one of such co-tenants may pay off such encumbrance to save his share in the property and then until he is reimbursed by his co-tenants, he may hold the lein as against such co-tenants as have not contributed their shares towards the extinguishment of the mortgage debt. If the obligation which has been discharges was paramount to any other obligations then the subrogation on account of payment of such debt will be paramount to any claims which were subject to the first debt which has been discharged. A co-debtor will not be subrogated

any further than is necessary to protect his rights and for a payment less than his share of the debt although others have paid nothing,and an overpayment by one of several joint debtors where each is bound for himself alone does not subrogate the one so overpaying, nor does such overpayment accrue to the benefit of the others.

Where an indorser of a note or bill is liable for payment and does pay , the note or bill so paid is not extinguished, but the indorser will become subrogated to the rights of the holder of it and may enforce all the rights which the original holder could have enforcedagainst the prior parties.

Another case where subrogation will be effected is where an executor or administrator pays the debts of an estate, in his hands for settlement, but of his own

funds and he holds sufficient funds or assets of the estate to reimburse himself he may so do and by electing to do so these assets become his own property.

Where a decree to sell realty has been made an executor or administrator may not retain it, but if he has paid out of his own property debts of the estate, he may, after the sale of such real property retain the proceeds for his reimbursement.

Where ever the executor pays out his own private funds for debts of the estate he will subrogated to the right of reimbursing himself from proceeds in his hands belonging to the estate.

It has been impossible to give very much more than a mere outline of the principal points of so broad, far-reaching and widely applied a doctrine as that of subro-

gation.

It has been the endeavor to treat at greatest length those divisions of the subject which seem to be of the greatest importance and to pass others without more than an explanation of the general principles applicable to them.

The general principle of subrogation which is found underlying cases in which it is applicable seems to be that one whose duty it is to discharge an obligation shall not escape so doing by the interposition of a third person who may make such discharge.

It would, however, be far from equitable to allow subrogation to extend to any stranger to the transaction and if it were allowed there would be a great opportunity for making a hardship against the original debtor.

Subrogation allows one who is in interest to discharge an obligation and so succeed to the rights of a creditor against the one whose debt he has paid. The doctrine does not allow one to become subrogated who attempts to make himself a creditor without any right to become one; a person who is not bound to pay a debt either because it could be enforced against him or in order to protect his own interests may not be subrogated.

The doctrine is one which works justice and equity to all; it is the duty of the original debtor to pay his debt and eventually he must do so; it is right that the creditor should receive payment of the debt; and if some third party shall make a discharge of the debt in behalf of the original debtor it is consistent with equity and good conscience that he should be reimbursed. All of

these ends are accomplished by the application of the principles of subrogation and no one is placed in a worse position than he would have been had the obligation been discharged between the original parties, thus carrying out one of the most important principles of equity that every one who has suffered a loss without his own latches shall be replaced as he was before the injurious occurrance.