SUBSTITUTED LIABILITIES.

A

TREATISE

ON

THE LAW OF SUBROGATION,

WITH

FULL REFERENCES TO THE CIVIL LAW.

BY

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ERRATA.

For *co-obligee* where occurring in Chapter III. read *co-obligor*.

INTRODUCTION.

In tracing the doctrine of subrogation to its original source in the Roman law, the design in the following treatise has been to compare the principles of the Roman jurisprudence on that subject with the rules applied to subrogation at the common law, and more especially with the law as understood and administered in these United States. It will be seen that by the Roman law, when the debt was paid by one who, being a debtor, was, nevertheless, justly entitled to subrogation, a species of fiction was resorted to, by treating the payment as a sale of the debt, and no technical difficulty was found in the cession from the creditor to such a debtor of the cause of action, when its effect was merely to authorize him to sustain an action in the name of the creditor, and not in his own name. The cession of actions by the creditor in such a case, to be effectual, as the law is understood in England, must be made to a third person. After a cession of actions according to the rules of the respective jurisdictions, subrogation being effected, the action is in the name of the creditor, and the rights and immunities secured thereby are, as well by the common law as the civil law, strictly such as the creditor himself was entitled to before payment. An absolute legal right exists in favor of the party to whom cession is made, which prevails against all subsequent creditors or purchasers. It will be seen, that though at the common law, as

understood in England and in this country, when a direct cession of actions is made by a creditor to a debtor on payment, who is entitled to demand subrogation, he acquires a legal right of action in the name of the creditor, and all the advantages which attend a priority of right; if the party is not thus subrogated by the act of the creditor in cases where an express cession of actions might have been required, that privilege which is termed legal subrogation gives him merely an equitable cause of action against the principal debtor which may charge such securities as remain in his hands, but cannot prevail against subsequent purchasers.

The distinction which is stated between the doctrine of marshalling assets and securities, and subrogation, is rendered important by the consideration, that a party who is entitled to the equitable remedies which attend legal subrogation, might by a cession of actions have acquired the absolute rights of the creditor, whereas, under the doctrine of marshalling securities, an incumbrancer could not by any cession of rights acquire an action at law. Subrogation is the substitution of one creditor for another. Marshalling is but the substitution of one incumbrance for another, and always proceeds upon equitable grounds.

THE LAW OF SUBROGATION.

CHAPTER I.

SUBROGATION.

SUBROGATION is the substitution of another person in the place of a creditor, to whose rights he succeeds in relation to the debt. Personal subrogation is of two sorts, conventional and legal. The difference between them, in regard to the effects of subrogation, in general, results only from the modifications of rights which are constituted by express agreement. Subrogation differs from delegation in this respect, that it is the substitution of a new creditor, whereas delegation introduces a new debtor in the place of the former, who is discharged. Subrogation differs from a transfer or assignment of a debt, and from delegation, in the circumstance, that it does not necessarily depend upon the creditor, but may be made independently of him. It is, properly speaking, but a fictitious cession made to one who has a right to offer payment; it is not a true cession nor sale of a debt, but such as is conceded by law, and may have effect by operation of law and the act of the debtor, even without the consent of the creditor from whom the debt proceeds. *Fit ex necessitate juris habenti jus offerendi; non est vera cessio, nec venditio nominis, sed cessio fictiva, et a jure concessa, quæ vim habet a lege, et fit beneficio legis etiam invito creditore a quo nomen procedit.*

The term subrogation does not, in relation to this subject, occur in the Roman law. It was called variously, *cessio actionum a lege, beneficium cedendarum actionum; successio; substi-*

tutio. He who had the cession of rights of action by provision of law, that is to say, he who was subrogated and who succeeded to the rights of the creditor who was paid, did not hold his right as derived from the creditor, although he entered in his place and stead. The creditor did not cede and transfer his right, but he ceased to be creditor by the payment which was made to him, and another took his place and succeeded to his rights. *Non est vera cessio, sed successio in locum alterius.* This appears from the nature of the transaction itself, when it is considered, that it is not the creditor who disposes himself of his debt, in virtue of his right of property, but that payment is made to him by the debtor to liberate himself and change his creditor; for when such evidently appears to be the fact, there is not a true cession and transfer, even though at the time of payment the creditor declares that he sells and transfers his right, but a simple subrogation.

He, therefore, who had a cession of rights of action, that is to say, he who was subrogated, did not hold his right of the creditor, with whom he had contracted no obligation. He held his right principally as derived from the law, in the case, where by law the cession of actions and subrogation took effect as of right; or he held his right as derived from the law and express agreement also, in the case where the law required that subrogation should be expressly stipulated for.

As examples of subrogation by the Roman law, may be mentioned the case, where a debtor had hypothecated his property to several creditors. The law allowed a subsequent creditor to offer to a precedent one payment of the amount due to him, either to avoid controversy, or to prevent the property of the debtor, which constituted the common security, from being exhausted in expenses. By the payment which is made to the first creditor his interest in the debt is extinguished, and he ought not to refuse to receive that which is his due, nor to transfer or deliver the evidences of his title to the subsequent creditor who pays him. Therefore the law in this case did, by its own operation, effect a transfer of action, and provided that the subsequent creditor should be subrogated to the rights of the older creditor, who had been paid, and that he should enter in his place and right. There was no necessity that the subse-

quent creditor should stipulate with the former creditor for a cession of actions and subrogation, the cession of actions and subrogation being regarded as effected by the law itself when the subsequent creditor made payment of the older debt.

As an example of subrogation which proceeded from the law and a stipulation combined, may be stated the case of a debtor, who, being apprehensive that his creditor will enforce payment from him by process of law, desires to pay him and receive a discharge. If the debtor in such case had any recourse to exercise, either because he was surety or because there were co-obligors, and he might derive an advantage from being substituted to the creditor, he might, on making payment, stipulate for a cession of actions, that is, for subrogation, and the creditor was obliged to consent to it. There are many passages of the Roman law which show that payment might be refused by the debtor, if the creditor declined to consent to subrogation and a cession of actions — *habet exceptionem cedendarum actionum.* This exception and defence was regarded as highly just, because it was the duty of the creditor to consent to a cession of actions and subrogation, which could work no prejudice to himself. *Creditor debet præstare actionem quam habet.* This exception *cedendarum actionum* was not, however, founded on strict right, but was introduced by equity. It was provided, also, that when the creditor refused to agree to a cession of actions and subrogation on payment, at the requisition of him who was entitled to make it, he might have recourse to the authority of a court, and procure an ordinance or decree of the court for a cession of the rights of action, notwithstanding the refusal of the creditor. As, in the case where a testator by his will bequeathed property which was hypothecated to a creditor; the Roman law declared that it belonged to the heir to pay the creditor, and not to the legatee, who ought to have the property bequeathed free from any charge, and that if the heir did not assume the payment, the legatee might make payment himself and obtain from the creditor a cession of actions, for the purpose of proceeding against the heir as subrogated to the rights of the creditor; and if the creditor had refused to make cession of actions and subrogation, it might be decreed by the court. It thus appeared that the cession of actions which is

called subrogation did not depend upon the creditor, and that it might be made in spite of him.

The Roman law speaks,[1] on this subject, of the case of a slave who had been freed by the will of his master, at the charge of accounting for the administration of certain property which had been intrusted to him. This freedman, after the death of his patron, accounted and paid to the heirs the balance of his account, in which he had included several sums still due, and which were yet to be recovered, and the law declared that the freedman might oblige the heirs of his patron to agree to a cession of the rights of action, and to consent to subrogation; and that he might require a decree to that effect to enable him to recover the amount advanced from his own funds, notwithstanding the opposition of the heirs.

Another instance may be adduced[2] to show that the party subrogated does not hold his right of the creditor who has been paid, and that subrogation does not depend on him; as where a debtor borrows money to reimburse a troublesome creditor. He who lends his money to the debtor to pay his creditor may declare to the debtor that he will not lend the money but on condition of being subrogated to the rights of the creditor. He ought to stipulate with him for subrogation, but there is no necessity that he stipulate with the creditor who is to receive payment. It is not necessary that he should be subrogated by the creditor, nor that he should consent to subrogation and the cession of actions; for although the creditor may not have consented, and in the discharge he declares that he has received payment without subrogation on his part, and that he does not intend to subrogate him who has lent his money to make the payment, nevertheless, if the debtor who has borrowed the money consents to subrogation, it will be good and effectual. The subrogation takes place by operation of law, in virtue of the stipulation and agreement made between the person lending the money and the debtor, who is the borrower. Though the lender is subrogated in this case to the rights of the creditor, he does not hold those rights of the creditor.

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[1] Digest, 33. 8. 23.

[2] Renussons, Tr. de la Subrogation, Ch. 2, No. 19.

This subrogation takes effect to the prejudice of other creditors later than the first creditor, but no injustice is done to them by the change. "He derives no cause of action," says Dumoulin,[1] "from the creditor, but only from the debtor, and yet he succeeds to the right of the first creditor, or at least to one similar and equivalent, and to the prejudice of other creditors subsequent to the first creditor, to whom no injury is done, though no advantage is gained by them, because the new creditor is subrogated, in the place of the first creditor, the state of things in other respects remaining as before." — *Nullam causam habet a creditore, sed solum causam habet a debitore et tamen succedit in jus primi creditoris, saltem in jus simile et æquipotens, etiam in præjudicium aliorum creditorum posteriorum primo creditori, quibus tamen non dicitur damnum inferri, sed lucrum non afferri, quia duntaxat novissimus iste creditor loco primi creditoris subrogatur, eodem in cæteris rerum statu manente.*

The law permitted subrogation to be effected by the act of the debtor, from a consideration of the advantage which he might derive from the substitution of a new creditor.

A payment which is made to the creditor for another, as surety or co-obligee, differs from that which is made by a stranger who would lend money to a debtor for the purpose of reimbursing his creditor. A surety or a co-obligee who pays a debt, and who would be subrogated to the rights of the creditor, to exercise his recourse, may stipulate for subrogation with the debtor for whom he makes payment, or with the creditor. It is sufficient if the one or the other agrees to it, and that it is declared in the receipt of payment; and if one or the other refuses his consent, he may offer payment to the creditor, with demand that he shall consent to subrogation, and, on his refusal, the creditor will be required by a court to make the proper transfer; but a stranger is not entitled to subrogation without the consent of the debtor to whom he has lent money for the purpose of paying the existing debt.

It is said by Dumoulin[2] that the cession of actions, which is termed subrogation, is not to be regarded as an ordinary trans-

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[1] Dumoulin, Tract. Usur. et Redituum Quæst. 37, No. 276.

[2] Dumoulin, Tract. Usur. et Red. Quæst. 49.

fer or sale of a debt, but rather as a simple cession of actions, made for the purpose of preserving the existing securities. *Licet creditor dicat se cedere, vendere jus suum, tamen hoc non intelligitur fieri ad transferrendum dominium, sed solum hypothecam in cessionariam; quia non censetur emere et pecuniam dare dominii acquirendi causa sed gratia servandi pignoris.* The cession has the same effect as a sale of the debt would have, but its design is merely to transfer the securities.

Subrogation, says Renussons,[1] produces some of the effects of a transfer and sale, but not all the effects of a sale, for although it preserves the security, the former creditor is not subjected to liabilities such as result from a sale. In respect to him the transaction may be regarded rather as an extinguishment of the debt — *est potius distractus quam contractus.*

By the Roman law,[2] every person, even a stranger, who paid a personal creditor, was subrogated of right to such creditor when paid; but this subrogation was attended with no results when there were no securities to be transferred; for he who paid became in his own right, by that act, a personal creditor, and entitled to the action *negotiorum gestorum*, to recover the money which he had paid. When, under that law, a stranger paid a debt to a creditor who had a personal privilege, he was subrogated of right to this personal privilege, and he was thus enabled to exclude other personal creditors who had not the same privilege.[3]

Renussons says,[4] the reason for such subrogation, as of right, when payment was made of a personal privileged debt, is not apparent, as it would seem that the personal privilege would not pass to a stranger unless he had expressly stipulated for subrogation; for payment alone would simply operate as an extinguishment of the debt and of all its incidents.

When the debtor had, under the Roman law, subjected his property to hypothecation, he might charge the same property in favor of other creditors, but their right was subordinate to

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[1] Renussons, Tr. de la Subrogation, Ch. 2, No. 25.
[2] Ibid. Ch. 3, No. 31.
[3] Ibid. No. 48.
[4] Ibid. No. 49.

that of the previous creditors. When the property exceeded in value the debt with which it was charged, a subsequent creditor might, by payment, render it effectual for his own debt; and this could not be prevented by the refusal of the first creditor to receive the amount of his debt.

The Roman law on this subject is declared in that passage of the Digest[1] in which it is said, that when the second creditor pays him who precedes him in order of time, or offers to make payment, he may dispose of the property which has been hypothecated, as well for the amount which was due to him from the common debtor, as for that which he has paid to the first or precedent creditor.

In another passage,[2] it is said that a subsequent creditor may offer to a prior creditor the money due to him, and if this creditor declines to receive it, he shall derive no further advantage from his hypothecary action, and he cannot prevent the subsequent creditor from proceeding against the property charged for the recovery of his debt, because it was his own fault that he did not receive what was due to him. *Si paratus est posterior creditor priori creditori solvere quod ei debetur, videndum est an competat ei hypothecaria actio, nolente priori creditore pecuniam accipere. Et dicimus, priori creditori inutilem esse actionem, quum per eum fiat ne ei pecunia solvatur.*

It is declared in the Code of Justinian,[3] that when the second creditor pays a prior creditor, or deposits the amount of the debt on his refusal to receive payment, he thereby establishes his own right. *Qui pignus secundo loco accepit, ita jus suum confirmare potest, si priori creditori pecuniam solverit, aut cum obtulisset eam obsignavit et deposuit.*

It is also declared, under the same title of the Code,[4] that so long as the more ancient creditor remains unpaid, the subsequent creditor cannot proceed for payment against the thing hypothecated, but that he must first pay the precedent creditor. *Diversis temporibus, eadem re duobus, jure pignoris obligata, eum qui prior data mutuo pecunia, pignus accepit, potiorem haberi certi*

[1] Digest, 20. 5. 2.
[2] Ibid. 20. 4. 11. 4.
[3] Code, 8. 18. 1.
[4] Ibid. 8. 18. 8.

et manifesti juris est, nec alias secundum creditorem distrahendi potestatem hujus pignoris consequi nisi priori creditori debita fuerit soluta quantitas. It is also said,[1] that the prior creditor may proceed against the property hypothecated for the payment of his debt, and that he cannot be required to offer payment to the subsequent creditor, but that such subsequent creditor, by payment, assures to himself the benefit of the pledge. *Prior quidem creditor compelli non potest tibi qui posteriori loco accepisti debitum offerre, sed si tu illi id omne quod debitur solveris pignoris tui causa firmabitur.* But if the former creditor is unwilling to receive payment of the debt from the creditor who is subsequent, if, on the contrary, it is his wish to make payment of the debt for which the property has been subsequently pledged, he may do so and retain the property.[2]

If the subsequent creditor was in possession of the thing hypothecated, he had the right to preserve his possession of the property by offering to pay the prior creditor the amount which was due to him, on the ground that the condition of the party in possession was most favorably regarded.[3]

The Roman law, which provided that the subsequent creditor might offer to a prior one the amount which was due to him, provided also for the interest of the subsequent creditor, by whom the payment should be made, by declaring that such creditor should be entitled to succeed to the prior creditor, and be subrogated to his rights, to the end that if creditors subsequent to him should appear and disturb him in the possession of the thing hypothecated, or assert a right so to do, he might defend himself against them as an original creditor, and that he should be subrogated to the rights of the creditor whom he had paid, and be preferred on the property hypothecated in the same manner as the creditor paid would have been. The reason of this subrogation and preference was, that as he had made the payment for the purpose of preserving his pledge and to confirm his right to the property, it would be unjust that a privilege which the law accorded him should turn to his disadvantage,

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[1] Code, 8. 18. 5.

[2] Renussons, Tr. de la Subrogation, Ch. 4, No. 6.

[3] Digest, 20. 6. 12. 1.

and that, after having paid the charges on the property, he should be disturbed by other claims subsequent to that which he had paid. There are many texts and passages of the Roman law which declare the rule on this subject. In a passage of the Digest,[1] it is said that a subsequent creditor, who has paid a prior creditor the principal and interest of his debt, acquires a charge upon the property hypothecated for the principal and interest, though the payment may have been made without the consent of the debtor and against his wish, but that he shall not be allowed for interest on the interest of the debt which he may have paid the prior creditor. *Sciendum est, secundo creditori, rem teneri etiam invito debitore, tam in suum debitum, quam in primi creditoris et in usuras suas, et quas primo creditori solvit, sed tamen usurarum quas primo creditori solvit, usuras non consequenter; non enim negotium alterius gessit, sed magis suum.*

In another passage of the Digest,[2] it is declared that a subsequent creditor who pays the first creditor succeeds to his rights, as in the following case. If you are the creditor of a certain debtor by titles of hypothecation of different dates, and Seius, another creditor, interposed in order of time between your two debts, offers to pay that which is due by your first title, the law permits him to do this, and provides that on such payment he shall be subrogated as of right to your first hypothecation upon the property, as well for the amount which he has paid as for that which is due to him, and that he shall be paid preferably to your last debt. *Quærbatur si post primum contractum tuum, antequam etiam pecuniam tu crederes, eidem debitori Seius credidisset quinquagenta et hyperocham, hujus rei, quæ tibi pignori data esset, debitor obligassit, dehinc tu eidem debitori credens forte quadriginta, quod plus est in pretio rei quam primo credidisti, utrum ei, ob quinquegenta an tibi in quadriginta cederet pignoris hyperocha — finge Seium paratum esse offerre tibi summam primo ordine creditam. Dixi, consequens esse ut Seius potior sit in eo, quod amplius est in pignore, et oblata ab eo summa primo*

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[1] Digest, 20. 4. 12. 6.
[2] Ibid. 20. 4. 20.

ordine credita usurarumque ejus post ponatur primus creditor in summa quam postea etiam debitori credidit.

The subsequent creditor, it is again said,[1] who has offered to a prior creditor payment of his debt, succeeds in his place *cum secundus creditor oblata priori pecunia in locum ejus successerit, etc.* And it is declared in the Code,[2] that a subsequent creditor of one who is indebted to the public treasury may pay the State and offer what is due, for the purpose of succeeding to its rights. *Si potior respublica contraxit, fundusque ei obligatus, tibi secundo creditori offerenti pecuniam, potestas est ut succedas etiam in jus reipublicæ.*

All the writers who have treated on this branch of the Roman law concur on this point, that a subsequent creditor who pays a prior creditor is subrogated, as of right, by such payment.[3] The reason, says Renussons,[4] that it was held by the Roman law that a subsequent creditor who pays a prior creditor, succeeds to him by operation of law, and is subrogated as of right without the necessity of any special agreement to that effect, is, that it is just that the payment which is made by the subsequent creditor to the more ancient one, in virtue of the privilege which the law allows him, should not result to his prejudice and be unavailable to him. Not indeed being a debtor, but occupying the position of a creditor, and the property of the debtor being hypothecated to him, his only object in making payment is to establish his right to the thing hypothecated, and to unite in his person the right of the prior creditor, and thus prevent the property charged from being wasted in expenses. It is, therefore, just that he should not be disappointed in his purpose, and that, to render his payment available, he should succeed by operation of law, and as of right to the creditor who has received payment of his debt. It is not necessary that he should stipulate for subrogation, or enter into any agreement to that effect at the time of payment, for the consideration of the payment is sufficiently evident, and

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[1] Digest, 20. 5. 5.

[2] Code, 8. 19. 4.

[3] Renussons, Tr. de la Subrogation, Ch. 4, No. 12.

[4] Ibid. No. 13.

the intention is declared by the nature of the transaction. It is clear that the payment was made by the subsequent creditor, for no other reason than to acquire the rights of the first creditor, for as he is not in the condition of a debtor, he has paid such creditor merely to enter in his stead and place, and by this means preserve the property charged. In this respect, a creditor who redeemed a prior incumbrance, was distinguished from a surety who paid the debt, and who was by reason thereof entitled to a cession of actions.

At the common law, it seems to have been held that it depends in such a case upon the intention of the parties, whether the original charge shall be extinguished or kept alive, so as to give the purchaser in respect thereto the advantage of priority over an intermediate incumbrancer.

In a case[1] where there were two mortgages, the estate mortgaged was sold to a purchaser, one of the terms of the agreement being, that out of the purchase-money he should retain in his hands a certain sum in order to pay the two mortgages, and by indentures of lease and release reciting the mortgages the estate was conveyed to him. Afterwards, the first mortgagee conveyed, by the purchaser's direction, the premises to a trustee. The purchase-money was furnished by another person, to secure whom the premises were demised for a term of years. It was held that the second mortgagee thereby became the first incumbrancer, and that the person who furnished the purchase-money was not entitled, to the extent of the money paid to the first mortgagee, to have his mortgage considered as still subsisting. The Vice-Chancellor observed, that when the money of the lender was applied in satisfaction of the first mortgage debt, the parties might have made an arrangement which would have kept the security against the second mortgage. Such an intention would perhaps have been presumed at the civil law.

With regard to the presumptive intention, where a person becomes entitled to an estate subject to a charge for his own benefit, Sir William Grant was of opinion,[2] that a Court of

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[1] Perry *v.* Wright, 1 Sim. & Stu. 369; 5 Russell, 142. See Toulmin *v.* Steere, 3 Meriv. 210.

[2] Forbes *v* Moffat, 18 Vesey, R. 392.

Equity would consider whether it was most advantageous for the party that the mortgage should be kept on foot, as otherwise a priority would be given to subsequent mortgages.

In a case decided by the Supreme Court of Massachusetts,[1] it was held that where a purchaser of a right to redeem takes an assignment, this shall or shall not operate as an extinguishment of the mortgage according as the interest of the party taking the assignment may be, and according to the real intent of the parties. The defendant first purchased the equity of redemption, and then took an assignment; and, as against a widow claiming a right of dower, it was held that the mortgage was not extinguished. And in another case, the same doctrine was held. "Suppose," said Shaw, Ch. J.,[2] "a man in good credit mortgages his real estate to two thirds of its value to A. Subsequently, it is attached by B. upon a secret attachment, not known to a subsequent purchaser, or, subsequently, C. purchases the equity of redemption to protect his own interest, he must obtain from the first mortgagee either an assignment or an extinguishment of the mortgage. If the latter, he may let in all the claims of attaching creditors, or second purchasers, and lose all the money he has paid, to discharge the mortgage. If the former, then he will stand, as he ought, in the place of the first mortgagee, with an unquestioned title to the extent of the money paid for such assignment, as against all subsequent claimants, so that if they would redeem, they must first repay to him, as assignee, the amount of the mortgage, leaving them to stand towards him, in his capacity of purchaser of the equity, according to their legal and equitable rights, in exactly the same manner as they would have stood towards the first mortgagee himself."

In a case decided by the Supreme Court of Connecticut,[3] where there was a first and second mortgage of land, the first mortgagee received a release of the equity of redemption from the mortgagor, in consideration of giving up to him the note on which the mortgage was given, and it was held, that the

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[1] Gibson *v.* Crehore, 3 Pickering, R. 475.

[2] Hunt *v.* Hunt, 14 Pickering, 383.

[3] Baldwin *v.* Norton, 2 Conn. R. 161, 709.

second mortgagee was not entitled to foreclose the first mortgage without paying off the first incumbrance. The question in this case was, whether the purchase of the equity of redemption by the first mortgagee, and the cancelling of his debt against the mortgagor, was a purchase of the land subject to the second mortgage. The decision of the court was founded upon the presumption that the purchase was not made subject to that mortgage. It was most advantageous to the purchaser to regard his incumbrance as subsisting; and if it had been the intention to provide in the transaction for the payment of the second mortgage, that intention should have been declared in the transaction.

As the subsequent creditor has the right to offer payment to the prior creditor, and be subrogated as of right by such payment, so, *e converso*, undoubtedly, the prior creditor may, on payment to the subsequent creditor, be subrogated of right to such creditor.[1] It may happen that the prior creditor, to render the property available for the payment of each debt, may wish to pay the subsequent creditor, and in such a case, it is reasonable that the anterior creditor should have the same advantage which the subsequent creditor has in the like case, namely, to be subrogated to his rights by the mere act of payment. And by the Roman law, the first creditor had *jus offerendi* the right to offer payment in preference to the subsequent creditor. He might have an interest to preserve the property hypothecated, and to exclude the subsequent creditor on paying to him what was his due, and whose only claim was for payment.[2]

A simple creditor without hypothecation has, by the law of France, no right to require a creditor by title of hypothecation to receive payment of his debt, and if the latter consents to receive payment from such creditor *creancier chirographiaire*, he is not subrogated thereby as of right to his debt. He can only acquire a right to subrogation by express agreement. In this respect, a creditor without hypothecation is regarded as a mere stranger. It would seem, however, that when such a creditor had acquired, as he might, a judgment which should

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[1] Renussons, Tr. de la Subrogation, Ch. 4, No. 22.

[2] Ibid. No. 14.

charge the property of the debtor, he would be in a condition to offer payment and to require subrogation.

The subsequent creditor who pays a former creditor, acquires a right to be subrogated to the creditor who has been paid; but this subrogation takes effect only against this common debtor, and not against his co-obligees, except in the case where they also are the common debtors of both creditors.[1] If there were other persons than the common debtor who were bound to the creditor, subrogation would have no effect against them, unless they were common debtors, because, in respect to them, the creditor who is entitled to subrogation is in the position of a stranger, and, therefore, he cannot have subrogation against them except by special stipulation.

The action which the subsequent creditor has who is subrogated of right by payment to a precedent creditor, is the same action which the former creditor had who has been paid.[2] The right of action and the hypothecation is the same. The debtor remains bound to the new creditor who has been subrogated, in the same manner as he before was to the old creditor who has been paid; there is no change except in the person of the creditor. A distinction would seem to exist between the case of a posterior creditor who succeeds to the rights of a precedent creditor by payment, and that of a person who is subrogated by the debtor to the rights of a creditor, to pay whose debt he has lent money to the debtor. In the first case, the last creditor is subrogated to the action of the first, but when subrogation is by the act of the debtor, without any concurrence by the creditor, the new creditor is not subrogated to the same action as that of the first creditor, but to a like action, and to the place and rights of the creditor.

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[1] Renussons, Tr. de la Subrogation, Ch. 4, No. 23.
[2] Ibid. No. 24.

CHAPTER II.

SUBROGATION IN FAVOR OF A PURCHASER.

When a purchaser is subjected to process of law by a creditor of the vendor, anterior to the sale, to whom the land has been hypothecated or mortgaged, and is compelled to make payment of the debt to avoid a loss of the property purchased, the question arises whether he is subrogated as of right to the creditor paid, though no express stipulation has been made for subrogation.

It was established by the Roman law, that the purchaser in this case should succeed as of right to the creditor whom he had paid, and that he should be subrogated in his place and stead, though he had not required or stipulated for subrogation at the time of payment, and that he might to that extent be protected against the claims of other creditors of the vendor, subsequent to the creditor who has been paid, and that he might defend himself against them as subrogated to the rights of such creditor. This rule was established because the only motive for the payment by the purchaser to the first creditor of the vendor, was to liberate the property purchased by him, and by this means to preserve possession; and if, on being proceeded against by other creditors for the property, after payment to the first creditor, he was compelled to abandon the property purchased, the payment which had been made to the first creditor would constitute a charge upon the property in the hands of creditors, or, if sold by a decree of court, upon the results of the sale, it being equitable that in abandoning possession, he should not be subjected to the loss of money paid in discharge of an actual incumbrance on the property. In like manner, when a purchaser was bound by his contract to pay a creditor of the vendor, and he had paid such creditor,

it was regarded as just, by the Roman law, that the purchaser should succeed as of right to the creditor, and, as subrogated to his privileges, defend himself against such subsequent creditors as might disturb his possession, or, if he was compelled to abandon the property, the amount paid to the creditor should constitute a charge thereupon, in the order of the security as it existed in favor of the creditor before payment.

There were several provisions to this effect in the Digest and Code — as in a passage of the Digest,[1] where it is said that he who has purchased of his debtor land charged with another debt, shall be so far protected as payment has been made to a former creditor. *Eum qui a debitore suo prædium obligatum comparavit eatenus tuendum, quatenus ad priorem creditorem ex pretio pecunia pervenit.*

In the Code,[2] it is said, in substance, that if precedent creditors have been paid by the funds of a purchaser from the results of the sale, the purchaser will succeed to the rights of such creditors, and will have a just defence against subsequent creditors. *Si potiores creditores, pecunia tua demissi sunt, quibus obligata fuit possessio, quam emisse tu dicis, ita ut pretium perveniret ad eosdem priores creditores, in jus eorum successisti, et contra eos qui infirmiores illis fuerunt justa defensione te tueri potes.*

The better opinion is, that by the Roman law a purchaser who discharged an existing debt which constituted an incumbrance upon the property, was subrogated as of right thereby to the privileges and rights of the creditor. An express stipulation for subrogation does not seem to have been necessary, though the purchaser might demand that the subrogation should be made to him expressly, by the creditor asserting his claim under a prior debt.

The case of a purchaser who discharges a debt existing against property bought, is entirely unlike that of a payment made by one who was in the condition of a co-obligor. In that case payment is made by a debtor. The object of the payment may have been to extinguish the debt, but where a purchaser of land pays a debt which constitutes a charge upon the land,

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[1] Digest, 20. 4. 17.

[2] Code, 8. 10. 19.

his object is to protect himself in the possession of the land. He does not pay the debt as a debtor who is bound to make payment; therefore, when subsequent creditors whose debts constituted a charge upon the land proceed against him, justice requires that the object of the payment, and the character in which it was made, should be regarded with a view to prevent subsequent incumbrancers from gaining an unjust advantage.

A case may be stated, as depending upon the same principle, by which a purchaser is subrogated to a creditor whose debt charged upon land he has paid.[1] As where a mortgagee of land purchases the land of the mortgagor, and pays him a sum of money over and above the amount of the mortgage debt, and being afterwards subjected to a suit on the part of a prior incumbrancer, abandons the land, it would seem that on principles of equity, although the mortgage debt was paid and extinguished by the sale, yet, when afterwards the sale was disaffirmed on account of the appearance of a precedent incumbrancer, the charge upon the land in favor of the mortgage creditor revived.[2] On the same principle, that the purchaser would have been subrogated to the rights of a creditor, whom he had paid for the sake of rendering his purchase secure, and, on an abandonment of the property, would have been entitled to have the debt constitute a charge upon it, the mortgage debt in his own favor must be held to revive. The purchaser, says Renussons,[3] may be held to succeed to himself.

That such would be the result in a Court of Equity under the system of the common law, is very clear. The maxim, that a party cannot at the same time be creditor and debtor for the same debt, though it extinguished the mortgage debt in the purchase, would not, when the purchase was abandoned, prevent the creditor from setting up his debt as a charge upon the land, precisely as if no sale had been made. Cases of this kind are regarded at the civil law as resting on principles analagous to

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[1] Renussons, Ch. 5, No. 21; Nouveau Repertoire Vo. Subrogation des Personnes, Sect. 2, § 4, No. 5; 7 Toullier, No. 144.

[2] See Baldwin *v.* Norton, 2 Conn. R. 161 and 709.

[3] Renussons, Ch. 5, No. 34.

those applicable to the doctrine of subrogation. In a passage of the Digest,[1] it is said that where a creditor who had accepted property pledged, which a second creditor by a second agreement had received, and afterwards, on a novation, the first creditor had received other property in addition to that originally pledged, it was decided that he held in the order of time of the original pledge, as succeeding to himself. *Creditor acceptis pignoribus, quæ secunda conventione secundus creditor accepit, novatione postea facta, pignora prioribus addidit; superioris temporis ordinem manere primo creditori placuit tanquam in suum locum succedenti.* The effect of novation in general is to extinguish the old debt, but in this case it was kept alive, in the same manner as if, by the agreement which constituted novation, a new creditor had acquired by transfer the first debt with its securities. The intention in this case was not to make way by novation for the second creditor. The intention to preserve the original security was presumed, though not declared in the novation.

So it is said in another passage,[2] that if the first creditor receive by novation a new pledge in addition to a former, he succeeds to himself. *Si prior creditor, postea novatione facta eadem pignora cum aliis accepit in suum locum eum succedere.*

But if the second creditor does not offer to pay the first, the first creditor may sell the property pledged for payment of the first debt, but not for payment of a subsequent debt, and what remains he is to restore to the second creditor. *Sed si secundus non offerat pecuniam, posse priorem vendere, ut primam tantum pecuniam expensam ferat, non etiam quam postea credidit; et quod superfluum ex anteriore creditore accepit, hoc secundo, restituat.*[3] Notwithstanding the novation, the creditor in these cases, for the purpose of sustaining the preference which the law gave him in order of time, succeeded to himself, that is to say, the law looked beyond the transaction by which the old debt was merged in a new obligation, and gave the first creditor the advantage of his original priority.

The question has been presented, whether by the abandon-

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[1] Digest, 20. 4. 3.
[2] Ibid. 20. 4. 12. 5.
[3] Ibid.

ment or resolution of a purchase, the original obligation may be restored as against a surety, and whether a creditor who is ousted, by one who has a prior charge, from an estate which he had taken of his debtor in payment, enters into all the rights which he had before the purchase, not only against the principal debtor, but also against the surety of the debtor. It may be maintained that the creditor, by accepting property in payment from his principal debtor, has liberated him so that the surety cannot proceed against him for his indemnity, because the debt is extinguished, and that therefore the surety is absolutely discharged.[1] The better opinion, however, under the civil law was, that the creditor who is ousted from the property which he has received from the debtor in payment, reënters into all his rights, not only against the principal debtor, but also against the surety himself.[2]

The release which is effected by the acceptance of property in payment, involves the tacit condition, that if the creditor is evicted therefrom, the debt shall revive, not only against the principal, but also against sureties who have not been discharged, provided there has been no want of diligence on the part of the creditor.

The doctrine of the civil law, as stated by Renussons[3] and others, is, that when land is mortgaged to a creditor for a debt, and is then sold in parcels, at different times, to different persons, the first purchaser cannot, by satisfying the debt, acquire the right to be subrogated to the creditor against the second purchaser, as liable for the debt or on the guaranty, by reason of the subsequent assignment to him from the vendor, whether, at the time of the payment of the debt, subrogation was stipulated for generally or not; because the purchaser is entitled to apply the right acquired by subrogation only to that portion of the property incumbered which he has purchased. It is further held, under the civil law, that the first purchaser has no claim for contribution in virtue of subrogation as against a subsequent purchaser. He can only protect thereby the property

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[1] Basnage, Tr. des Hypotheques, Ch. 15.

[2] Renussons, Tr. de la Subrogation, Ch. 5, No. 40.

[3] Renussons, Tr. de la Subrogation, Ch. 5, No. 42; 7 Toullier, No. 145.

which he has purchased. His only claim in addition, is a personal one, on the vendor for guaranty. If he has purchased the land without acquiring a charge upon the land remaining in the hands of the vendor, he cannot pursue it, as charged with the guaranty in the hands of a subsequent purchaser. He has no recourse, except against the vendor. As the purchaser had no lien upon the lands remaining in the possession of the vendor as security, the land passed without incumbrance to the subsequent purchaser. The assignee could not be charged with liability by reason of the assignment of property to which it was not before subject.

A case is stated by Renussons,[1] which, so far as it is material to the question of subrogation, may be stated as follows: Sempronius borrowed of Mœvius the sum of 6,000*l.*, for which he bound himself to the payment of the annual sum of 300*l.*, and mortgaged therefor two houses which belonged to him, one in the Faubourgh St. Germaine, the other in the Faubourgh St. Antoine. Mœvius died, and was succeeded by his son as heir. Sempronius, being thus indebted for the annual payment of 300*l.*, sold the house in the Faubourgh St. Germaine for 6,000*l.* to Titius; and, one year after, sold the other house in the Faubourgh St. Antoine for the sum of 8,000*l.* Afterwards, the heir of Mœvius, to whom the annual payment of 300*l.* was due, instituted proceedings against Titius, the purchaser of the house in the Faubourgh St. Germaine, that he might be charged with the payment of the 300*l.* Titius, to protect his purchase, paid the principal and arrears of the debt which was due to Mœvius, and, as subrogated to his rights, commenced proceedings against Caius, the second purchaser, not only for the said debt and arrears, but also as bound to guaranty of the purchase which he had made. Titius claimed that Caius, the second purhaser of a part of the mortgaged premises, was, as assignee of the vendor, bound in like manner to warranty, and also that he was chargeable with the whole debt due to Mœvius, to which he had become subrogated by payment. Caius, the second purchaser, though admitting that Titius, the first purchaser, was

[1] Renussons, Ch. 5, No. 42.

subrogated as of right to Mœvius, by the payment which he had made of the debt to Mœvius, maintained that the effect of the subrogation was limited to the house which he had purchased in the Faubourgh St. Germaine; that, as subrogated to the creditor, he had a right to protect his possession, and to defend himself against any subsequent creditors who might appear and claim to charge the property; because, having liberated it from the debt, he had acquired a right to the security, and it was just that he should be preferred to subsequent creditors; but that this subrogation gave him no right to proceed against the second purchaser, because, in paying the debt for the purpose of securing his possession of the house which he had bought, he had merely discharged a debt from him, by reason thereof, and without the payment of which, he must have abandoned the property. When a debtor, it was said, discharged a debt, the payment operated merely as an extinction of the debt, and there was no cession of any right of action, nor is there a sale of the debt, because no one is regarded as purchasing by payment that which he owes. *Debitore solvente extinguitur obligatio, nec possunt ei cedi actiones, nec ejus respectu, potest dici emptio nominis; quia nemo emere videtur quod ipse debet.*

Though Titius was not indeed, originally, the principal debtor, but only a purchaser of mortgaged property by which it was secured, yet, as he had paid the creditor for the sake of securing his possession in the property purchased, it was said that he should really be regarded as debtor, by reason of his possession, and that, in the capacity of debtor merely, he had made payment; that he discharged himself in liberating the property, of which he preserved the possession, and that though the law subrogated him as of right, by the payment which he had made to the creditor, that subrogation was limited to the property possessed, for the law merely gave him the right to defend himself against subsequent creditors asserting a right, and gave him a preference on the property possessed, but that this subrogation gave him no right to proceed against a subsequent purchaser to charge his land with the debt.

Renussons[1] is of opinion that the defence of Caius, the

[1] See also, 7 Toullier, No. 145. Toullier is of opinion that the same principle

second purchaser in the case stated, was well founded; for Titius, by paying Mœvius the principal and arrears of his debt, was subrogated as of right to Mœvius by the payment, but the subrogation was limited to the property purchased, because a purchaser who pays a creditor of his vendor, who sets up a charge against the property, has no other design but to secure his possession; it is not his intention to acquire the right of the creditor as a charge on other property, because it is not declared at the time of payment.

The intention to succeed to the rights of the creditor generally, does not appear. The law gives effect, as of right, to subrogation, merely to sustain the apparent intention of the parties; and in this case, the purchaser's intention, from the nature of the case, is limited to the liberation of the property. Such being the case, the first purchaser, by discharging the debt for which his land was mortgaged, acquired no right to proceed, for the same debt, against a subsequent purchaser of other property also mortgaged for its security.

Although a purchaser may be a creditor by hypothecation for the guaranty of his purchase, and every such creditor is subrogated to creditors of the same character whom he may have paid, the purchaser, who is entitled to his actions of guaranty, is not regarded in the same light as an actual creditor for a sum certain. There is, in relation to this matter, an entire difference between them. He who is an actual creditor for a sum certain, and who pays a creditor of the debtor, has no motive to make such payment, but to acquire the general rights of the creditor upon the property of their common debtor, for he is not a debtor on his own account.

A subsequent creditor who pays a prior creditor, makes the payment merely to acquire the rights of the prior creditor. The payment is made to preserve the property charged, and prevent its being wasted. This is his intent in acquiring the rights of the creditor by payment; therefore the law subrogates him, as of right to the creditor, for all the property hypothecated.

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must be extended to the analogous case, where legal subrogation is accorded to a creditor who pays a preferred creditor, to preserve the common security, and prevent its being consumed in expenses. 7 Toullier, No. 146. See note, however, to No. 146.

It is otherwise of a purchaser against whom proceedings are commenced by a creditor of the vendor. He is not, in the first place, a creditor. He has merely an action against his vendor. In the second place, he is himself a debtor, as possessor of the property hypothecated, which was purchased by him. He is obliged to pay as debtor, or give up the property which he has bought. If, to avoid this, he simply pays, it is true that he becomes a creditor of his vendor, and that he has his action to recover that which he has paid; yet he has had no purpose but to resort to this action, and to liberate the property which he has purchased. It is not to be presumed that he had any other object in view when he made payment, since he has not declared it; and, therefore, the law which subrogates him as of right to the creditor paid, has limited also his subrogation to the property purchased. In regard to the right of action which the purchaser has on his own account, founded upon the guaranty of the sale, he may exercise it on all the property of the vendor which may be reached by it, but for the subrogation which the law gives him *ipso jure*, by reason of the payment which he has made to the mortgage creditor, the law has limited him to the property purchased. And the same principle holds, though, in the case supposed, Titius, the first purchaser, who had paid the debt charged upon his land, is subsequently evicted from the same land by creditors anterior to that sale. The subrogation which the law gives him being limited to the property purchased, if he is evicted from that property by creditors of an earlier date, still he has no recourse except to the vendor and his privies. The eviction suffered in consequence of the appearance of creditors who have a superior right, gives him no new cause of action against the second purchaser. The purchaser who has paid a debt for which the property purchased has been charged, acquires no right by reason of his limited subrogation on other property. He has only the action of warranty and the action *negotiorum gestorum*, to recover from the vendor the debt from which he has been discharged by the payment of the purchaser, over and above the amount of the purchase-money.

The question presents itself whether, if the first purchaser, on paying the debt which constitutes a charge on his property and

also on that of the second purchaser, stipulates expressly for subrogation, and it is declared in the discharge, that he shall be subrogated to the rights of the creditor, it extends to the whole property charged. It may be said, on behalf of the second purchaser, that the first purchaser, in paying the debt, has acted merely as a debtor who seeks to discharge his property from an incumbrance; that the subrogation stipulated for has its effect upon the property liberated, and secures the possession, whilst it also enables him to defend himself against other creditors; that he has no right to resort to the second purchaser, because, having acquired a secure possession of the property purchased, by means of the subrogation applied to that, it would be unjust for him to acquire a second recompense by resorting to the property of the second purchaser. It might be added, also, that the subrogation stipulated for at the time of payment gave him only the rights of the creditor, and that as the creditor, had he not been paid, might have entered upon the land of the first purchaser, for satisfaction of the debt; the debt being thus discharged, he could not afterwards resort to the second purchaser. And the same result, it may be said, would follow from payment by the first purchaser with express subrogation. He enters upon the property in the right of the creditor, and the debt is satisfied thereby, as it would have been if the creditor himself had taken the property in payment of the debt. The subrogation in this case may be regarded as having had its full effect upon the property, and that, therefore, resort cannot be had to the second purchaser for a double recompense.

The question suggests itself, whether the second purchaser, Caius, in the case supposed, would not be bound to contribute to the payment of the debt with which the property was charged, together with other property of the party subrogated. It may be said, in favor of such contribution, that when two or more persons are jointly bound for one and the same debt, that if one of the co-debtors pays the entire debt to the creditor, and stipulates at the time of payment for subrogation to his rights, the debt is extinguished for the part to which he who has made payment was bound, *debitore solvente extinguitur obligatio, nec possunt ei cedi actiones, nec ejus respectu, potest dici emptio nominis, quia nemo emere videtur quod ipse debet.*

There is no subrogation except for the shares of the other co-obligees, but for such parts it exists because payment has been made for them, and it may be said that the same principle is applicable to several purchasers whose property is charged with the same debt, so that when one of the purchasers pays the whole debt, he should be permitted to resort to the others for contribution. There is, however, a difference between co-obligors who are jointly charged at the same time and bound for the same debt, and purchasers who have separately purchased different properties charged with the same debt, and who are neither co-debtors nor co-obligors.

Notwithstanding the acknowledged difficulty of the subject, the established rule of the civil law[1] seems to be, that neither by operation of law, nor by express stipulation, has the first or a subsequent purchaser a right to be subrogated against other property charged with the same debt on payment thereof, but that the purchaser shall be subrogated alone against the property, for the protection of which the payment was made.

The rules which prevail in Courts of Equity under the common law, where the maxim governs that equality is equity, have been supposed in such a case to require contribution between the respective purchasers.

In a case decided by the Court of Chancery of the State of New York,[2] however, a rule was laid down which would, in the case supposed, render the second purchaser liable for the debt, in exoneration of the first. Mr. Chancellor Kent, says: "If there be several purchasers in succession at different times, I apprehend that, in that case, there is no equality and not contribution as between purchasers. Thus, for instance, if there

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[1] Renussons, Ch. 5, No. 59.

[2] Clowes *v.* Dickinson, 5 Johns. Ch. R. 235. See Guion *v.* Knapp, 6 Paige, 35. In this case, it is said by Mr. Ch. Walworth, that if the mortgage is a lien upon 200 acres of land, and the mortgagor conveys 100 acres thereof to A.; the 100 acres which remain in the hands of the mortgagor is to be first charged with the payment of the debt, and if that is not sufficient, the other 100 acres is next to be resorted to. But if A. had subsequently conveyed one half of his 100 acres to B. *with warranty*, the 50 acres remaining in the hands of A., is in equity first chargeable with the payment of the balance of the debt which cannot be raised from the 100 acres still remaining in the hands of the mortgagor. And the principle holds in every case, whether the ale is with or without warranty, if it is not a mere salc of the equity of redemption.

be a judgment against a person owning at the time three acres of land, and he sells one acre to A., the remaining two acres are first chargeable in equity with the payment of the judgment debt, as we have already seen, and that, too, whether the land be in the hands of the debtor himself or of his heirs. If he sells another acre to B., the remaining acre is then chargeable, in the first instance, with the debt as against B. as well as against A. And if it should prove insufficient, then the acre sold to B. ought to supply the deficiency, in preference to the acre sold to A.; because, when B. purchased, he took his land charged with the debt in the hands of the debtor, in preference to the land already sold to A. In this respect, we may say of him as is said of the heirs, he sits in the seat of his grantor, and must take the land with all its equitable burdens; it cannot be in the power of the debtor, by the act of assigning or selling his remaining land, to throw the burden of the judgment, or a ratable part of it, back upon A. It is to be observed, that the debt in this case is the personal obligation of the debtor, and that the charge on the land is only by way of security; the case is not analogous to a rent charge which grows out of the land itself, and every purchaser of distinct parcels of a tract of land charged with the rent, takes it with a proportionable part of the charge. The owners of the land in that case all stand equal, and if the whole rent be levied upon one, he will be eased in equity by a contribution from the rest of the purchasers, because of the equality of right between them."

Mr. Justice Story[1] questions the correctness of this doctrine. After stating that the general rule now acted upon by Courts of Equity, is, that where there is a lien upon different parcels of land for the payment of the same debt, and some of these lands still belong to the person who, in equity and justice, owes or ought to pay the debt, and other parcels of land have been transferred by him to third persons, his part of the land, as between himself and them, shall be personally chargeable with the debt, he then observes: "But it has been further held, that, if he has sold or transferred different parcels of the land at different times to different persons, as incumbrancers or purchasers, then, as between themselves, they are to be charged in

[1] 2 Story's Equity, § 1233.

the reverse order of time of the transfers to them; that is to say, the parcels last sold are to be first charged to their full value; and so backwards, until the debt is fully paid; for, it is said, the last purchasers are to take only as far as they may, without disturbing the rights of the prior incumbrancers or purchasers, who, being prior in point of time, have a superiority of right."

And Mr. Justice Story proceeds to say: "But there seems great reason to doubt whether this last position is maintainable upon principle; for, as between the subsequent purchasers or incumbrancers, each trusting to his own security upon the separate estate mortgaged to him, it is difficult to perceive that either has, in consequence thereof, any superiority of right or equity over the other; on the contrary, there seems strong ground to contend, that the original incumbrance or lien ought to be borne ratably between them, according to the relative value of the estates." And so he says the doctrine has been asserted in the most recent English cases on the subject. If the doctrine stated by Mr. Justice Story furnishes the true rule of equity, each of the purchasers, in the case above stated from Renussons, was chargeable ratably, according to the relative value of their lands, and, by the principles of equity, if either of the purchasers had become subrogated to the rights of the creditor, either by operation of law or by express stipulation, the subrogation would not merely be applicable to the land purchased, which the design of the payment was to liberate from the debt, but the purchaser would be subrogated to the creditor's security against the other purchaser for the share which he would be bound to contribute, ratably, to the value of the estate. There is no similarity between the condition of the original vendor and that of the second or last purchaser. The vendor is the debtor, and is chargeable with the whole debt. The property, while remaining in his hands, is to be applied in relief of purchasers. It is true, that when a purchaser has a right to have land in the hands of the vendor applied in relief of the lands purchased, a subsequent purchaser is in privity with the vendor, but he is not a debtor. The first purchaser cannot call upon *him* to pay the debt in discharge of his land. The legal title of the second purchaser is perfect, and,

on principle, his only liability is an equitable one, by which he may be bound to a ratable contribution.

Although by the civil law, it would seem, the first purchaser could not, on payment of a debt which constitutes a charge on his own land, as well as on the land of the second purchaser, be subrogated to the rights of the creditor, for the purpose of recovering the same from the second purchaser, either by operation of law, or conventionally; as it is the right of a creditor to proceed against any property charged with the debt, and the same right exists in favor of his assignee; if there is no rule of equity which provides for a contribution between the first and second purchasers, the policy of the law may be completely evaded by either of the purchasers, if the payment of the debt is secretly made to take the form of a sale to a third person. If the payment of the debt is made with the funds of the first or second purchaser, by a third person who is expressly subrogated to the debt, he may proceed to recover the same from either purchaser, because he succeeds to all the rights of the creditor. This inequitable result cannot always be avoided, unless the rule of a ratable contribution according to values exists as between the purchasers, however charged.

As between the rule of the civil law as stated by Renussons and others, which throws, in certain events, the whole burden of a debt charged on separate parcels of land, in the hands of different purchasers, upon one of the purchasers, without the right of contribution: that of Mr. Chancellor Kent, which renders, in default of the original debtor, the last purchaser liable as representing the debtor: and that of Mr. Justice Story, which proceeds upon the ground that the burden of the debt should be equally borne by those who are subjected to a common charge, it must be conceded, that the doctrine of contribution stated by Mr. Justice Story, as the existing rule of equity in England, is founded upon a broader view of the principles of equity, and furnishes the only fixed measure for the respective liabilities of the several parties. But the doctrine that the last purchaser is liable, as stated by Mr. Chancellor Kent, has been generally followed in these United States.

Whenever, says Mr. Chancellor Walworth,[1] the judgment

[1] James *v.* Hubbard, 1 Paige, R. 233.

creditor disposes of a part of the land held by the judgment, the purchaser has an equitable right to have the judgment discharged out of the residue of the property. Although a subsequent purchaser has an equal equity to have the land which he has purchased and paid for discharged from the lien of the judgment as against the debtor, the first purchaser, having the prior equity, must be preferred.

In another case, Mr. Chancellor Walworth says:[1] "Where lands belonging to several persons are covered by a mortgage given by the person from whom they all derive their titles, the lands last sold by him are first liable to satisfy the incumbrance; and the several parcels must be sold by the master in the inverse order of their alienation."

Where lands incumbered by a mortgage or judgment against the owner, said the Vice Chancellor,[2] are subdivided and conveyed to different persons at different periods of time, that portion which is conveyed last by the incumbrancers, is to be first called upon to contribute, for its full value, towards satisfying the incumbrance, and thus each portion is to bear its proportion of the burden in the reverse order of the time of alienation.

In a case decided by the Supreme Court of Pennsylvania,[3] where a man owning several tracts of land, bound by a judgment against him, sold one tract to another person, the remaining tract being more than sufficient to pay the judgment, and afterwards sold one of the remaining tracts to another who had notice of the circumstances; it was held, that if the land of the second purchaser was taken in execution, and the judgment satisfied by the sale of it, he could not maintain assumpsit on an implied promise against the first purchaser for contribution. The court also were of opinion that the second purchaser had no remedy by *audita querela*, or in any other way. The court held that the second purchaser stood in no better situation than the vendor of the land who was the original debtor; that he took it subject to all the incumbrances against the vendor, and

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[1] Gouverneur *v.* Lynch, 2 Paige, R. 300.

[2] Patty *v.* Pease, 8 Paige, R. 278.

[3] Nailer *v.* Stanley, 10 Serg. & Rawle, R. 450.

that he was bound to look to the state in which the vendor and the first purchaser stood.

Because, if the lands had descended or been devised by the debtor, who was the vendor, his heir or devisee could not have compelled contribution, the court said that the subsequent purchaser had no such remedy; but the condition of a purchaser is certainly very different, in regard to the vendor, from that of an heir or devisee who personally represents the debtor. The purchaser is not to be regarded, in equity, as standing in the place of the debtor, because he is not indebted, and has paid an equivalent for the land.

In another case determined by the same court,[1] however, the question was, whether a mortgagee of land of the debtor, conveyed to secure the payment of seven bonds payable at different times by the mortgagor to him, the first four of which had been assigned by him to four different persons at different dates for value received, could, upon a sale of the mortgaged premises being made for a sum of money insufficient to pay all the bonds, claim a full *pro rata* dividend of the proceeds of the sale, with the persons to whom he had assigned the first four bonds, towards payment of the three remaining bonds still held by him that became last payable; and it was held by a majority of the court that the claim might be sustained.

In another case,[2] the question arose, whether the purchasers of different tracts of land at different times, subject to a payment of a mortgage upon the whole, should contribute *pro rata* to the payment of the mortgage, according to the relative values of their respective tracts; or whether the last purchaser should not contribute, in the first place, to the amount of the whole value of his tract, if requisite, and if found insufficient to pay the whole debt, then the preceding purchasers to contribute, according to the inverse order of the time in which they purchased, until the mortgage debt should either be paid or all the mortgaged lands exhausted. A majority of the court decided that each purchaser, or that the land purchased by him, was liable to contribute, *pro rata*, towards the payment of the mortgage debt according to its relative value.

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[1] Donley *v.* Hays, 17 Serg. & Rawle, R. 400.

[2] Presbyterian Corporation *v.* Wallace, &c. 3 Rawle, R. 109.

In a more recent case,[1] which is regarded as settling the law in that court on this subject, the doctrine of the two last-mentioned cases was denied, and the rule above stated of Mr. Judge Story was held inapplicable. The question presented was, whether, in the distribution of funds in the hands of the court, moneys arising from the sales should be marshalled or appropriated in such a way as to throw debts and legacies which had become payable at the time of the sales, upon those funds which had been raised from such parts of the estate as became last incumbered, so that the incumbrancers as between themselves should be charged in the reverse order of the time of the incumbrances obtained by them, that is, that the last incumbrances should give way in an inverted order, to all prior, until the latter should be paid so far as they might be adequate to that end: and it was held by the court, that the debts and legacies must be paid in full out of the moneys that otherwise would be applicable to the payment of the last incumbrances or liens, in point of time.

In those cases where it has been held that the whole of a debt, for which the estates sold to different purchasers at different times are liable, shall be thrown upon the last purchaser or incumbrancer, it has been assumed that the position of the second purchaser is assimilated to that of the heir of the vendor or debtor, or to that of a person claiming merely as a volunteer; but the justice of this comparison was not admitted in an English case, where this position was taken by counsel. In this case,[2] Sir L. Shadwell, the Vice-Chancellor, proceeds upon the ground that equity requires the original incumbrance on several estates to be ratably distributed upon them.

Racster being seized of Foxhall Coppice and a piece of land marked in a plan of the estate as No. 32, mortgaged in 1792, Foxhall to Barnes; in 1795, Foxhall to Hartwright; in 1800, Foxhall and No. 32 to Barnes, to secure a further advance; in 1804, Foxhall and No 32 to Williams. The subsequent incumbrances were taken, with notice of the prior incumbrances.

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[1] Cowden's Estate, 1 Penn. State R. 267. See also, Patten *v.* The Agricultural Bank, 1 Freeman, R. 419; Holden *v.* Pike, 24 Maine R. 427. But see Allen *v.* Clark, 17 Pick. 47, and Parkman *v.* Welch, 19 Pick. 231.

[2] Barnes *v.* Racster, 1 Younge & C. R. 401.

The question, as stated by the court, was, whether as No. 32 was sufficient to pay the whole of Barnes's demand, Hartwright could, as against Williams, compel Barnes to resort to No. 32, thereby leaving Hartwright, the first incumbrancer, on Foxhall Two other questions were presented which were not considered by the court. First, what would have been the rights of Hartwright and Williams, had Barnes's security upon No. 32 preceded, and not been subsequent to Hartwright's security on Foxhall; secondly, what would have been the rights of the parties, had Williams's security not existed at all, or not existed until after the commencement of the proceedings in equity. The Vice-Chancellor was of opinion, that, without any reference to Hartwright or to Williams, the nature and effect of the security of 1800 were, to make No. 32 and Foxhall *pari passu* and ratably, according to their values, liable to Barnes's two charges, as between the different heirs of Racster, had he died intestate and insolvent as to his personal estate, leaving one person his heir as to No. 32, and another person his heir as to Foxhall. He was also of opinion that Hartwright had not, before 1804, when Williams took his security, acquired any right in No. 32, or any equity against Racster, to preclude him from dealing with it as his necessities might require. Hartwright had no privity or concern with the mortgage by Racster of No. 32 to Barnes, and had no equity to prevent Racster from selling or incumbering it, as charged ratably and *pari passu* with Foxhall. He was also of opinion, that if it were conceded that had Williams's charge not existed, the right claimed by Hartwright, that is to say, the right of marshalling, could be enforced against Racster, it did not follow that in 1804 any such right had arisen. Hartwright's title, if any, against No. 32, did not extend beyond such interest in it as before the suit, Racster did not alienate for value.

It further appears from this case, that the last incumbrancer is not to be regarded as representing the debtor, so as to be rendered incapable of subrogation to the rights of the creditor for his just proportion of the securities. Instead of the whole burden of the debt being thrown upon the land conveyed to him, the securities were marshalled ratably, so as to let the last incumbrancer in upon the property of the debtor, *pari passu*, with a prior incumbrancer.

In contrast with the above case, may be cited a case decided by the Court of Appeals of Virginia.[1] S. mortgaged a parcel of three hundred acres of land to B. to secure a debt due to him; then S. mortgaged all of the same land, except seventy-five acres, to H., to secure a debt due to him, these seventy-five acres being excepted and reserved out of the second mortgage, because the mortgagor was then in treaty with a third person for a sale thereof to him, which treaty was afterwards broken off; and then S. mortgaged the whole parcel of three hundred and sixty acres to C., to secure a debt due to him. It was held by the court, 1. That H., the second mortgagee, had a right as against S., the mortgagor; B., the first mortgagee; and C., the third mortgagee; to claim that the debt due to B. should be satisfied out of the parcel of seventy-five acres reserved out of the second mortgage to H., so as to leave that part of the property mortgaged to H. untouched, and applicable to the satisfaction of the debt due to him. 2. That C., the third mortgagee, had no right to call on H., the second mortgagee, to contribute *pro rata* to the satisfaction of the debt due to B., the first mortgagee.

This case differed from the preceding one, in the circumstance, that the first mortgage covered both pieces of land, and the question decided by the court was one which the Vice-Chancellor declined to consider, namely: What would have been the rights of the subsequent incumbrancers, had the security of the first mortgagee acquired on No. 32, by the second deed, preceded that of the second mortgagee, and not been subsequent to it. The court proceeded in their decision, upon the ground that the right of marshalling, which existed in favor of the second mortgagee against the first mortgagee, who had a more extensive lien, was an absolute charge upon the land. But this doctrine, it is believed, is unsound. The second mortgagee had no privity or concern with the first mortgage. His equity did not extend beyond such interest in it as, before the suit, the mortgagor had not alienated for value.

According to the doctrine of the English Court of Chancery, if the second mortgagee had satisfied the first mortgage, he

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[1] Conrad *v.* Harrison, 3 Leigh, R. 532.

could have been subrogated only for a ratable contribution against the land not embraced in his own mortgage; but, under the rule which prevailed in the Court of Appeals of Virginia, the second mortgagee would, on payment of the first mortgage debt, have been entitled to be subrogated for the whole debt against the land not included in his own mortgage.

CHAPTER III.

OF SUBROGATION IN FAVOR OF A JOINT DEBTOR.

When the several heirs had, under the Roman law, accepted the common succession, they were bound for the debts as co-obligees. Each of the heirs, as between themselves, was chargeable with his several part only, but he might be proceeded against by hypothecary creditors for the whole debt, and, in that case, he had his recourse to his co-heirs for contribution, and might recover from each one his respective part. But as the action which one of the co-obligees had, who paid a common debt, might often be of no avail, if the other co-obligees, from whom the respective portions were due, had hypothecary creditors who were anterior to him, the party who paid the whole debt for which he was bound with others, might, for his own security, stipulate for subrogation to the rights of the creditor to whom he made payment, so that he might proceed against his co-obligees for their several portions, from their property, as subrogated in the place of the creditor who had been paid. By the Roman law, when several persons were bound to pay the same sum for the same consideration, if they were not bound jointly, the one for the other, and if they had not renounced the benefit of division, each of the parties bound was liable for his own part, and if one paid the parts of the others, his payment was regarded as made by a stranger, that is, as it would be, if made by any other person who was not one of the co-obligees. If he desired to be subrogated to the creditor, to recover that which he had paid from the others, he ought to stipulate for subrogation, otherwise he would have only the action, — *negotiorum gestorum.*[1] And when several

[1] Renussons, Ch. 6, Nos. 66, 67.

were bound to pay for the same cause, and were bound jointly, each for the other, and had renounced the benefit of division, each of the co-obligees was charged with payment of the whole, but each was principal debtor only for his part and surety for the others for their parts. And he who paid the entire sum, either voluntarily or by constraint, ought to stipulate for subrogation, otherwise, he had only the action *mandati*, or the action *negotiorum gestorum*, to recover from the others what he had paid for them.[1]

A question which, under the civil law, has received great discussion, is, Whether, when one of several co-obligees has paid the entire debt and stipulated for subrogation to the rights of the creditor, he may, as thus subrogated, exercise his right of action against all the other co-obligees, or only against each one of them for his several part. On one side, it might be said, that the effect of subrogation is to cause the party subrogated to succeed to the creditor for the exercise of the same rights of action which he had, and that as the creditor might undoubtedly proceed against all, so he who is subrogated may sustain an action against all jointly, deducting the portion for which he was himself chargeable. On the other hand, it might be said that the co-obligee, who has procured himself to be subrogated, is bound himself for the whole, and that to permit him to sue for that for which he was bound himself, would be merely to authorize a circuity of actions. Great diversity of opinion has existed on this subject, but the better opinion, and that which has generally prevailed, is, that the subrogation which is stipulated for by one of the co-obligees gives him a right of action for its recovery only against each of the other obligees for his part.[2]

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[1] Renussons, Ch. 6, Nos. 66, 67.
[2] 7 Toullier, No. 163.

CHAPTER IV.

OF SUBROGATION IN FAVOR OF A SURETY.

A SURETY who paid the debt of the principal debtor had, by the civil law, always his recourse against him for the sum which he had paid. He might resort to the *actio mandati* for his indemnity.

The question here presents itself, whether the surety, who has paid for the principal debtor, is subrogated as of right, by the payment, to the actions of the creditor who has been paid, or whether he is only subrogated when he has stipulated for subrogation, and whether, if he has neither required nor stipulated for subrogation, he has only the action *mandati*, and the personal action *negotiorum gestorum*.[1]

At the civil law, a surety who simply pays the debt to a creditor, and has neither asked nor stipulated for subrogation to the rights of the creditor, does not succeed to him as of right, nor enter in his place, and he cannot exercise his rights and actions; and, in order to be subrogated, he must expressly require and stipulate for subrogation.[2] In the first place, this appears, it is said, from this consideration, that the law which makes provision for the indemnity of the surety who has been constrained to pay for the principal debtor, or who has voluntarily paid, to prevent an action by the creditor, provides no other remedy than the *actio mandati*, which results from his becoming surety; or the action *negotiorum gestorum*, for having paid money for the debtor. The law has not expressly subrogated, as of right, the surety who has simply paid the debt to the rights of the creditor. The law does not presume that by

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[1] 7 Toullier, No. 147.

[2] Renussons, Ch. 9, No. 7.

mere payment, without an express stipulation, it is the intention of the surety to be subrogated. In the second place, when the surety has consented to become bound for the principal debtor, and has simply paid the debt to the creditor, without having asked or stipulated for subrogation, he has relied upon the faith of the principal debtor; he is satisfied with the obligation which the debtor has contracted with him as surety, and relies upon the action *mandati*, or the action *negotiorum gestorum* (equivalent to the action of assumpsit), which the law gives, on his own account. It is evident from his inaction, that he has had no intention to acquire the rights of the creditor on making payment.

The provisions of the Roman law, which gave to the surety on payment of the debt, special actions, would be unmeaning if they were to be construed as giving him a cession of actions and subrogation, as of right, to the creditor by the mere effect of payment. Though a surety is not subrogated as of right, or by mere operation of law, when payment is made by him, it is in certain instances declared by law, that the surety has a right to claim that he shall be subrogated, on payment, to the rights of the creditors. As where a person gave an order to another to lend a sum of money to Titius, and the party on whom the order was drawn, in compliance with the mandate, paid the money, and afterwards proceeded against the drawer of the order for reimbursement of the sum paid, and enforced payment from him, it was declared that the party who had paid the money on the order, ought, on being reimbursed, to consent to a cession of actions, in favor of him by whom the order was drawn, and subrogate him to his rights of action.[1]

It is said in the Code,[2] that although a creditor, who has taken security and a surety for a debt, may, if he prefers so to do, proceed against the surety for the payment of the debt, for which he has bound himself, yet, having done so, he ought to transfer to him the right to the security. *Creditori, qui pro eodem debito, et pignora et fidejussorem accepit, licet, si malit fide, jussorem convenire in eam pecuniam in qua se obligaverit; quod*

[1] Digest, 46. 3. 95. 10.
[2] Code, 8. 4. 1. 2.

cum fœcit debet jus pignorum in eum transferre. It appears, that though, under the Roman law, subrogation did not take effect of right or by operation of law; it was only because some act was necessary on the part of the surety, manifesting his desire to have the right of the creditor preserved and transferred to him for his benefit. The natural effect of payment by the surety, without more, was to extinguish the debt. If the surety intended that the right of the creditor should be preserved for his benefit, after payment, it was necessary that this should be manifested at the time of payment. The right to subrogation depended altogether upon the intention of the surety, and not of the creditor. If the surety made an absolute payment without demanding subrogation, the law gave him his action *mandati*, or *negotiorum gestorum*, and the debt of the creditor being extinguished, there remained nothing for the law to transfer as of right to the surety. But if the payment was qualified by a demand for a cession of actions and subrogation, the debt was not extinguished, and the surety might demand a cession from the creditor and a subrogation to the securities: but, under the Roman law, this subrogation did not take place as of right. The surety might, on the refusal of the creditor to make the necessary transfer, resort to the courts for relief; and they provided for the indemnity of the surety, not by a subrogation as of right, nor by operation of law, but by requiring the creditor to make the necessary transfer. There was nothing in the mere fact of payment by the surety, as necessarily extinguishing the debt, and with it the creditor's right to securities, which made the creditor's right of action incapable of transfer. Such an effect was only produced by the absence of intention on the part of the surety, at the time of payment, to acquire the right of action. If the surety simply paid, the debt was extinguished. If the surety, on payment, required subrogation, the payment was made with a view to a transfer of the creditor's rights. When the payment was thus made, the debt afterwards existed, and the cession of actions with subrogation, whether voluntarily made by the creditor or under a decree, partook of the nature of a sale of the debt.

In a passage of the Digest,[1] it is said, that when a creditor

[1] Digest, 46. 1. 36.

to whom the principal debtor is bound with sureties, receives the amount due from one of the sureties, and transfers his rights of action, though it may be alleged that no such rights of action exist, as the creditor has received his debt, and thereby all have been discharged: yet this is not so, for in such a case he has not received the money in discharge of the debt, but he has, as it were, sold the obligation with the name of the debtor. The creditor, therefore, has existing rights of action, because he is bound by law to transfer his actions to the surety. *Cum is qui reum et fidejussores habens, ab uno ex fidejussoribus, accepta pecunia, præstat actiones poterit quidem dici, nullas jam esse, cum suum perceperit, et perceptione, omnes liberati sunt. Sed non ita est: non enim in solutum accepit, sed quodammodo, nomen debitoris vendidit; et ideo habet, quia tenetur ad id ipsum, ut præstet actiones.*

The same principle prevailed in regard to co-sureties. By the Roman law, the surety who made payment of the debt for which he was bound, did not, as against co-sureties, acquire, by operation of law, a right to subrogation. If the surety simply made payment of the debt without demanding subrogation, the debt was extinguished, and he had no remedy against his co-sureties, but by the action *mandati*, or *negotiorum gestorum;* but if, on payment, he was subrogated by the creditor, either voluntarily or by the decree of a court, he might, as subrogated to the creditor, proceed against his co-sureties for their respective portions.

It has been supposed that the rules of law as administered by Courts of Equity, under the system of the common law, were different. The general principle is, that the surety, on payment of a debt for which he was bound, acquires a right of action on his own account. This is the rule of the common law, as well as of the Roman law. At the common law, the surety has his action of assumpsit on payment, and is not subrogated as of right to the actions of the creditor. The creditor may be a specialty creditor, and so privileged; but the surety who pays the specialty debt is not thereby subrogated to the specialty. That is gone by payment. If the surety wishes to be subrogated to the privileges of the creditor, he must take the proper measures to effect that object. One mode of attaining this

end, as said by Lord Eldon in a case decided by him,[1] was by causing the bond which was paid by the surety, to be assigned to a person in consideration of a sum of money paid; another mode was by means of a counter bond, so that if a surety paid one bond, he became instantly a specialty creditor by virtue of the other bond. The technical difficulty which is supposed to render a transfer to a third person on payment, rather than to the surety, necessary, founded upon the idea that a party cannot at the same time be creditor and debtor for the same debt, did not exist at the Roman law, for, on payment by a surety or by a co-obligor, cession of actions might be made with effect to the surety or co-obligor, who thereby became creditor for the amount justly due to him.

The principal design of subrogation as an equitable remedy, must be borne in mind. Although a surety is entitled to subrogation against his principal, whether the latter has given security or not, it is ordinarily attended with no results, except in regard to the security. And if the property given as security remains after payment in the hands of the debtor, it may be as effectually reached by the actions which the law gives the surety on payment, as by subrogation to the actions of the creditor, it is only as against subsequent purchasers and creditors who have acquired a new lien, that subrogation has any important effect. If, on payment of a debt, the property given as security returns by the mere fact of payment to the debtor, he may dispose of it by sale or otherwise, so as to give the purchaser not only an equitable right, but a legal title such as must, on principles of justice, prevail over the claim of the surety, who by his own neglect has permitted the property to return under the control of the debtor. The surety can have no relief, by way of subrogation, by operation of law except in those cases, as of mortgages of land, where the security does not, on payment, return to the debtor.

It appears, from the decision of Lord Eldon in the case referred to,[2] that, as a general rule, payment by the surety absolutely extinguishes the debt, and that, by the mere effect of

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[1] Copis *v.* Middleton, 1 Turner & Russ. R. 224.

[2] Ibid.

payment, the security, if of a certain character, may be absolutely lost. In that case, it was held that a surety who paid the bond debt, became a simple contract creditor only of the principal. Lord Eldon said, that, as a general rule, a surety is entitled to the benefit of all the securities which the creditor has against the principal, but that the nature of those securities must be considered; "where there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond that the debt was extinguished; the general rule, therefore, must be qualified by considering it to apply to such securities as continue to exist, and do not get back, upon payment, to the person of the principal debtor; in the case, for instance, where, in addition to the bond, there is a mortgage, with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say: "I have lost the benefit of the bond, but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate, which has not got back to the debtor." Lord Eldon distinguished between pledges of personal property for the security of the debt, which would, on payment, return to the debtor, and mortgages of land which would not go back to him by the mere effect of payment.

If the technical difficulty which attends subrogation in favor of a surety or co-obligor, who has by a fiction of law received an assignment of the debt for which he was jointly bound with the principal, may be overcome, and if he may, by express agreement, acquire the creditor's rights of action against the principal debtor, a deduction being made for the portion of the debt for which he was properly chargeable, what rule shall be applied to cases where no express agreement is made to preserve the lien of the surety or co-obligor by subrogation? The Roman law provided that payment by the party jointly bound, should extinguish the debt, unless the intention of the party to preserve the lien of the creditor by subrogation was declared at the time of payment. The simple payment of the debt extinguishes it, and enables the debtor to convey the property or charge it with other incumbrances. Can the rule be established consistently with principle, that property which has been received by the creditor as security for his debt, shall remain

chargeable in his hands after payment of the debt by the surety, until it shall appear that the surety has been fully indemnified, or until his intention appears to release the security and rely upon the new rights of action which the law gives him on payment? If a surety desires to provide for an eventual lien upon the security, if he shall afterwards be compelled to pay the debt, he may acquire such a lien by express stipulation. Or, if, on payment of the debt, he would be subrogated to the security of the creditor, he may preserve the security, but that intent is not to be presumed, and does not always exist. It may well have been the intention of the surety to rely upon the personal credit of the debtor, and to concede to him the privilege of freely disposing of the property after having himself paid the debt. The law does not presume an intention that is not declared, as is evident from the consideration that a new action is given to the surety, on payment by him. After such payment without an express stipulation for subrogation, the debtor may transfer the property to a new creditor as security, or to a purchaser. If the debt for which it was bound is paid, the creditor or purchaser acquires a legal right to the property, and is not bound by latent equities. It is sufficient for him that the debt for which it was charged as security has been paid. By an express stipulation for subrogation in the manner required by law, the surety might have acquired a legal right which would have taken precedence of subsequent incumbrances, and, without an express stipulation, he may have an equitable claim to the security whilst it remains unincumbered in the hands of the debtor, and also to property which is not returned to the debtor by the mere effect of payment. Lord Eldon, in the case above cited, seems to have supposed that, where the surety by paying the debt had lost the benefit of the bond, he might, when the mortgagor resorted to a Court of Equity for a reconveyance, in some way assert his right to the benefit of the mortgaged estate. It would be impossible for a subsequent incumbrancer, before a reconveyance, to gain the legal estate in the land mortgaged, and his equitable interest would not take precedence of a prior surety.

For the same reason, namely, that, because of the superior equity of the surety, land mortgaged will not be reconveyed

unless the surety, on his demand, is indemnified for the payment which he has made, it is plain that, before payment, that equity would be made effectual at his instance, by rendering the whole property liable in the first instance to the debt, which, on payment of the debt, would, by operation of law, return to the debtor.

A surety has a right, in a proper case, to require that the creditor shall proceed not only against the person of the surety, but also against the property received by him as security.[1] He has not only the right of subrogation to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment, and to stand in his place and stead for that purpose; but, before payment, and when the creditor might, by obtaining judgment against the surety, extinguish the lien by means of the bond, the surety has a right to require the creditor to render the securities available, which would be lost, if the debt was paid or extinguished without any provision for the rights of the surety.

The doctrine of Lord Eldon in the case cited[2] has been questioned as resting only upon narrow and technical grounds, but, when properly considered, it may be found to be necessary to the security of legal rights, and to sustain the presumed intention of the parties, so far as it regards subsequent transfers or incumbrances.

If the surety has lent his credit to a merchant for the purchase of a stock of goods which are mortgaged to the creditor, and the surety afterwards pays the debt, and the goods return to the debtor and are sold by him in the course of his business, or charged as security for debts newly contracted, the legal right of the purchaser, or of a new incumbrancer, ought to prevail over any claim of the surety founded upon a supposed legal subrogation.

The right of a purchaser or a new creditor may be more manifest when the property constituting the security for a debt is delivered to the debtor, on payment of the debt by the surety with his express consent, and for the purpose of enabling him to proceed in his business; so, when there is a second debt, for

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[1] Hayes *v.* Ward, 4 Johns. C. Rep. 123.

[2] Copis *v.* Middleton, 1 Turner & Russ. 224.

which the property is bound by a judgment or incumbrance created before the payment, by the surety for the first debt: if, on payment, the property is, without objection on the part of the surety, subjected to the control of the debtor in the conduct of his business, the second incumbrance may become the first charge in exclusion of the surety. The presumption is, that the surety relied upon the personal security of the debtor, even after payment of the second incumbrance.

The question in such cases is one of intention, and when new legal rights have been acquired, the intention of the surety to be subrogated to the rights of the satisfied creditor is not to be presumed, and, in general, an express stipulation for subrogation seems necessary to prevent the debtor from absolutely disposing of the security, after payment of the debt.

The case is different when, though payment is made by the surety without express subrogation, no new legal right is acquired, and where no intent on the part of the surety can be presumed so to aid the debtor as to let in a subsequent incumbrance to priority. Subsequent incumbrancers cannot in equity assert a claim to be substituted to the first. While the property remains within the control of the debtor, the equitable claim of the surety on the first incumbrance is prior in time, and must therefore prevail.

But if, by operation of law, a surety is, on payment, supposed to be subrogated to the rights of the creditor as fully as he would be if it were expressly stipulated for at the time of payment, by the surety, of the debt for which he was bound, that is, if the security remains charged with the debt by operation of law on such payment, until the surety has been indemnified; the intention of the parties to liberate the property from the lien, must be expressly shown in each case. Such, however, is not the just construction of the agreement between the parties, and under the civil law,[1] as well as by the law of England as settled by Lord Eldon,[2] the intention to discharge the security was presumed. In order that subrogation should be wrought in favor of a surety, it was necessary to give to payment by

[1] Pothier, Tr. des Obligations, No. 280.

[2] Copis *v.* Middleton, 1 Turner & Russ. 224.

him the fictitious effect of a sale, and a cession of actions by the creditors was necessary.

The modern French law, as declared in the Code,[1] seems to reverse this presumption. A distinction is made between the effect of pure and simple payment, and payment with subrogation. Legal subrogation takes effect whenever payment is made by a surety, unless the intention is otherwise declared.

In the United States, where a surety for a debt has been regarded as subrogated by operation of law, and as thus entitled to the benefit of securities provided for the creditor, the surety has never been regarded as acquiring the legal rights of the creditor, but rather as entitled to equitable relief; and there is a plain distinction between a surety who has obtained a cession of actions from the creditor, and such a surety who has merely a claim in equity to relief against the debtor for securities remaining in his hands. A surety to whom a cession of actions has been made by the creditor, has a right to stand in the shoes of the creditor, and to exercise his absolute rights; but subrogation by operation of law, or on an imaginary assignment, would give him only a claim to relief in equity.

On the subject of contribution between sureties, Mr. Justice Story says:[2] "The ground of relief does not stand upon any notion of mutual contract, express or implied, between the sureties to indemnify each other in proportion (as has sometimes been argued); but it arises from principles of equity, independent of contract. If the doctrine were otherwise, a surety would be utterly without relief; because he has not, either in equity or at law, any title to compel the obligee to assign over the bond to him upon his making payment, or otherwise discharging the obligation."

"In the Roman law," he proceeds, "analogous principles existed, although, from the different arrangements of that system, they were developed under very different modifications. By that law, sureties were liable, indeed, for the whole debt due to the creditor; but this liability was subject to three modifications. In the first place, the creditor was generally bound to proceed,

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[1] Code Civil, Art. 4250.

[2] 1 Story's Equity Jurisprudence, § 493.

by process of discussion (as it is now called), in the first instance, against the principal debtor, to obtain satisfaction out of his effects, before he could resort to the surety. In the next place, a suit against one surety, although each surety was bound for the whole after the discussion of the principal debtor, yet the surety, in such a suit, had a right to have the debt apportioned among all the solvent sureties, on the same obligation, so that he should be compellable to pay his own share only; and this was called the benefit of division. But if a surety should pay the whole debt, without insisting upon the benefit of division, then he had no right of recourse over against co-sureties, unless (which is the third case) he procured himself to be substituted to the original debt (which he might insist on) by a cession thereof from the creditor; in which case, he might insist upon a payment of a proper proportion from each of his co-sureties."

The rule which formerly prevailed in Courts of Equity, under the jurisprudence of the common law, is supposed by Mr. Justice Story to have been the same, and to have been founded upon the same principle; and several cases are cited by him.

When there is a principal and surety, said Lord Hardwicke, and the surety pays off the debt, he is entitled to have an assignment of the security, in order to enable him to obtain satisfaction for what he has paid over and above his own share.[1]

The liability of bail for the principal was regarded as in the nature of security for the principal debt, to which the sureties were entitled on payment. As in a case[2] where the principal in a bond gave bail, and judgment was had against the bail. The sureties, who had been sued and forced to pay the money, brought their bill to have the judgment against the bail assigned to them, in order to be reimbursed what they had paid. It was held by the Lord Chancellor, that the bail stands in the place of the principal, and cannot be released on other terms than on payment of principal, interest, and costs, and the sureties in the original bond are not to be contributory; and he therefore decreed the judgment against the bail to be assigned to the plaintiffs,

[1] Ex parte Crisp, 1 Atk. R. 135.

[2] Parsons *v.* Briddock, 2 Vernon, R. 608.

in order to reimburse them what they had paid, with interest and costs. In this case, though technically the effect of payment of the bond debt by the sureties might be to discharge the bond for the debt, it could have no such effect upon the bail bond. The bail, when sued upon the bond after assignment, could not, in defence, avail themselves of payment by the sureties. The sureties in the original bond were not to be contributory, because the undertaking of the bail was for the benefit of the sureties, as well as for that of the creditor. Though in a certain sense the bail was surety, he was of a different class from the sureties for the debtor.

In a case[1] where a surety for the husband, who had granted an annuity, and who had assigned the dividends of certain stock standing in the name of trustees for the wife, as security, had paid some instalments, Sir William Grant held, that the surety, with regard to the payment he had actually made of the annuity, was entitled to stand in the place of the creditor, and to be reimbursed out of the dividends, and had also an equity to have the fund applied in his exoneration; that fund being provided by the principal debtor; and made subject to the payment of the annuity. "I conceive," said the Master of the Rolls, "that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor. The equity of the surety, as against the principal debtor or his representatives, and as against creditors who had acquired any lien upon the property after payment by the surety, was unquestionable; and it would seem that, as the security had been provided for a continuing liability, that is, for the annuity as long as it was payable, it would not, by the payment of certain instalments, return to the control of the debtor so as to enable him to assign the security or charge it with a new liability."

In the case decided by Lord Eldon,[2] which is supposed to have changed the law on this subject, two persons executed a bond, the one as principal, the other as surety, and no other assurance was given at the time. As no security was given,

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[1] Wright *v.* Morley, 11 Vesey, R. 12.

[2] Copis *v.* Middleton, 1 Turner & Russ. 224.

no question of subrogation to securities was presented. The only question in this case was, in effect, as to the nature of the remedy which the law gives the surety who has been forced to pay a bond debt. By payment, the bond debt was extinguished and gone, and the action which the law gave the surety was certainly not a privileged action, as on a specialty, but an action of assumpsit, as on a simple contract debt.[1]

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[1] In most of these United States where the question has arisen, it has not been held that the surety, on payment of a bond debt, is reduced to the rank of a simple contract creditor of the principal; but it has generally been held that he is subrogated as of right to the claim, or one of the same character as that of the creditor. The question has arisen in cases where, on payment after the death of the principal, the indemnity of the surety required that he should occupy the position of a specialty creditor. It has been held in the State of Virginia, that where the surety has made payment after the principal's death, he will be regarded as holding the place of the bond creditor, and entitled to all the advantages which such a claimant has over simple contract creditors. Such is the doctrine in equity (11 Leigh, R. 97); though at law, a surety paying off a bond debt, becomes only a creditor by simple contract. The right of subrogation in equity, it was held, existed in favor of sureties when a judgment was recovered against a principal and his sureties, and no *elegit* or other execution had been sued out within the year, and that they had a right to be subrogated in equity to the benefit of the lien of the creditor's judgment upon the lands of the principal, in preference to a foreign attachment, sued out by another creditor of the principal, after the judgment. "The whole train of authorities," said Tucker, P., "on this subject, is founded upon the principle of the superior equity of the sureties, to be paid out of that fund to which their creditor might have resorted for their relief. The surety in a bond, for the payment of which the principal has bound particular property, has a preference over all other persons to have the debt charged upon that fund. If the principal dies, and after his death the surety pays off the bond, he has a right to demand the payment of the bond out of the assets, before the simple contract creditors, and thus to be placed in the shoes of the obligee; because, at the instant of the principal's death, the obligee had a right to demand payment out of the assets, in preference to any simple contract creditor." Watts *v.* Kinney, 3 Leigh, R. 272. But if he acquired only a right to the action of assumpsit by his implied contract with the principal, he occupied no higher ground than any other simple contract creditor. If he had only a claim in equity to become a preferred creditor, it is difficult to discern any equitable principle which would justify the court in creating inequality between simple contract creditors. This case was decided before that of Copis *v.* Middleton.

In a subsequent case (Powell *v.* White, 11 Leigh, R. 309), the same judge (Tucker) refers to the case of Jones *v.* Davids, 4 Russ. 277, where it is decided that a surety who paid the bond after the death of the testator, who was bound by it, was only a simple contract creditor of the testator's estate. This doctrine he controverts, though he says the court does not place the surety in the shoes of the bond creditor, when he has paid off the bond in his principal's lifetime, but still considers him merely a simple contract

In a subsequent case,[1] Cawthorne as principal, and Dowbiggin as surety, gave to Bourne their joint and several promissory notes for £1,130 lent to Cawthorne. Dowbiggin paid several sums as interest on the promissory note, and afterwards Bourne brought separate actions against Cawthorne and Dowbiggin on the note, and recovered judgment in both actions, and, having issued execution against Dowbiggin, the surety, the debt and costs were paid by him. The administratrix of Dowbiggin afterwards filed a bill against Cawthorne and Bourne, for the purpose of obtaining an assignment of the judgment obtained by Bourne against Cawthorne, the principal debtor. To this bill, Cawthorne, the principal debtor, demurred for want of equity, chiefly on the ground that the judgment was satisfied at law, and that no effectual assignment could be made of it.

The Lord Chief Baron (Alexander) said that he apprehended it to be the settled and general rule of courts of equity, that when a surety pays the debt of the principal debtor, he has a clear right, by the course of proceedings in equity, to the benefit of all instruments and securities given by the principal debtor for payment of that debt. His Lordship distinguished the case from that of Copis *v.* Middleton, in which, principal and surety having executed a bond, without any mortgage or other assurance, and without any counter-bond being executed

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creditor. "But after the principal's death, there are rights which the creditor has, and to which the surety has a right of subrogation. These are the right to go against the heir, and the right of priority in the administration of the assets." The doctrine of Lord Eldon, in Copis *v.* Middleton, proceeds, he says, upon the ground that the debt is extinguished at law, and therefore cannot be made available for any purpose, and that equity has no power to revive it, and to sustain the surety in an action upon it for his benefit, by enjoining the principal from unrighteously barring the just recovery of the surety by a plea of payment, when that payment was made to the creditor by the surety himself. But the court were of opinion that a Court of Equity had the power to revive a debt which was extinguished at law in favor of the surety, and therefore reaffirmed the decision in Watts *v.* Kinney, as above stated.

The doctrine of the court in the above cases was recognized by the Supreme Court of the United States as presenting the settled law on the subject in the State of Virginia. Lidderdale *v.* Robinson, 12 Wheaton, R. 594. See also, Schultz *v.* Carter, 1 Speers, Eq. R. 534. The claim of a surety to be substituted to a privileged creditor on payment of the debt against the principal, is less obvious, on grounds of natural equity, than his right to be substituted to the creditor's lien upon securities which have been specially set apart for the satisfaction of the debt.

[1] Dowbiggin *v.* Bourne, 1 Younge, 111.

to the surety, it was held, that the surety, having paid off the bond, was only a creditor, by simple contract, of the principal debtor. He said, that "if this were a case of a joint judgment by a principal and surety, he should probably be of opinion that the judgment having been satisfied, there is an end of it. But that where, as in the present case, there are two judgments, and where it may, and perhaps will, come before the court of law, on a question of pleading in *audita querela*, he was of opinion that he could not properly enter into consideration of the subject on demurrer."

The case[1] afterwards came on for hearing upon the answers and evidence. Alderson, Baron, said, the whole effect of assigning the judgment to the plaintiff would be to give her that which would be wholly useless, except for the purpose of recovering the costs of the action against Cawthorne, and to which, as administratrix of Dowbiggin, she could not possibly have any right. The case, he proceeds, is not distinguishable from that before Lord Eldon (Copis *v.* Middleton),[2] in which he says, that if a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety paying the bond has a right to stand in the place of the mortgagee; but that, if there is nothing but the bond, the surety, after discharging it, cannot set it up against the principal debtor.

In a subsequent case,[3] decided by Lord Brougham, the right of the surety, having been secured by a distinct obligation, was held not to be extinguished by payment. In 1812, a joint and several bond was executed by Richard Shaw and Henry Shaw, as principals, to one Wilkinson. In 1813, Wilkinson died, and soon afterwards Richard Shaw died. In 1815, Henry Shaw and John Whaley joined, the former as principal, the latter as surety, in a bond for the sum of £2,420 due on the bond of 1812. Whaley died in 1818, having made some payments on account of the bond of 1816 to the executors of Wilkinson. After Whaley's decease, other payments were made by his representatives out of his estate, in further discharge of what was

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[1] Dowbiggin *v.* Bourne, 2 Younge & C. 462.

[2] 1 Turner & Russ. 224.

[3] Hodgson *v.* Shaw, 3 Mylne & Keene, 183.

due in respect of that bond, and in consideration of those payments, which amounted in the whole to the sum of £2,937, the executors of Wilkinson, by an indenture dated 24th June, 1830, reciting that they had received from Whaley and his estate the sum of £2,937, in part discharge of moneys due on the bond of 1816, and that no payment had ever been made by Richard Shaw and Henry Shaw, on account of the bond of 1812, and that the same was still subsisting and an available security at law for the full amount of principal and interest thereby secured; and further reciting, that the estate of Whaley was entitled to the benefit of the bond of 1812, for recovering the sum of £2,937 so paid by the estate of Whaley, as such security for Richard Shaw and Henry Shaw as aforesaid, they the executors did thereby assign and transfer to John Harrison, in trust, the said bond of 1812, and all the sums of money thereby secured: In the first place, to pay them the amount still due to Wilkinson's estate, and, upon the further trust, to pay the personal representatives of Whaley the surety, in the bond of 1816, for their own use and benefit.

The Master of the Rolls, Sir John Leach, having decided that the personal representatives of Whaley were not entitled to rank as specialty creditors against the estate of Richard Shaw, the case came by appeal before the Lord Chancellor. Lord Brougham, after stating the circumstances out of which the question arose, said, "The principles upon which Copis *v.* Middleton rest are sound and unquestionable; and it is only upon a narrow and superficial view of the subject, that the decision has ever been charged with refinement or subtlety. The ground of the determination was clear; it was founded in the known rules of law, and determined in strict conformity with the doctrines of this court."

"When a person pays off a bond," said his Lordship, "in which he is either co-obligor or bound *subsidarie*, he has at law an action against the principal for money paid to his use, and he can have nothing more. The joint obligation towards the creditor is held to give the principal notice of the payment, and also to prove his consent or authority to the making that payment."—"But beyond this claim, which is on simple contract merely, there exists none against the principal by the surety

who pays his debt; nor, when the matter is clearly viewed, ought there to exist any other. The obligation, by specialty, is incurred not towards the surety, even in the event of his paying, but only towards the obligee; and there is no natural reason why, because I bind myself under seal to pay another person's debt, the creditor requiring security of that high nature, I should therefore have as high a security against the principal debtor. If I had chosen to demand it, I might have taken a similar obligation when I became so bound; and if I omitted to do so, I can only be considered as possessing the rights which arise from having paid money for him which I had voluntarily, and without consideration, undertaken to pay." Lord Brougham stated the true doctrine to be, that the surety paying off the debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. His Lordship adopted the exposition of the doctrine of the court, in the argument of Sir Samuel Romilly, in Craythorne *v.* Swinburne,[1] which had been sanctioned by Lord Eldon, in giving judgment in that case, by his full approval, as follows: "A surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all 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 those securities against the debtor." "Thus the surety," said his Lordship, "is entitled to every remedy which the creditor has. But can the creditor be said to have any specialty, or any remedy on any specialty, after the bond is gone by payment?" But he distinguishes the case from that of Copis *v.* Middleton, *supra*, by the circumstance, that in that case the debt had been paid by the surety, bound in the same obligation with the principal, whereas in this case it had been paid by a third party, who had, by a separate instrument, made himself liable for the same debt. It could not be contended that the specialty was gone; that the bond

[1] 14 Vesey, 160.

of 1812 was paid off and at an end; and that in the year 1830 there remained nothing to be assigned. The bond of 1812 subsisted to the effect of being assignable; the bond of 1816 was paid by John Whaley, and of this it was true, that it was paid and gone, so that it could not be assigned to him or his representatives, to give him a claim as a specialty creditor against the estate of Henry Shaw, who was the principal in that bond. As against that estate, Whaley could only claim on the *indebitatus assumpsit* at law, and in equity he could only stand as a simple contract creditor, for there was no longer any thing capable of assignment. The security was gone by being paid off, but the security of 1812, in which the transaction had its origin, remained. The payment, which of necessity must be attributed to the bond in which John Whaley was an obligor, could not extinguish that to which he was a stranger. There was something, therefore, to assign, and an assignment was in fact executed.

By paying off his own bond, says Lord Brougham, and obtaining an assignment of the bond of 1812, John Whaley and his representatives had become purchasers of the latter specialty, and stood in the relation of assignees of the debt. "It is true," he adds, "that if the surety had paid off the bond in which he was bound, he could have no assignment; but that is because, in paying at once his own debt and the principal's, he had extinguished the obligation."

Notwithstanding the stress which his lordship lays upon the circumstance, that the party claiming subrogation was not bound in the debt assigned, it is equally true, in point of principle, that, by a proper assignment, a co-surety may acquire a debt in which he is personally bound, and when the indebtedness on his part is in effect extinguished by the assignment. In that case, as in the case decided by Lord Brougham, the instrument might be kept alive, if such was the intention of the parties. A co-surety who is bound with the principal in an obligation, may either pay the amount due and extinguish the debt, or he may, by agreement with the obligee, take an assignment of the bond and keep it alive, notwithstanding the effect of the transaction is to extinguish his liability. Every thing depends upon the intention of the parties as appearing from

the transaction. In this very case, the right of the surety to avail himself of the original bond depended entirely upon the assignment. If he had paid the second bond without making any provision for keeping alive the first bond, he would not have been entitled to claim that, by operation of law, the specialty should be preserved for his advantage. But for the special agreement, the payment of the amount due would have extinguished both obligations; and if there had been an agreement for the transfer to the surety of the bond in which he was himself liable, and an assignment had followed, that, according to the rule of the civil law, would have been equally available. The transaction would have been equivalent to a purchase of the debt and securities for a sufficient consideration. Lord Brougham insists that payment of the bond of 1816, which was given for the greater part of the same debt, which was secured by the bond of 1812, would not have been payment of that bond. But in a court of equity it would have constituted payment, and, so far as it regarded the rights of the surety, as resulting from payment, to take precedence of a subsequent incumbrance, it is not true that he would be entitled to claim that, by operation of law, the first bond should be kept alive in his favor. The legal right of the surety to the first bond depended upon an express agreement to that effect, and an actual assignment of the parties.

The several bonds being extinguished by payment, if there was no mortgage of land or other security which would not return to the debtor by the effect of payment, a court of equity could give no relief to the surety on either bond, simply for the reason, that, without an assignment of the bond, another remedy was provided, namely, the action of *indebitatus assumpsit.*

It is observable, that, in the case of Copis *v.* Middleton, decided by Lord Eldon, as well as in that of Hodgson *v.* Shaw, by Lord Brougham, the question of subrogation to securities, either by operation of law or by assignment of the creditor, did not arise, though discussed by the court. It is clearly shown in these cases that the remedy which the law provides for a surety on a bond or specialty, is an action on a simple contract debt, a remedy of a less favored class. From the nature of the

case, a debt which was extinguished by payment, could not be kept alive for the benefit of a surety, but the policy of the law was to furnish the surety with an action which placed him only on a footing of equality with other creditors.

In commenting upon the case of Hodgson *v.* Shaw as compared with that of Copis *v.* Middleton, Mr. Justice Story supposes that the principles of the Roman law on this subject have been departed from, though he says that Sir William Grant was influenced by those principles in the case of Butcher *v.* Churchill.[1]

Mr. Justice Story says,[2] the reasoning in those cases proceeds upon the ground that, by the payment by the surety, the original debt is extinguished. Now that, he says, is precisely what the Roman law denied,[3] and that it treated the transaction between the surety and the creditor, according to the presumed intention of the parties, to be not so much a payment as a sale of the debt, and he proceeds to say, that it is not wonderful that courts of equity, with this enlarged doctrine in their view, which is in entire conformity to the intention of the parties as well as to the demands of justice, should have struggled to adopt it into the equity jurisprudence of England. The opposing doctrine is founded more on technical rules than on any solid reasoning founded in general equity. "In truth," he says, "courts of equity, in many cases, do adopt it and act upon it; as in cases where they give the right of substitution to particular parties, when there are two funds, out of one of which a creditor has insisted upon receiving satisfaction, to the disappointment of the parties who have no claim upon the other fund. Whether it might not have been wise for courts

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[1] 14 Vesey, 568.

[2] 1 Story's Equity Jurisprudence, § 499 *c*, note 1.

[3] Notwithstanding what is said by Mr. Justice Story, it would seem that the Roman law, in requiring a cession of actions by the creditor to the surety on payment by him, in order to give effect to subrogation as upon a fictitious sale, though legal subrogation took effect in favor of a subsequent creditor who redeemed a prior incumbrance, proceeded upon the ground that payment by the surety, without an express cession of actions, extinguished the debt. The discrimination made in these cases showed that, without an express stipulation to the contrary, the security was lost. That the effect of payment by the surety was to extinguish the debt, is expressly stated in a passage of the Digest, 43. 3. 76. cited below, p. 65.

of equity to have followed out the Roman law to its full extent, instead of adopting a modified rule, which stops, or may stop short of some of the purposes of reciprocal justice, he considers it now too late to inquire."

It is believed, however, that the discrepancy between the principles of the Roman law and the rules which have been established on this subject in courts of equity, is not so great as has been stated. In one respect, there is a technical difference. Under the Roman law, the surety, who is also bound for the debt together with the principal, is permitted to give payment of the debt the form of a sale, and afterwards to become a creditor on the transfer, and to sustain an action, in the name of the original creditor, against the debtor for the whole debt, or against other sureties for the respective portions for which they were liable.

If, when a surety pays the debt for which he was bound, together with the principal debtor, he cannot, under the law of England, be subrogated to the action of the creditor by express stipulation, the technical difficulty which prevents one co-debtor from acquiring a right of action, may be avoided in the manner suggested by Lord Eldon in the case of Copis *v.* Middleton. His lordship mentions, as a reason why the surety on payment became only a simple contract creditor, that "the bond was not assigned to any body in consideration of a sum of money paid, which was one way we used to manage these things." Subrogation, to be effectual in favor of the surety, must be expressly stipulated for, and it seems that the cession of actions must be to a third person, otherwise, on payment, the personal property might be sold or subjected to a new incumbrance.

There is not to be found a single passage in the Roman law which shows that the surety, on payment, was subrogated to the rights of the creditor by operation of law. Dumoulin, however, has maintained, against the opinion of all former jurists, that a debtor *in solido*, a surety, and generally all those who pay what they owe, with or for others, are thereby subrogated of right to the actions of the creditor, and without requiring subrogation. His reason is, that they ought always to be presumed to have only paid, subject to this subrogation which they had a right to demand, nobody being presumed to neglect and renounce

his rights. The only passage cited by Dumoulin in support of this view, is from the Digest, l. 1, § 13, *de Tutelis et Rationibus;* but, as is justly observed by Pothier, who denies the doctrine of Dumoulin on the ground that subrogation is a privilege which may be renounced, this passage is to be understood as applicable to the *actio utilis negotiorum gestorum.*[1]

The doctrine of Dumoulin[2] has not generally prevailed, because there can be no subrogation as of right unless it is expressly provided for by law. The doctrine of Dumoulin, however, was regarded as so conformable to the principles of justice that it was provided in the Civil Code of France,[3] that subrogation should take effect as of right in favor of him who, being bound with others or for others for the payment of the debt, had an interest in its discharge, thus giving a surety an absolute lien upon the security, unless the intention is otherwise expressly declared by the parties at the time of payment. The rule of the Roman law which required that, on payment by a surety, subrogation to be effectual must be express, was founded upon the consideration that the natural effect of simple payment was to extinguish the debt on which the law provided for the surety by new actions, *mandati* and *negotiorum gestorum.* In order to give the character of a sale to the surety, who was bound for a debt when payment was made by him, an express stipulation was necessary. Under a system of law which substitutes the surety on payment as of right, the presumption in regard to the extinction of the debt is reversed, so that it becomes necessary to show by positive proof, when such is the fact, that it was the intention of the surety, on payment, to relinquish the right of subrogation; that the debt was extinguished; and that he relied upon the personal credit of the surety; and it would seem that this could be done only with the like formalities as are necessary to discharge the right of the creditor himself. The construction given to the transaction by the Roman law was more consistent and natural.

If payment was made simply, and the debt thereby extin-

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[1] Pothier on Obligations, No. 280.

[2] 7 Toullier, No. 147.

[3] Code Civil, 1251.

guished, there could be no subsequent subrogation, for rights of action which had ceased could not be transferred to a third person.

Modestinus was of opinion,[1] that if it was not till after payment of what remained due from a debtor as guardian, that the rights of action had, after an interval of time, been ceded without any agreement having been made to that effect, nothing was accomplished by such cession, as no action remained to be ceded. But if this had been done before payment, or if on payment there had been an agreement for a future transfer, the cession would have been valid; because the amount received in this case would have been regarded rather as the consideration of the rights of action than as payment, by which the debt would have been extinguished.[2] — *Modestinus respondit: si post solutum, sine ullo pacto, omne quod ex causa tutelæ debeatur, actiones post aliquod intervallum cessæ sint, nihil ea cessione actum, cum nulla actio superfuerit. Quod si ante solutionem hoc factum est, vel quum convenisset ut mandarentur actiones, tunc solutio facta esset, mandatum subsecutum est: salvas esse mandatas actiones: quum novissimo quoque casu pretium magis mandatarum actionum solutum, quam actio quæ fuit, perempta videatur.*

In this statement of the Roman law we find the same distinction as is made by the English courts of equity, the only difference being, that the rules of equity require that, in point of form, the cession of actions should be made to a third person, and not to the surety who is chargeable himself as a

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[1] Digest, 46. 3. 76.

[2] Pothier, in a note to this passage in his edition of the Pandects (Lib. 46, Tit. 1, § 49), says, that when simple payment is made, the obligation and rights of action which resulted from it are extinguished, and cannot therefore be ceded; and to this opinion, that a cession would not be effectual if made at an interval after payment, another law of the Pandects (D. 30, 57) is not opposed, namely, that a person to whom a farm, subject to a mortgage, is left in trust, may require of the creditors to whom the farm is mortgaged, that the rights of action against the debtor may be ceded to him: which, although it was not done at the time, that is, at the time when the agreement was made with the creditors, will still be decreed to him by the Prætor of the Province, because in that case there was no question respecting payment which should extinguish the debt, but only respecting the delivery of a farm, made by the party in whose favor the trust existed, to creditors prosecuting their mortgage debts.

debtor. The whole question is made to rest upon the intention of the parties to make payment or to make a transfer; and some act is necessary to show that a transaction, importing in itself simply payment, is intended by the parties to constitute a sale.

It appears, from the above-cited passage of the Roman law,[1] that if, when payment is made in good faith by another who has a right to make it, from his own funds, subrogation will take place, though the transfer has not actually been made, if such person, in making payment, has stipulated expressly that subrogation should afterwards be made to him. An agreement *ut mandarentur actiones* manifests the intention of the parties, that a transfer of the rights of action should follow the payment. Whatever may have been the operation of such an unexecuted stipulation for a cession of actions, under the Roman law, when, after payment, the debtor had sold the property charged, which by the mere effect of payment returned to his control, it would seem that a purchaser without notice must, under the rules of the common law, prevail against the surety who has merely stipulated for future subrogation.

The doctrine which has prevailed in modern times in those countries whose jurisprudence is founded upon that of the Roman law, agrees with the principles of that law, in regard to the necessity of an express stipulation, as a general rule, to give the new creditor, who has become such by payment of the debt for which he was bound, the benefit of subrogation. Unless such an express agreement has been made to that effect, the third party, who has paid the debt, when the law has not subrogated him, the debt being extinguished, and with it all the securities which were attached to it, has no other action against the debtor than the action *mandati* or the action *negotiorum gestorum*, equivalent to the action of assumpsit at the common law, though, if payment had been made with subrogation, the third person would have, besides these remedies against the debtor, whose liberation he has effected, the same rights of action which the creditor would have had himself, and, as a consequence, all the securities belonging to the debt.

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[1] Digest, 46. 3. 76.

When, says Duranton,[1] the operation of payment by a third person is to give the latter the advantage of existing securities by subrogation, it is not to be regarded as an ordinary payment, having simply the effect of extinguishing the debt, but as a payment with restricted effects, according to the intention with which it has been made, and merely in discharge of the claims of the creditor, from whence it follows, he says, that, besides the action *negotiorum gestorum*, the third party has really, by the effect of subrogation, the same action which the creditor had himself, with all the accessories attached to it, but without any claim to recover from the debtor more than an agent would be entitled to receive for services rendered, since his intention in receiving subrogation was to act in behalf of the debtor.

Subrogation by the civil law must be express, that is to say, the intention of the party must clearly appear by the agreement or discharge. Therefore, says Duranton, it is sufficient, if it is said in the writing which acknowledges payment, or by which the debt is discharged, that the creditor puts in his place such a one, who has made payment of the debt; or, if it is said that he substitutes him to his rights, or that he transfers or relinquishes the debt to the person thus making payment.

But there is no subrogation, if it is merely said that the creditor has received from another the payment of his debt against such a one, *with the right of recourse* to him against the debtor, or to *cause himself to be reimbursed*, or other similar phrases. Subrogation must be express, and these terms do not express it. But subrogation agreed to in general terms, as to the rights of the creditor, to his right of action, his claim, &c., comprehend thereby all privileges, mortgages, and other securities and advantages, attached to the debt.[2] And it is indifferent, in reference to subrogation, when that is agreed upon, whether it is said, in the discharge or acknowledgment of payment, that the third party pays in his own name or in that of the debtor, or whether any positive declaration is made on the subject. The creditor, it is true, cannot be compelled to subrogate a

[1] 12 Duranton, No. 117 note.
[2] Ibid. No. 119.

third party who has no liability in reference to the debt, because this would be in effect to constrain him to sell his claim without a motive, and no man can be compelled to cede his property, except for the public advantage.[1] But if he is willing to agree to subrogation, he may do so, since he may, at his election, dispose of his rights. The creditor, in consenting to the subrogation of a third party, does in some sort sell to him his debt; and, in effect, subrogation has, between the third person subrogated and the debtor, the general results of a sale or a transfer of the debt. In one, as in the other case, the debtor remains always debtor and of the same debt; the privileges, mortgages, and securities, if there are any, remain, in the two cases, and in both, there is only a change of the creditor, but nevertheless without novation, for it is always the same debt.

The Roman law, on the subject of the receipt of payment by a creditor from another person than the principal debtor himself, treats the transaction as a sale.[2]

When he who has a claim against the principal debtor and sureties, on the payment of the money by one of the sureties, transfers the rights of action, it may be said, indeed, that no such rights exist, as he has received his due, and by such receipt liberated all. But the doctrine of the civil law is, that payment of the debt is not in such a case actually made; there may not only be a transfer of the rights of action by the creditor, but, in a proper case, the law requires the cession of actions to be made.

The rule which in the English Court of Chancery has restricted subrogation to cases where on payment an assignment is made to a third person, proceeds upon the principle, that a right of action exists which may be ceded, but there must be an actual cession made, and to one who is not also bound for the debt.

There is some diversity of opinion in the American courts, but in general the doctrine has prevailed, that on payment the surety becomes subrogated by operation of law.

The rule is recognized in Massachusetts, that a co-debtor who makes payment of a debt in which others are bound with

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[1] Duranton, No. 128.

[2] Digest, 46. 1. 36.

him for payment, thereby extinguishes the security, leaving the party who makes payment to his remedy at law by an independent action.

A joint debtor in an execution, who was liable for the whole debt, paid to the creditor's attorney the amount of the judgment, and, instead of having a discharge entered upon the execution, took a separate receipt, purporting that he had received the sum paid, in full satisfaction of the execution. The court held that the judgment was satisfied by this payment, received from a person who was party to it and obliged to pay it; that the execution was *functus officio*. The payment of the whole execution by one of the judgment debtors, gave him a right of action against his fellow-debtor, but did not keep alive the execution for his benefit.[1]

When one of two judgment debtors paid the sum due, but instead of the execution being returned satisfied, it was with the assent of the creditors returned unsatisfied, and an *alias* was taken out, upon which the other judgment debtor was committed, with a view to compel him to contribute his share of the debt for the relief of that debtor who had made the payment; the court held that payment by one joint debtor discharges both; that an obligation was thereby raised against the other to pay his proportion, but that the suit would be an equitable one, and that the defendant would be let in to show that he had paid, or that he ought not to pay, according to the equitable circumstances in the case.[2]

When one of two sureties pledged a note to a creditor, as security for the debt due to him, and on payment the creditor delivered to a surety the note thus pledged as collateral security; it was held that the creditor had no right to transfer the note, his lien having been discharged. The court were of opinion that, as the sureties were jointly liable to the creditor, the payment by one discharged both.[3]

In the State of North Carolina, the doctrine of subrogation by operation of law, on payment of a debt by a person who is

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[1] Hammatt *v.* Wyman, 9 Mass. R. 138.
[2] Brackett *v.* Winslow, 17 Mass. R. 153.
[3] Bowditch *v.* Green, 3 Metcalf, R. 360.

bound as a co-debtor or co-surety with another, is not admitted, and effect is given to technical rules which restrict one who is a co-debtor from occupying the position of a creditor. It has been held by the Supreme Court of the State,[1] that at law, a payment by any one of two or more jointly, or jointly and severally bound for the same debt, is payment by all; and any of the parties may take advantage of it, and plead it to an action brought by a satisfied creditor, or in his name by the sureties. "It is true," said Ruffin, J., "that if a payment be not intended, but a purchase, there is a difference. But that can only be by a stranger, or by using the name of a stranger, to whom an assignment can be made when there is but a single security, and that one upon which all the parties are jointly liable. This is upon the score of intention, and because the plea of payment by a stranger is bad upon demurrer. If the assignment of a joint security be taken by the surety himself, there is an extinguishment, notwithstanding the intention; because an assignment to one, of his own debt, is an absurdity. When the securities are separate, as several bonds or a several judgment upon a joint and several note, probably an assignment may be made to the surety himself, since he is no party to the judgment. But if that can be, clearly nothing but a plain intention, evinced by an assignment to keep up the judgment, can have that effect. Upon the face of the transaction, it is a payment." This was an action at law for the benefit of the surety, in the name of the creditor who had received and intended a satisfaction. But a surety may make payment without extinguishing the debt, if an assignment thereof is made to a third person.

A surety who was bound with the principal for the payment of a debt, deposited the money with a third person, with express directions not to pay it in discharge and satisfaction of the judgment, but to take an assignment thereof, for the purpose of keeping it in force against the defendant. The agent, in pursuance of his instructions, took an assignment to himself in trust for the plaintiff. The court were of opinion that "no satisfaction of the judgment acknowledged of record; no release

[1] Sherwood *v.* Collier, 3 Devereux, R. 380.

of it; nor any receipt of money, as and for a payment of it; no payment; was intended, but the contrary." The question, then, said the court, is, whether, against the intention of the parties, the payment shall be deemed to be in satisfaction, because the money belonged to one of the defendants in that suit. This, they said, "was a common mode whereby a surety indemnifies himself. He may relinquish it by making payment in satisfaction; but he may make the payment not in satisfaction, and take an assignment. If the surety is not a party to that suit, he may take the assignment to himself. This is generally done by an indorser who is not sued jointly with the maker. By taking an assignment, the judgment is preserved, and satisfaction may be obtained from the principal by immediate process. If the judgment be joint against the surety and the principal, the former does not thereby lose his right to an assignment. He cannot take the assignment to himself, however, for that would be an extinction of the judgment. But he may take it to another person."[1]

The surety in a bond on which judgment had been recovered, paid the debt and took an assignment of the judgment. By the payment of the amount due on the judgment, the surety did not intend to satisfy it, but meant to avail himself of the lien which might exist under it upon the property of the principal. The prayer of the bill was, that effect might be given to the judgment, so as to give him priority to other creditors in satisfaction of his debt. But the court held, that though the plaintiff did not intend to extinguish the judgment, by paying the amount due thereon, yet in a court of law and in a court of equity, it would have that effect. If the plaintiff, said the court, had taken an assignment of the judgment against his principal and himself to a stranger, and did not intend satisfaction, then the judgment would not have been extinguished, and if an execution had been issued on the same, it would have held its rank in the scale of priorities. But the plaintiff, the surety, had paid the debt to the judgment creditor, and the general rule was, that if one of the joint obligors, being a surety, pays off the debt, he is at law merely a simple contract cred-

[1] Hodges *v.* Armstrong, 3 Devereux, R. 253.

itor of the principal; and if the principal dies, equity will not convert him into a specialty creditor.[1]

The doctrine of subrogation is stated by the Supreme Court of Alabama[2] as follows: "The rule is, that a surety paying a debt, shall stand in the place of the creditor, and is entitled to the benefit of all securities which the creditor had for the payment of his debt, from the principal debtor; in a word, he is subrogated to all the rights of the creditor. The surety, however, cannot avail himself of the instrument on which he is a surety, by its payment. By payment it is discharged, it ceases to exist, and the payment will not, even in equity, be considered an assignment; the surety merely becomes the creditor of his principal to the amount paid for him. The security," the court proceeds, "which the complainant seeks the benefit of, or through which, it is supposed, his equity can be traced or derived by this doctrine of substitution, is the covenant entered into by the complainant and others to indemnify a party against his acceptance. But this became *functus officio*, the moment the debt was paid, either by the corporation or by any party to it, and cannot be again resuscitated." This doctrine proceeds upon the authority of Copis *v.* Middleton, but differs from the mass of American authorities by which subrogation is admitted in equity, in favor of a surety who has at law extinguished the principal debt by payment.

As a general rule, the payment of a debt by any person who is liable for its payment, is a discharge of it. It is, therefore, *functus officio*, and cannot be enforced against any person who is liable for its payment, in the same degree as the party paying. The rule is applicable to co-debtors, and, under ordinary circumstances, to the case of the co-debtor who is surety merely, as well as where all the debtors are principals. But it was held by the Supreme Court of New Hampshire,[3]

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[1] Briley *v.* Sugg, 1 Dev. & Bat. Eq. R. 366.

[2] Foster *v.* Trustees of the Athenæum, 3 Alabama, R. 300; Morrison *v.* Marvin, 6 Alabama, R. 797.

[3] Edgerly *v.* Emerson, 3 Foster, 555. Buckingham Bank *v.* Claggett, 9 Foster, 292. If a joint and several promissory note is taken up by one of the sureties with the intention to purchase it, and not with the intention to pay and discharge it, such payment will not be a discharge of the debt, and an action may be maintained upon it for the benefit of the real plaintiff in the name of the payee. Whether, in such a case, the note was paid by the surety or purchased by him, was held to be a question for the jury.

that the rule, that a surety may take an assignment of any security for the payment of the debt which is held by the creditor, unavoidably implies an exception to the general rule, that payment of a debt by a co-debtor, discharges the other co-debtors, whether the debt rests in contract merely, or is merged in a judgment. It is of the nature of all securities for a debt, said the court, to be mere incidents of that debt, and entirely dependent upon it. Payment of the debt discharges all the securities for it. The mortgage either of real[1] or personal property is discharged by payment of the mortgage debt; and in the same way pledges and liens are at once at an end, when the debt is paid. If, then, it were held that by the payment of a debt by a surety the debt was entirely discharged, all the collateral securities of the creditor must also be discharged. He would no longer have any thing to assign, and the equitable principle, that the surety is entitled to the benefit of all the securities of the creditor, would be entirely defeated. But it has never, such was the opinion of the court, been so held. The debt is regarded as still unpaid and unsatisfied, so far, and perhaps no further, than is necessary to the preservation of the sureties' interest in such securities. The court were, therefore, of opinion that the rule, that payment by a co-debtor discharges the debt, must be subject to this exception; namely, if the co-debtor making the payment, is a surety, the debt will be holden undischarged, so far as is necessary to preserve and give effect against the principal to the collateral securities assigned by the creditor to the surety, either voluntarily or by a decree of a court of equity. Assuming, then, this principle, the inquiry was, whether an attachment under the law of the State, was such a collateral security for the payment of the debt as to come within the same reason and rule as the mortgage pledge, and other more common collateral securities.

The court were of opinion, that the lien of an attachment is to be preserved for the benefit of the surety who pays the

[1] In certain jurisdictions, it may be held that a mortgage is discharged by payment; the legal estate, however, would be regarded as in the mortgagee for all equitable purposes, and subject to the control of a court of equity.

debt and takes an assignment of the creditors' securities, in the same manner and to the like extent, whether the payment was before or after judgment; that, though payment for most purposes discharges the debt, it does not so discharge it as to destroy the security of the surety, but a judgment may be entered up, to be levied on the property attached, or, if judgment be rendered, a levy on that property may be effectually made, though the execution would be enjoined or set aside if used for any other purpose.

The court seems to have distinguished between the case where there has been a cession of actions by the creditor, or subrogation by a decree of the court, and the case where, at the time of payment, there has been no such cession or demand for subrogation by the surety. It does not, from this decision, appear that there could have been any subrogation by operation of law in favor of the surety, such as would preserve his lien on the securities for his indemnity. On the contrary, it would seem that payment alone, by the surety, operated at once to extinguish the debt. There seems to be no difficulty, in a case where subrogation had been stipulated for, or where it had been made by a decree of court, in viewing, even after judgment and execution, a payment of the amount due as a purchase, and the transfer of the execution as a sale of the debt, according to the rule of the civil law, precisely as if the assignment had taken place, on payment of the debt, before judgment, to a third party. The principal was bound in equity to the surety, and liable to an action at law, even if there had been no agreement for an assignment. And it is very clear that the surety was entitled to the benefit of the lien in equity, even if the action was extinguished at law. Even if there had been no assignment to the surety by the creditor, or decree of the court in his favor, on refusal by the creditor, it might well have been claimed that, as against the principal, the surety might insist that the security should, in equity, be available for his benefit.

Though, in the more recent cases decided in the State of New York, the doctrine that the surety who has paid the debt for which he was bound with the principal debtor, is subrogated by operation of law, has been generally acted upon; in

many of the early cases, the right of subrogation is placed on the ground of assignment, or an actual cession of actions at the time of payment: as in a case [1] where the indorsers of a note as sureties for the principal who was sued by the payee, and against whom judgment was recovered, were also afterwards sued as such indorsers, and judgment recovered against them. The sureties paid the amount of the debt, and took an assignment of the judgment against the principal. The court were of opinion that the judgment assigned by the creditor to the sureties, must be considered unsatisfied and a *legal lien* on the property. "Had the judgment," said Thompson, J., "against the indorsers been paid and discharged without at the same time taking an assignment of the judgment against the principal, it might have operated as a satisfaction of that judgment; but the surety stood before the court as a purchaser and assignee of the judgment; the money paid by him, being the consideration for the assignment. The judgment against the principal and the surety were separate and distinct, and there was no reason why the surety might not purchase a judgment against the principal as well as any other person. But the court were of opinion that, though the assignment was made to one of the sureties alone, as the payment was made by both, the assignee ought not to be allowed more than a moiety of the judgment.

"If the creditor to a bond," said Mr. Chancellor Kent,[2] "exacts his whole demand of one of the sureties, that surety is entitled to be substituted in his place and to a cession of his rights and securities, as if he was a purchaser, either against the principal debtor or the co-sureties." "This doctrine of substitution," he says, "which is familiar to the civil law and the law of the countries in which that system essentially prevails, is equally well known to the English Chancery."

The surety is entitled to pay the debt when it becomes due, or he may call upon the creditor, says Mr. Chancellor Kent,[3] by the aid of a court of chancery, "to enforce his demand

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[1] Clason *v.* Morris, 10 Johns. R. 524.

[2] Cheeseborough *v.* Millard, 1 Johns. Ch. R. 409.

[3] King *v.* Baldwin, 2 Johns. Ch. R. 554.

against the principal debtor. On paying the debt, he is entitled to the creditor's place by substitution."

"According to the doctrine of the civil law," says the same learned judge[1] in another case, "the surety may, *per exceptionem cedendarum actionum*, bar the creditor of so much of his demand as the surety might have received, by an assignment of his lien and the right of action against the principal debtor; provided the creditor had, by his own unnecessary or improper act, deprived the surety of that resource. The surety, by his very character and relation of surety, has an interest that the mortgage taken from the principal debtor, should be dealt with in good faith, and held in trust, as well for the secondary interest of the surety as for the more direct and immediate benefit of the creditor; and the latter must do no wilful act, either to poison it in the first instance, or to destroy or cancel it afterwards. This doctrine," he says, "does not belong merely to the civil law system. It is equally a settled principle in the English Chancery, that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security, and to stand in the place of the creditor and have his securities transferred to him, and to avail himself of those securities against the debtor. This right of the surety stands not upon contract, but upon the same principles of natural justice upon which one surety is entitled to contribution from another."

And in a more recent case,[2] where the second indorser of a bill paid the plaintiffs and took up the bill, the court held that this did not extinguish the bill as against the drawers or against a prior indorser. The second indorser might have sued either of those parties on the bill; but as a judgment had already been recovered against the principal on the bill, the indorser took an assignment of the judgment, with authority to use the names of the plaintiffs for his own benefit. There was nothing, the court held, objectionable in this transaction. It was a sale, rather than a satisfaction of the judgment.

A second mortgagee became the purchaser of the equity of redemption of that mortgage. Afterwards he became the as-

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[1] Hayes *v.* Ward, 4 Johns. Ch. R. 123.

[2] Harger *v.* McCullough, 2 Denio, R. 119.

signee of the first mortgage, and then commenced an action at law in the name of the first mortgagee against a surety, who, after the bond and mortgage were given, without the desire or request of the mortgagor, but at the solicitation of the creditor, had executed upon the bond a guaranty of the payment thereof, and recovered judgment against him for the amount remaining due upon the bond and mortgage. The surety (who was the complainant in the bill) thereupon tendered the amount recovered against him, and demanded an assignment to himself of the bond and mortgage. This was refused; and the complainant then paid absolutely the sum, and demanded an assignment. This was also refused. The complainant claimed, by the bill, to be subrogated to the rights of action of the holders of the bond and mortgage, for the purpose of reimbursing to himself the sum collected of him by suit on the guaranty; and the prayer of the bill was, that such right of subrogation might be declared, and that the premises might be sold, etc. The court were of opinion, that the legal presumption was, that when the second mortgagee purchased the premises at the sale under his mortgage, he only bid to the value of the equity of redemption, and that he must be adjudged to hold them subsequently as a fund for the satisfaction of the prior incumbrance; that, therefore, the surety had a right to demand of the creditor, whose debt he had paid, the securities he held against the principal debtor, and to stand in his shoes, and that this right did not depend at all upon any request or contract on the part of the debtor with the surety, but grew rather out of the relations existing between the surety and the creditor. "If the creditor," said the court, "has insisted upon the surety's discharging his obligations and liabilities as such, and fastened the character upon him by a judgment, he cannot, after receiving from him his debt, turn round and deny him the rights of a surety." It is clear that the party in this case was entitled to a decree for subrogation. By demanding subrogation before payment, and subsequently proceeding, on refusal, by a bill in equity, he undoubtedly preserved his lien upon the land as a legal incumbrancer.[1]

"It is perfectly well settled," said Mr. Chancellor Walworth,

[1] Matthews *v.* Aiken, 1 Comstock, R. 595.

"as a general principle of equity, that where one person or his property stands in the situation of a surety for the payment of a debt, for which payment another person or his property is primarily liable, the one who is secondarily liable, upon payment of the debt to the original creditor, is entitled to be subrogated to all the rights and remedies of the creditor as they can exist against the principal debtor or his property."[1] He is entitled to demand subrogation on payment, and, on refusal, may, as in the above case, seek the aid of a court of equity.

The doctrine which has generally prevailed in these United States in opposition to that which has been adopted, as presenting the true rule, in the English Court of Chancery, is, that a surety who is bound for a debt, may satisfy the debt of his principal, and that, without thereby extinguishing the debt, he, though a co-debtor, may be subrogated to the rights of action of the creditor himself by intendment of law. But, after all, there is no real subrogation. At law, the debt is extinguished. A party cannot at law be at the same time debtor and creditor on the same debt. Subrogation which takes effect by operation of law, is merely equitable. The ground on which courts have proceeded in giving the surety a recourse to securities of the creditor, has expressly been stated as a revival of the debt by the equitable jurisdiction. It is only in equity that payment of the debt, however made, is not, on oyer of a bond, etc., a discharge. If the action of a court of equity in favor of the surety was merely upon the person of the creditor, requiring him to make a cession of actions, its jurisdiction would end there; but this is not the case. A cession of actions is designed to prevent a discharge of the debt by giving the transaction the form of a sale; but when a court is applied to for the revival of a debt for the sake of giving relief to a surety who is in fact a co-debtor, the jurisdiction of equity is exerted throughout, and relief is given on the principles of the court with reference to countervailing equities and legal rights. Thus subrogation by intendment of law, is reduced to an equitable proceeding by bill in favor of the surety, nearly analogous to the direct remedial action which is given to him at law. Therefore, on principle, relief can only be given against the parties

[1] Wilkes *v.* Harper, 2 Barb. Ch. R. 338.

to the original debt and their privies, and not against subsequent incumbrancers or purchasers.

Very different is the condition of a party who has made himself an assignee of the creditor. When the creditor has assigned his debt to a stranger for a pecuniary consideration, his assignee may sustain an action at law in the name of the creditor, and avail himself fully of such right of action. So when the surety pays the debt, and at the same time takes an assignment in the name of a third person (and at the civil law the cession to the surety himself would be sufficiently effectual), the legal right of the creditor is preserved. The right of action will prevail against all, and the right of the surety will be maintained on legal grounds, and as standing in the place of the creditor.

Actual subrogation which takes effect by a cession of actions or an assignment, gives the surety every right which the creditor may have, and those rights must prevail against subsequent purchasers without notice. Whereas, subrogation by operation of law or on an imaginary assignment, is little more than an extension of the equitable jurisdiction to give a direct recourse to securities which, though discharged from legal incumbrances, have not been subjected to new liens or charges. Without a cession of actions by the creditor, or a decree of the court constituting in effect such a cession, there can be, indeed, no true subrogation to legal rights of the creditor in favor of a surety. It is a mere perversion of terms to speak of the equitable remedies of the surety against the principal as a substitution to the creditor, and such as may be attended with injurious consequences. No inconvenience, perhaps, may follow from giving a court of equity some degree of concurrent jurisdiction with courts of law in favor of the surety, when it is called into exercise against the debtor, and with a view to more effectual relief against property in the hands of the debtor, or of his assignee with notice; but this is only a *quasi* subrogation, and is not to be taken as a true substitution of the surety to the legal or absolute rights of the creditor.

When, as in the State of Pennsylvania, on payment by a party who would be entitled to a cession of actions, the debt is held to be extinguished, but the court, in the exercise of

equitable jurisdiction, revives the extinguished debt on the ground of an imaginary assignment in favor of him who was entitled to legal subrogation, it must be conceded that there was an interval of time during which the debtor might have charged the security with new incumbrances, which must prevail both at law and in equity, whereas, if the surety had been actually subrogated to the creditor by a cession of actions, he might have exercised all his legal rights to as full an extent as the creditor himself.

The doctrine of subrogation by operation of law, has been fully recognized in the Court of Chancery of the State of New York. In a case[1] decided by Mr. Chancellor Walworth, he stated the right of a surety, who is compelled to pay a debt for which he was bound, to be subrogated, as taking effect in all cases, by operation of law. "It is only in cases," he said, "where the party advancing money to pay the debts of a third party, stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases," he says, "the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned, or kept on foot, for the benefit of such third person, is absolutely extinguished."

The doctrine of an imaginary assignment of securities, which is held to take place in Pennsylvania, in favor of a surety, on payment of the debt by him, is equivalent to the doctrine of subrogation by operation of law in all cases.

"Actual payment," says Gibson, C. J.,[2] "discharges a judgment at law, but not in equity, if justice requires the parties in interest to be restrained from alleging it, or insisting on their legal rights. Kuhn *v.* North, 10 Serg. & Rawle, 39," he says, "was the case of the voluntary payment of the debt of another which, so far from creating an interest in the judgment to affect subsequent creditors, would not have sustained an action of *indebitatus assumpsit* against the debtor. There is an obvious

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[1] Sanford *v.* McLean, 3 Paige, R. 122.

[2] Fleming *v.* Beaver, 2 Rawle, R. 132.

difference between one who has voluntarily paid the debt of another, and one who has paid on compulsion, from having become surety at the instance of the debtor, which gives an equity, not only against the latter, but against every one else deriving title from him subsequently to the contract of suretyship." The learned judge is to be understood as expressing the opinion, that a surety who has been compelled to pay the debt, acquires a right to subrogation by operation of law, which will prevail against subsequent incumbrancers and purchasers.

In the case where the doctrine of subrogation was stated, as above, it was decided that the surety of a judgment debtor was entitled to be subrogated to the right of a creditor, as against a second judgment creditor. This was a case where, in equity, a subsequent creditor, whose fund was taken away by a prior creditor, would have had a right to be substituted to the prior creditor, under the doctrine of the marshalling of assets, but for the claim of the surety to subrogation on payment; and it was claimed that it was a case where there was but equity against equity, and that therefore the parties should be left to their legal advantages. The case was decided on the ground, that the surety had a prior equity. "The right of the surety," said the court, "to be substituted in the first place, is indisputable; and the question stands exactly as if the prior creditor himself were pressing his claim on this fund, without having pursued the surety to insolvency." "The surety contracted on the credit of this very fund; and being prior in time, he is prior in right to a creditor who has acquired a claim on it subsequently." "As to the supposed inefficiency," said the court, "of the substitution attempted by the parties, and the alleged inability of this court to compel the creditor to assign the judgment, it is sufficient to remark, that an actual assignment is unnecessary. The right of substitution is every thing, and actual substitution nothing. By a fiction to which we are indebted for nearly all our equitable jurisdiction, the law has made the assignment already; and hence the right of the party entitled, by no means depends on the willingness of the creditor to transfer the security. Here there is a clear right of substitution; and the surety, having paid the debt, succeeds, by operation of law, to the rights of the creditor."

One of three sureties who paid the debt to their common creditor, it was held, may be subrogated to the rights of the creditor, in the judgment paid by him, to enable him to recover contribution from the other two. "As a remedy," said Gibson, C. J., "between surety and principal, or between sureties themselves, subrogation to the ownership of the security has advantages which must always incline courts to favor it. As each co-surety is separately liable at law for no more than an aliquot part to one who has paid the whole, an action for contribution has this disadvantage, that it leaves him who has paid more than his part exposed to a possibility of loss from the insolvency of any one of the contributors, which a bill in equity does not." "The necessity," he adds, "that we are under of administering equity through the medium of common-law forms, compels us, in cases like the present, to arrive at justice indirectly, by the instrumentality of an imaginary assignment of the security, which enables the surety to apply it, by direction of the court, in a way to cast the burden on those who ought to bear it."[1]

After citing, in a subsequent case,[2] the various decisions which had been made, in the State of Pennsylvania, on the subject, the court say, "from the foregoing cases it would appear, that we have adopted the general rule, that a surety, by paying the debt of his principal, becomes entitled to be subrogated to all the rights of the creditor, so as to have the benefit of all the securities which the creditor had for the payment of the debt, without any exception, as well as those which became extinct, at law at least, by the act of the surety's paying the debt, as all collateral securities which the creditor held for the payment of it, which have not been considered as directly extinguished by the surety's paying the debt." "These decisions have been made upon a supposed principle of equity, which, for the purpose of doing justice to the surety who has paid the debt, interposes to prevent the judgment or security which has been extinguished at law, from being so considered as between the surety and the principal, or his subsequent lien creditor."

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[1] Croft *v.* Moore, 9 Watts, 451.

[2] Lathrop & Dale's Appeal, 1 Barr, R. 512.

In the following case,[1] the relief to which the party was entitled in equity, seems not to have rested upon the artificial assumption which was made by the court, that, as surety, he might claim the benefit of subrogation to the rights of a creditor by operation of law, or by a direct cession of actions.

Where one of four heirs of an intestate conveyed the undivided fourth part of a portion of the real estate which descended to her, to a purchaser, and, the personal estate of the intestate being found to be insufficient for the payment of his debts, the administrator sold a part of the land in which an undivided share had thus been conveyed, and the proceeds thereof were applied to the payment of the intestate's debts, and thereupon, as the vendor of such undivided fourth part still owned an undivided fourth part of the premises which were subsequently decreed to be sold in a partition suit, the purchaser claimed to have an equitable lien upon that undivided interest, to remunerate himself for his one fourth of the proceeds of the lands sold for the payment of the debts, Mr. Chancellor Walworth held, that the defendant Ross, the purchaser, had an equitable lien upon the undivided interest of the vendor, of which partition was sought in the case, to the extent of one fourth of the proceeds of the lands in which he had purchased his share, and which were sold for the payment of the debts of the intestate. "It is an established principle of equity," he said, "that sureties, or those who stand in the situation of sureties for those who pay a debt for them, are entitled to stand in the place of the creditor, or to be subrogated to all his rights as to any fund, lien, or equity which he may have against any other person or property on account of the debt. And where the creditor has two funds to which he may resort for the satisfaction of his debt, if he resorts to that which in equity is only secondarily liable, to the injury of one who has a claim upon the secondary fund only, or resorts to a fund belonging to a third person, which fund is only secondarily liable for the payment of the debt, the person who is the owner of, or has a claim upon the fund thus taken, is considered as a surety merely, and is entitled to stand in the place of the creditor or against the primary

[1] Eddy *v.* Traver, 6 Paige, R. 521.

fund." It appears, from the statement of the case, that the personal estate was insufficient for the payment of the debts; there was, therefore, remaining no fund to which the party might resort, as primarily liable on subrogation. The only ground, therefore, on which the assignee of one of the heirs could claim subrogation, was for contribution against the other heirs. But the relief sought in this case was against the vendor and his portion of the proceeds of the land, and the purchaser would seem to have had a direct equitable claim against the vendor and his portion, founded upon the implied warranty. The case would have been different if relief had been sought against all the heirs, and for a contribution from the portion of each in the fund. He might perhaps have asserted this claim as substituted to the creditor; but the creditor had no action against the vendor. The action of the creditor was gone. Mr. Chancellor Walworth proceeded in this case to say: "In cases depending upon this equitable principle as between the debtor and his sureties, it makes no difference, except as against *bona fide purchasers or mortgagees*, that the debt has been actually paid by the sureties or out of their property, so that the creditor's lien upon the property of the principal debtor is extinguished at law." But the acquisition of a legal right is the very foundation of subrogation. The creditor in this case had an absolute legal right upon the whole estate, and, by a proper cession of actions, one of the heirs, on payment of the whole debt, might have acquired such legal right not only as against the co-heirs and their representatives, but also against *bona fide* purchasers and incumbrancers.

There is a class of cases where, on a transfer of the security to a purchaser, he has covenanted with the debtor to assume and pay the debt for which he continues liable, but without actually charging himself to the creditor, where the debtor, who was the vendor of the security, and who has been compelled to pay the debt, has been subrogated as a surety to the rights of the creditor as against the security, on the ground that the purchaser is the real debtor, and that the vendor is, in effect, only secondarily liable as a surety. It is true that, as between himself and the debtor, the purchaser who has agreed to assume the debt, is actually bound to him for its payment. But there

is no privity between him and the original creditor, who has no right of action against the purchaser on his promise. The vendor, in such a case, who has failed to take security from his purchaser on his promise to pay the debt, cannot set up, as against subsequent purchasers, the security given by himself to the creditor. On payment to the creditor by the principal debtor, the creditor has no right of action. If the vendor has failed to take security from the purchaser for payment, he cannot, after payment of the original debt, avail himself of a security for that which he has sold without reserving a lien.

In certain cases decided by Mr. Chancellor Walworth,[1] an undue application of the principle of subrogation seems to have been made by an artificial view of the relation of a debtor, as surety, to purchasers who have assumed liability for the debt, which has been paid by the debtor. As where the complainant Marsh, who was the owner of certain land, mortgaged the same for $3,000 to the defendant Pike; and afterwards, the complainant conveyed the mortgaged premises to the defendant McLean, subject to the mortgage, the amount of which was deducted from the purchase-money, and which mortgage McLean agreed with the complainant to pay off and discharge. Subsequently, McLean sold the premises to the defendant Towle, subject to the mortgage as a part of the consideration of the conveyance, and which mortgage Towle agreed to pay off and satisfy. After the mortgage became due, the complainant called upon Towle to pay off and satisfy the bond and mortgage, so as to relieve him from his responsibility upon his bond, but he neglected to do so. "The effect of these several conveyances and agreements," said Mr. Chancellor Walworth, "is, in equity, to place the complainant in the situation of a surety for the payment of the bond and mortgage, and to make the defendants, Towle and McLean, the principal debtors as to him; the first being primarily, and the latter secondarily liable to him for the payment of the debt. The complainant, therefore, if he had paid the bond and mortgage to Pike, would have been entitled to be substituted in Pike's place, not only as to the remedy against the land, but also as to the equitable claim

[1] Marsh *v.* Pike, 10 Paige, R. 595.

against McLean and Towle, who had agreed to pay off the mortgage." Undoubtedly the purchasers of the mortgaged premises were bound to pay the debt, and the decree of the court against them on behalf of the complainant was just; but if the complainant had paid the debt, he could not have been subrogated to the action of the creditor against himself. When a debt is paid by the debtor, the debt is necessarily extinguished. The claim of the debtor was not, as was supposed by the Chancellor, that of a surety, but the purchaser was liable to him in the first instance. On payment of the mortgage by the debtor, he had a right to resort to the purchaser for reimbursement, but not as subrogated to the creditor's action. That was gone. The purchaser was not in privity with the creditor, and could not be treated as the original debtor. His liability depended upon his agreement with the mortgagor, of whom he purchased, and it depended upon that agreement whether the purchase-money was a lien upon the land, or whether it would pass to another purchaser discharged of the lien. The complainant did not, as was held in this case, occupy the anomalous position of debtor and surety, though he had a recourse to a third party who had, subsequently to the mortgage, promised to pay the debt.

When the equity of redemption is sold by the mortgagors, subject to the payment of the debt, with or without an express agreement on the part of the purchaser to pay the debt, and the mortgagors are afterwards compelled to pay the amount of their bonds "to any other persons as the owners of such bonds and mortgages, the mortgagors would in equity have, as against the purchaser of the equity of redemption, a right to be indemnified for such payments, but not as subrogated to the rights of the creditor against the mortgagors themselves. The right to indemnity is merely equitable." [1]

When mortgaged land was sold subject to the incumbrance, "the land itself," said Mr. Chancellor Walworth,[2] "became thereby, in equity, the primary fund for the payment of that

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[1] Halsey *v.* Reid, 9 Paige, R. 446; Vanderkemp *v.* Shelton, 11 Paige, R. 34.

[2] Cox *v.* Wheeler, 7 Paige, R. 258.

incumbrance; and if the premises were sold to a stranger, the mortgagor, upon being compelled to pay the incumbrance by suit upon the bond, would be entitled to be substituted in the place of the holder of the incumbrance as to the remedy against the land as the primary fund." If the party is entitled to be thus subrogated, he has, besides his equitable claim, a legal right to the estate, and may follow it into the hands of a purchaser without notice from the vendee of the equity of redemption. Actual subrogation always imports the transfer of all the legal rights of the creditor, but, though the purchaser of the equity of redemption holds subject to the claim of the creditor, it is certain that the lien would not exist against a purchaser from him, under a conveyance of the legal estate, made *bona fide*, for a valuable consideration without notice, if he has paid the purchase-money. A right to a mortgage by subrogation is absolute.[1]

In another case,[2] where land had been purchased, subject to the mortgage therein particularly mentioned, Mr. Chancellor Walworth, though he held that the mortgagor, who had been compelled to pay the debt, would have a right to be subrogated to the creditor against the land in the hands of a grantee of the purchaser, rested the right to resort to the land as the primary fund for payment, upon the circumstance that the equitable charge appeared upon the deed, so that the grantee had constructive notice. The right to equitable relief did not, therefore, depend upon subrogation.

Where a debtor,[3] against whom executions had been issued, which were liens upon his personal estate, made an assignment of his property to a trustee for the payment of his debts, and directed the avails of certain cloth in the process of manufacture, to be first applied to the payment of notes given to M. and S. for the purchase-money of the wool used in the manufacture of such cloth, after paying the manufacturer's lien thereon; and the sheriff subsequently sold the cloth upon the prior executions, subject to the manufacturer's lien, and the

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[1] 2 Story, Equity Jurisprudence, § 1228.

[2] Jumel *v.* Jumel, 7 Paige, R. 594.

[3] State *v.* Van Vechten, 11 Paige, R. 21.

same was bid in by the assignee, and subsequently sold for a much larger sum; it was held, that the other part of the assigned property, as between M. and S. and the general creditors, was the primary fund for the payment of the executions, which were liens upon the assigned property, and that M. and S. were entitled to be subrogated to the rights of the execution creditors, against the fund assigned for the payment of the debt generally, so far as the cloth assigned for the payment of the debt of M. and S. specifically, had been applied in payment of such execution creditors. The parties to which the property was specifically assigned, had undoubtedly an equity to stand in the place of the execution creditors; their right, however, was a simple equity, and not to be subrogated to the rights of the creditors. Subrogation would have revived the lien of the execution creditor, which was discharged by payment; but M. and S., in this case, would have no claim against a *bona fide* purchaser.

The distinction between the doctrine of subrogation and that of marshalling of assets, is often disregarded by the courts; but it is of the utmost importance to keep in view the principle that true subrogation is absolute for every existing legal right; whereas, the right of a party who might have required assets to be marshalled in his favor, is, after payment of the debt, a mere equity, and can never revive a lien which has been extinguished against a purchaser without notice.

The jurisdiction of the court was legitimately exercised in another case,[1] where a mortgagor sold his equity of redemption, and the amount of the mortgage debt was deducted from the price, and the land was charged in equity in favor of the debtor, but the right was not placed on the ground of subrogation. There was no necessity for subrogation against the purchaser of the equity of redemption; a grantee from him without notice would have been protected.

In another case,[2] two persons became joint purchasers of land mortgaged, and assumed the payment of the mortgage debt, as a part of the purchase-money. One of the purchaser's

[1] Ferris *v.* Crawford, 2 Denio, 595.

[2] Cornell *v.* Prescott, 2 Barbour, Supreme Court R. 16.

paid his share of the debt due upon the mortgage, which was a charge on the premises; although the whole of the premises remained liable to be sold for the payment of the mortgage debt. Mr. Justice Harris, sitting in equity, held, that when one of the purchasers had paid his share of the debt, he had the right, without paying his co-purchaser's share of such debt, to apply to a court of equity to compel such co-purchaser to pay off his portion of the mortgage debt, so that the lien of the mortgage upon the whole property may be discharged, and the purchaser who has paid his share be protected against a bond of indemnity to the mortgagor.

The equity in this case was clear; but it is by no means true, as was supposed by the court, that the mortgage debtor would, on payment of the debt, be entitled to be subrogated to the action of the creditor. The right of the party to be relieved against his co-purchasers, was effectual against the land whilst it remained his property, but would not have followed the land into the hands of a *bona fide* purchaser.

C. and S. bought land, and gave a bond and mortgage for the price. Afterwards, C. conveyed his moiety to S., who agreed to pay the debt. The creditor attempted to collect the whole debt of C. by a suit on the bond. Mr. Chancellor Walworth [1] was of opinion that, by the agreement between the debtors, subsequent to the execution of the bond and mortgage, C. became a surety for S., who was thereby made primarily liable, and that, as such, he had a right to be subrogated to the mortgage creditor. But C. was a joint debtor for the original debt. The subsequent agreement was a thing distinct. It could not make him a surety on the mortgage debt.

The agreement by one of the purchasers and co-debtors to indemnify the other, may have given him an equitable right to claim that the land should be applied to the payment of the debt, but did not constitute a legal charge upon the land against subsequent purchasers.

In a case [2] decided by the Supreme Court of Pennsylvania,

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[1] Cherry *v.* Monroe, 2 Barbour, Ch. R. 618.

[2] Gearhart *v.* Jordan, 1 Jones, Penn. R. 325.

the application of the doctrine of subrogation was very questionable. The case, so far as it regards this subject, was as follows: Baldy obtained a judgment against Clark for a debt. The judgment became a lien upon a house and land, which Clark afterwards agreed to sell to Gearhart, the plaintiff in error, and Brown. Brown's moiety of the house and land was sold and applied to the payment of Baldy's judgment against Clark, the vendor. A judgment creditor of Brown afterward presented a petition to the court, praying the court to decree that the petitioner might be subrogated to the rights of Baldy, the creditor of Clark, under his judgment against the moiety of Gearhart, to the extent of one half of the said judgment. The court decided, that the right of subrogation existed on the ground that, in equity, each of the purchasers was bound to contribute only in proportion towards the discharge of the common burden, and beyond this, was to be considered as a surety of the remaining party. But, though the joint purchasers might, as between themselves, be regarded as occupying a position analogous to that of sureties, they had no connection in that character with the creditor, whose debt had been satisfied out of the moiety of one of them. They had no privity as sureties with him. Clark was the debtor, and they were not sureties for Clark. As between the purchasers, an equity existed for contribution. This right to contribution, however, could not connect itself with the lien of the creditor so as to give a priority, by virtue of that lien, against intermediate incumbrancers. If Gearhart in this case had mortgaged his moiety of the land purchased to his own creditor, the judgment creditors of Brown could acquire no superiority of right over Gearhart's creditors by resorting to Baldy's judgment.

A surety who was bound to Baldy for the debt of Clark, would be entitled to subrogation and to the legal advantage which that would give against subsequent incumbrancers, but no such advantage could be extended to the sureties (as they impliedly were), on the purchase, for each other. Suppose an express agreement had existed between the joint purchasers and Clark, the vendor, that they should be held as sureties for each other, and that each had given security to Clark, they would be entitled to be subrogated to the rights of the vendor,

but they would thereby acquire no claim in equity to the prior lien of Baldy. Clark's judgment creditors would take precedence of the creditors of Brown in reference to any security in the hands of Baldy.

Atwood [1] was indebted to the State of Connecticut for a sum of money secured by mortgage on land. Atwood conveyed the land mortgaged to Cunningham, who, for a valuable consideration, agreed, by an instrument in writing, to pay two thousand dollars of the mortgage debt, and indemnify and save harmless Atwood therefrom; and it was also agreed between Atwood and Cunningham, that this mortgage, to the amount of two thousand dollars, should be chargeable upon the land conveyed by Atwood to Cunningham; but Atwood acquired thereby no actual lien upon the land. The interest of Cunningham in the premises was afterwards transferred to Vincent by the levy of an execution in his favor against Cunningham. It was held by the court, that Cunningham, by his agreement with Atwood, assuming the payment of two thousand dollars, as between himself and Atwood, became the principal debtor, and that Atwood, whose bond was still outstanding at the treasury, stood as his surety to the State, and that the principle applicable to this position of the parties was well settled: the surety was entitled to the benefit of all the securities which were available for his advantage. The land mortgaged, in this case, was the primary fund for the payment of the debt. Vincent, the creditor who acquired the land by the levy of execution, stood in the place of the debtor, and represented him in reference to the debt. But though the agreement made between Atwood and Cunningham bound the latter and those who were in privity with him, Atwood still continued the principal debtor on the mortgage, and he could not become a surety thereon, so as to be entitled to be subrogated to it. If Atwood had paid the debt, and Cunningham thereafter had conveyed the land to a *bona fide* purchaser, Atwood could have set up no claim against him as subrogated to mortgage. If he acquired no lien on the land at the time of the conveyance to Cunningham, he would be without remedy.

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[1] Atwood *v.* Vincent, 17 Conn. R. 575.

R. & M., being owners of land, executed a mortgage thereon to secure their bond to P. In 1839, they conveyed the land to Barrington, who, by the deed, assumed the debt; but R. & M. continued to pay the interest on the mortgage debt until 1844, when they procured an assignment of the bond and mortgage to Oakford as their trustee. He obtained judgment, with interest from 1839. A sale was made by the sheriff, and the question arose on distributing the proceeds. The court were of opinion, that when Barrington made the debt his own, the relation of principal and surety was established as between them and Barrington, though they continued liable to P. as principal debtors. "So viewed," said the court, "the case is the ordinary one of payment of the debt of a principal by his sureties, which, under the familiar equity, entitles them to be substituted for the creditor." But, though, as between the vendors and the purchaser, the latter became the principal debtor, he was not a party to the original debt. The vendors, therefore, being themselves the principal debtors, could not be subrogated to the rights of the creditor. The case, however, was distinguished by the circumstance, that an assignment had been made by the creditor to a trustee. The mortgage was thus kept alive, and against the fund in court the equity of the vendors was plain.[1]

To the cases which have been decided on this subject may be added a case[2] determined, in supposed accordance with the principles of the civil law, by the Supreme Court of Louisiana.

Baldwin purchased certain lots of land from Kohn, and gave him a mortgage to secure the payment of his notes given for the price. Baldwin afterwards sold the land to Green, who assumed, in favor of the vendor, the payment of the notes given by him to Kohn. Green sold the land to Thompson, the defendant; but Green did not pay and take up Baldwin's notes to Kohn, as stipulated in the act of sale by the former, consequently the original promisor was obliged to pay them as they became due; and it was held, that, as against the purchaser, the debtor was subrogated to the mortgage of the creditor, and

[1] Morris *v.* Oaksford, 9 Penn. State, R. 498.

[2] Baldwin *v.* Thompson, 6 Louisiana R. 474.

that the debt was not extinguished by the payment made by the debtor. In this, as in other similar cases, the mortgagor sold the land without requiring any security, and afterwards sought to avail himself of the lien of the mortgage, by procuring himself to be subrogated to the creditor, after payment of the debt.

It has been seen that, under the Roman law, as well as by the common law, when a debt is paid by a surety, who is himself bound as a debtor, an actual cession of actions by the creditor at the time of payment, is necessary to give the benefit of subrogation to the surety. Where, as under the modern French code, as well as in some of these United States, the law provides that, by the mere effect of payment by the surety, he shall be subrogated, as of right, to the creditor, it would seem that, on principle, as representing the creditor, and substituted in his place by positive law, he must prevail against subsequent purchasers, even with notice. Such purchasers acquire the property which has been given as security, subject to the rights of the surety. But where, as in most of these United States, under the system of the common law, the surety is held to be subrogated by operation of law, there is no absolute charge in favor of the surety on the property given by the principal debtor to the creditor as security.

The right of the surety is an equitable one. If the creditor has not made to him a cession of actions, the debtor, on payment by the surety, may sell the security, if personal, to a subsequent purchaser, who, if without notice, in virtue of his legal right, will prevail over the surety. The consequence is, that subrogation by operation of law, in favor of a surety, is little more than an equitable remedy concurrent with the action of assumpsit against the debtor and his privies. But, as in every case where subrogation by operation of law is properly held to exist in favor of a party who, being liable as surety, has paid the debt, he might have acquired, by a cession of actions in due form, the absolute right of the creditor, and thus have acquired all the advantages which belonged to the creditor, as legally entitled to hold the securities against subsequent purchasers. It is, therefore, important to discriminate between cases proper for subrogation, where the surety may thus acquire the legal

right, and other cases, where he may, indeed, as against the principal debtor, be entitled to relief, but in which, having only an equity, he cannot prevail against subsequent purchasers.

Such are cases where a party may be entitled to have securities marshalled, or where property held as security, has been sold to a purchaser who has agreed to pay the debt, and on whose default the principal debtor has been compelled to pay the debt, and thereupon seeks to be subrogated to the action of the creditor and his lien upon the security.

In such cases, circumstances may often render a resort to the equitable jurisdiction necessary, for the relief of those who have a just claim to the interposition of the court, but who cannot establish a right of substitution to the lien of the original creditor against subsequent purchasers.

The marshalling of assets and securities takes place between parties who have equal rights, and it is exercised in regulation of the right of legal resort to securities, so as to provide for the satisfaction, as far as possible, of each incumbrancer.

The question, whether one incumbrancer shall be substituted for another, is very different from that, whether one person shall be substituted for another as creditor. A surety has an absolute right, by subrogation or otherwise, to stand in the place of the creditor in regard to the security. Whether one security shall be substituted for another, under the doctrine of marshalling, depends upon equitable considerations.

It has been held, in equity,[1] that if a creditor has the security of two funds, another creditor who has a lien on one of them only, may compel the former to resort to the other for payment. But if A. has a lien on two funds, B. and C., and D. has a lien only on C., if D. pays the debt of A., he acquires the lien of the creditor against C., but he is a stranger to the creditor, except so far as the debt is a prior incumbrance on C., and therefore cannot be subrogated generally to the debt of A., so as to acquire a lien on the fund D. He is not in the position of a surety, and, though he might have been entitled to have the securities marshalled in his favor, he had no right to demand subrogation, and must take his place, after payment, subse-

[1] Aldrich *v.* Cooper, 8 Ves. 391.

quent to intervening incumbrancers. He is not subrogated by law, generally, and he could not claim a cession of actions.

In another case,[1] Lord Eldon said, "It was never said, that if I have a demand against A. and B., a creditor of B. shall compel me to go against A.; without more; as if B. himself could insist, that A. ought to pay in the first instance; as in the ordinary case of drawer and acceptor, or principal and surety; to the intent that all the obligations arising out of these complicated relations; may be satisfied: but if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity giving B. the right, for his own sake, to compel me to seek payment from A." But if we suppose that A., as principal, and B., as surety, are bound to me for the payment of a debt, and that A. mortgages Blackacre to me as security, and B. mortgages Whiteacre; and that B. also mortgages Whiteacre for his own proper debt to C. If B. pays the debt for which he is surety, he has a right to be subrogated to the creditor; but C., the creditor of B., though he may discharge my debt, which is a charge upon the land of B., has no claim whatever to be subrogated to me as creditor of A. and B. In regard to my claim against A., he is a mere stranger, and cannot therefore offer payment with demand of subrogation; but as B., on his own account may, as surety, require A. to pay the debt, he is within the distinction above stated by Lord Eldon, and C. may require the securities to be so marshalled, as to throw my debt upon A.'s land, that he may avail himself of the security provided by B. for his own proper debt. But before proceedings are instituted for thus marshalling the securities, A. may sell the security subject to my debt, and thus defeat the equity of C., to have the securities marshalled in his favor.[2] So, as the equity of C. depends upon the right of B. to insist that the principal debtor should pay, in the first instance, B., by waiving his own right, on payment of the debt, may defeat the equity of C.; but the right of the surety B. to be subrogated, cannot, after payment by him, with a cession of actions, be defeated by a sale of the

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[1] Ex parte Kendall, 17 Vesey, 513. See Dorr *v.* Shaw, 4 Johns. Ch. R. 17.

[2] Racster *v.* Barnes, 1 Y. & C. C. R. 401. But see Conrad *v.* Harrison, 3 Leigh, 532.

security. The right of B. will prevail against subsequent purchasers, with or without notice. The equity of C. to require the marshalling of securities, is only such as may prevail in the arrangement of securities which have not been disposed of at the time of the commencement of proceedings in equity for that purpose. The very basis of the equity for marshalling is, that it cannot prejudice concurrent rights, whilst the lien of the surety may always be rendered absolute; and this marks the distinction between subrogation and the marshalling of securities.

If A. is the drawer of a bill of exchange, and B. is the acceptor, and A. mortgages Blackacre as security for the payment to the holder, and B. also mortgages Whiteacre to him; afterwards A. mortgages Whiteacre for his own debt to C., C. may, under the doctrine of marshalling, require the creditor of both to resort to the securities of B., the acceptor, because A. may demand, as between himself and B., that he should pay the bill; but before proceedings are had for the marshalling of the securities, B. may execute a second mortgage, which will prevail against this equity, and if B. is entitled, by way of set-off or compensation, to claim that his liability to the drawer has been extinguished at any time before the proceedings are commenced, that will render C.'s claim ineffectual.

The right to demand the aid of a court of equity for the marshalling of securities, does not constitute a lien upon the land or other property. In that respect, it differs from the right of a surety to demand subrogation, which is an absolute charge during the existence of the debt. That the equitable right to have securities marshalled, is not a charge upon the property before the commencement of proceedings in equity, is evident from the consideration that the parties have not constituted a lien upon the property by express agreement. A debtor, in mortgaging certain parts of his property for the security of his debt, whilst leaving certain other portions unincumbered, could have had no other object than to preserve the right of disposing of it freely. If a person who is the owner of two parcels of land, and having mortgaged them both to one creditor, afterwards suffers a judgment to another creditor, which judgment constitutes a lien upon both parcels, and then the debtor

mortgages one of the parcels of land to the last-mentioned creditor, on his agreement to relinquish the lien on the rest of his property; the object of this agreement is to give the debtor a full power to dispose of the land not mortgaged; and yet, if the debtor becomes a bankrupt without having sold or incumbered the land, an equity will nevertheless exist between the two mortgage creditors, to have the securities marshalled for the benefit of that creditor who has a mortgage on one tract only. There is here no lien in favor of the second mortgagee, for it has been expressly relinquished; and yet, if the debtor has not exercised his right to sell or incumber the land which was left to his free disposal, as between the two mortgagees, the securities will be marshalled so as to throw the first mortgagee upon the land not included in the second mortgage. The equity of marshalling is not exercised on the footing of a lien in favor of the second mortgagee, but upon the ground of a just distribution of existing securities.

The first mortgagee and the mortgagor had the absolute right of disposing of the land which was alone mortgaged to the latter. It would be strange, indeed, if from the relative claims of the two mortgagees, a restriction on the rights of property should result which was not created by the agreement of the parties.

If A. has a right to go upon Blackacre and Whiteacre, and B. has only a right to go upon Whiteacre, having both the same debtor, A. may be required to take payment from Blackacre, if that is sufficient to satisfy his debt; but this equity is lost if the debtor executes a second mortgage of Blackacre to C. If afterwards B., by a cession of actions from the prior creditor, is subrogated to his rights, he cannot exclude C., because B. acquired merely a right which was subject to the interest of the second mortgagee of the tract which had no other incumbrance than the first mortgage to A.

In a case already cited,[1] the Supreme Court of Pennsylvania applied the principles of the doctrine of subrogation as taking effect by operation of law, where the rules which determine the marshalling of securities were properly applicable.

[1] Lathrop & Dale's Appeal, 1 Barr, R. 512.

The Bank of Pittsburgh in this case had a judgment and lien against Lewis Peterson, Peter Peterson, and James T. Kincaid, upon which they sued out an execution, took the separate estate of Lewis Peterson, and by a sheriff's sale thereof, made the amount of their judgments. The next judgment and lien, in the order of time, was in favor of the Monongahela Navigation Company against Lewis and Peter Peterson, which company claimed to be subrogated to the rights of the Pittsburgh Bank under their satisfied judgment. The next judgment and lien in order, was in favor of William Speer against the real estate of the two Petersons, but not against Kincaid; a subsequent judgment was in favor of Sylvanus Lathrop, upon which the real estate of the Petersons and of Kincaid were taken in execution and sold also under a prior levy under the judgment of the Pittsburgh Bank. The question was stated by Kennedy, J., as follows: "Will a subrogation of the Monongahela Navigation Company and William Speer, respectively, to the rights of the Pittsburgh Bank, entitle them to receive the money in court; that is, the Monongahela Navigation Company to receive, first, as much of it as will satisfy their judgment, and next, William Speer the residue of it, towards satisfying his judgment *pro tanto*." The decree of subrogation was opposed, on the ground that the Pittsburgh Bank, having sued out execution on their judgment, and made the amount thereof, by a seizure and sale of the property of one of the defendants in it, had no right or claim under or by virtue of it to which any person could be subrogated, or from which any possible benefit could be derived, and that the judgment, having become thus satisfied, had become extinct, and the same as if it never existed. The court held that the Monongahela Navigation Company were entitled to be subrogated to the rights of the Pittsburgh Bank, and to have their judgment satisfied out of the moneys arising from the sale; and next, that Willam Speer was, upon a like principle, entitled to receive the residue of the money towards payment of his judgment.

Whatever equity the Monongahela Company might have had, by reason of the circumstance, that the judgment in their favor was against two only of the three parties who were bound by the judgment in favor of the Pittsburgh Bank, or for any

other equitable consideration, to have the judgment of the bank so marshalled as to enable the Monongahela Company to recover their debt against their judgment debtors, or whatever equitable claim William Speer might have had, whose judgment was against all the parties, it is very clear that neither had any claim by subrogation. All the parties were separate and independent creditors, and each had a distinct incumbrance. There was no privity between the first judgment creditor and the second or third creditor which rendered the relation of the subsequent creditors analogous in any respect to that of a surety. The judgment of the first incumbrancer had been paid and satisfied, but not by the subsequent creditors. They did not and could not claim to stand in the place by virtue of any real or imaginary assignment of the debt. If either of the two subsequent incumbrancers had paid the debt, he might have claimed to stand in the place of the first judgment creditor, and to exercise his legal rights, but such was not the fact. It would appear that the only purpose of the second judgment creditor, who had a claim against the Petersons only, was to have the judgment of the bank, which had been satisfied from the estate of Peterson, revived for the purpose of being marshalled so as to make it a charge on the estate of Kincaid. If such an equitable right could be established, being a mere equity, it could not, like a right by subrogation which on a cession of actions is legal, prevail over subsequent *bona fide* purchasers.

It did not appear that any inequitable result was wrought by giving the second judgment creditor a right by subrogagation, rather than a mere equitable right by a decree under the law of marshalling assets; but suppose that, in this case, Kincaid, after the judgment in favor of the Pittsburgh Bank, and satisfaction of the execution thereon from the estate of the Petersons, had sold his private property (which was by agreement bound by partnership debts) to a *bona fide* purchaser. The second judgment creditor, if entitled to subrogation, would have prevailed over such a purchaser, whereas, if a decree had been made for marshalling the debt of the Pittsburgh Bank so as to make it a charge on the property of Kincaid, the equity and legal right of the purchaser must have prevailed.[1]

[1] In the case of Williams *v.* Washington, 1 Devereux, Eq. R. 137, which was treated

In another case,[1] decided by the same court, the facts were as follows: In 1839, Gwin obtained a judgment against David Miller and Isaac Neff, the latter being a surety for Miller. In 1843, Isaac Neff's land was sold by the sheriff. Jane Smith at that time held a judgment against Isaac Neff, John and Jacob Neff, the two latter being sureties for Isaac. They resisted the claim of Gwin to the proceeds of Isaac Neff's land, on the ground that he was but a surety, and there was land of Miller out of which satisfaction could be had. But the court decreed against them, and accordingly Gwin's judgment was paid; and in consequence of that, the judgment of Jane Smith was not reached by the fund. Jane Smith, having been paid the amount of her judgment, assigned it to John and Jacob Neff; and they claimed to be subrogated as against Miller to Gwin's judgment, to the extent that that judgment had excluded Jane Smith from the proceeds of Isaac Neff's land. The claim to be subrogated was resisted by subsequent judgment creditors of Isaac Neff, who had attached the debt thus due by Miller to Neff.

"The peculiarity of the question before us," said the court, "is, that one creditor, having a joint and several incumbrance against the estates of *two distinct* debtors, claimed and received the amount of that incumbrance from the separate estate of one of the debtors, and thus defeated the claim of a lien creditor of the latter. It is then the case of two funds belonging to different debtors, and not an instance of a double fund belonging to a common debtor. Under such circumstances, a court of equity will not, in general, compel the joint creditor to resort to one of

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by the court as arising under the doctrine of subrogation, the bill was in behalf of the surety of a creditor, who, having a lien upon certain property of the debtor, sought to be substituted to another creditor who had a prior specific lien upon other property, but recovered satisfaction from that which constituted the only security of the former. It was conceded by the court, that such relief might have been given, if application had been made in time. But the court held, that, after the creditor had resorted to the fund not charged with double liability, it was too late for the exercise of the equitable principle, as against a third creditor who had obtained an assignment of the special fund. The surety could have no higher claim than the creditor to whom he sought to be subrogated, and the right of the creditor was a mere equity, liable to be defeated by an assignment to a *bona fide* purchaser.

[1] Neff *v.* Miller, 8 Barr, R. 347.

his debtors for payment, so as to leave the estate of the other debtor for the payment of his separate and several debt, for, as between the two debtors, this might be inequitable; and the equity subsisting between them ought not to be sacrificed merely to promote the interest of the separate creditor. Nor will chancery, for the same reason, substitute the several to the place of the joint creditor, who has compelled payment from the estate of the debtor of the former. But where the joint debt ought to be paid by one of the debtors, a court of equity will so marshal the securities as to compel the joint creditors to have recourse to that debtor, so as to leave the estate of the others open to the claims of his individual creditors; or, if the joint creditor has already appropriated the latter fund, it will permit the several creditors to come in *pro tanto*, by way of subrogation, upon the fund which ought to have paid the joint debt."

The principles, said the court, that have been brought to view, are of easy application in this instance. Here is a surety whose money has been applied in payment of the debt of his principal, to the exclusion of his own proper creditors. The court therefore held, that the judgment creditors of the surety had an equity to be subrogated to the creditor against the fund. The decision of the court in this case was rested upon the subtle distinction made in *Ex parte* Kendall, 17 Vesey, 520, under the doctrine of marshalling assets, &c., which may always be defeated by a conveyance to subsequent purchasers, but it in fact came within the doctrine of subrogation strictly. If the surety had paid the debt before judgment, he might have demanded a cession of actions, and then have acquired the right to stand in the shoes of the creditor, as the surety had a clear right in equity to the fund in the hands of the court, and this fund was charged in favor of the judgment creditors of the surety.

In determining the question, how far the right of a surety to be subrogated to the actions of the creditor is absolute, it is important to consider the character of the right of the surety. Is it a mere equity, or is it a legal right? Is it subject to a prior equity, or does it supersede an equity which might otherwise

have existed between the debtor and creditor, if their rights alone were concerned?

So far as the rights of a surety depend upon contract, they are certainly absolute; whether the contract is express or implied. If Titius borrows money of Mœvius, and Caius agrees to become surety for Titius, and Titius, on his part, agrees to place property in the hands of Mœvius, as security, who, on his part, agrees to receive the property and to apply the avails thereof in satisfaction of the debt when received by him, and further agrees with Caius, the surety, that if thereafter the surety shall pay the debt, he will, by a cession of actions, subrogate him to his actions and securities, there is, in such a case, an express tripartite contract. If Caius, the surety, is afterward compelled to pay the amount due, he has not only his action of assumpsit against the principal debtor, and perhaps an action against the creditor if he refuses to perform his contract, but he has an absolute right of subrogation, and a lien upon the security which cannot be defeated by a conveyance to a purchaser without notice. The right is an absolute one, though it may be necessary to require the aid of a court of equity for enforcing it.

So, when the security is received by the creditor at the time of making the loan and receiving the guaranty of a surety, there is an implied contract which binds the creditor in like manner, and constitutes a lien also in favor of the surety. Where it is, therefore, said, as it often has been in the discussions of this subject, that the right of the surety to subrogation rests not upon contract, but upon principles of natural justice, that must be understood as true of cases where the contract of suretyship is not created expressly, and cannot be implied; for when there is such a contract, that is the foundation of the right, and the contract of suretyship itself may be specially modified by the parties. It may be agreed that the principal debtor shall have the right to dispose of the property held for security, as agent for both the creditor and surety, as well as for his own advantage, and that the contingent results of the sale may be bound for the debt in like manner as the specific property pledged. In such cases, the surety would have no absolute lien upon the security.

So, when property has been pledged as security, and the lien upon it is expressly released to enable the debtor, by disposing of it, to pay the debt or to provide for his other necessities, there is no doubt that, even if it is returned to the creditor as security, it ceases nevertheless to be held under the contract, and may be disposed of by the debtor. If, by express agreement between the debtor, creditor, and surety, after the creditor on a loan has received one hundred shares of bank-stock as security, it is agreed between the parties that fifty shares of the bank-stock shall be returned to the debtor, to be disposed of by him as discharged of the lien, and the debtor, failing to make sale of the property, afterwards pledges it to the creditor for a further advance of money and also for the former debt, there can be no doubt that the fifty shares thus pledged are discharged from the original lien created by the contract of suretyship, and yet, if they remain in the hands of the creditor until the first debt is paid by the surety, he will, on grounds of natural justice and equity, be entitled to be subrogated to the creditor for all the securities remaining in his possession.

It is to be observed that, though in equity the rule — equality is equity — is a fundamental maxim of the court, the object and effect of the claim to subrogation is to gain a preference over other creditors, and it is commonly exercised for that purpose after insolvency. The equity of a surety to gain a preference over other creditors by means of a lien on property received by the creditor as security, over and above that provided by the contract of suretyship, whether express or implied, is not very obvious. But it certainly would be a great stretch of the principle on which relief by subrogation is founded, if it were construed to give the surety a lien on a security obtained after the debt was contracted, and the contract of suretyship was entered into, in restraint of the debtor's power of disposing of the property, when there could have been no consideration on the part of the surety for such an extension of the terms of the contract.

It seems to have been held, in certain cases decided in the English Court of Chancery, that the surety has no right to require that the creditor shall retain, for the benefit of the surety, such securities as he may have taken from the principal debtor after the contract of suretyship, but that the creditor may sub-

sequently part with that security without releasing, wholly or in part, the surety.

It is a well-established rule,[1] that, by virtue of the contract of suretyship, the surety (as between himself and the creditor) is entitled to the benefit of every mortgage or other security held by the creditor, whether he knows it is held by him, or does not know that it is held by him at the date of the contract. By intendment of law, the surety is supposed to have contracted his liability in reference to all existing securities. His right is, therefore, by contract, to be substituted to the creditor's remedies and securities on payment of the debt.

In a case before the Vice-Chancellor of England,[2] it was held by him that there was no instance in which, when the security was given subsequent to the debt, the surety had a right to insist on the benefit of that security.

The Vice-Chancellor, in effect, decided that, though the surety was absolutely entitled to the benefit of the securities held at the time of the original contract of suretyship, because it was a part of the contract, the position of the surety should not be altered; yet, that he was only entitled to such securities received by the creditor after the contract, as remained undisposed of, on payment by the surety, or on his putting himself in active motion.

In a later case,[3] on a bill in chancery, relief was sought for the estate of the plaintiff's testator from his liability as surety, on the ground that, after the plaintiff's testator had become surety to the creditor on a bond taken from the principal debtor, the creditor had taken a deposit of certain title deeds as security for the bond debt and interest; that the executor of the creditor had allowed the deeds to be taken by the principal debtor, upon his undertaking to return them; but that the debtor, instead of doing this, had sold and conveyed the property constituting such security to a purchaser, without notice of the lien, whereby the same was lost, and the plaintiff's testator's estate deprived of the benefit thereof.

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[1] Dering *v.* Earl of Winchelsea, 2 Bos. & Pul. 270; Mayhew *v.* Crickett, 2 Swanst. 185.

[2] Wade *v.* Coope, 2 Sim. R. 155.

[3] Newton *v.* Chorley, 10 Hare, R. 646.

The ground taken in support of the surety's absolute lien on the security taken by the creditor after the debt was contracted, was, that there is an engagement as between the principal debtor and the surety, that, if the principal debtor at any time thereafter places securities in the hands of the creditor, the surety, as against the debtor, is entitled to the benefit of those securities, and, therefore, the creditor, knowing that to be the equity of the surety against the debtor, whenever by any chance the debtor has securities which come into his hands, he is bound by that knowledge and understanding at the time the contract is entered into, and bound to retain, for the benefit of the surety, those securities that so come into the hands of the debtor.

The question was regarded by the court as a nice one, and the real question and difficulty in the case was said to be, whether the additional equity claimed will or will not be imported into the contract of suretyship.

There is a class of cases, said the Vice-Chancellor, affirming this proposition, that, although the security is taken under the original contract, yet, if the surety satisfy the creditor his debt, and the creditor has in his hands securities for the debt which have been given him, whether at or after the original contract, the surety then becomes entitled, on paying off the creditors, to stand in the shoes of the creditor, and to have the benefit of every security which the creditor then holds. That arises upon a different principle of equity from what may be considered to be the equities under the original contract. It arises, he said, from this, that the party who pays off any person who holds a mortgage or other security, is entitled to have the benefit of all the securities that person so holds, in respect to the debt which he has paid off; he has discharged the liability for which the security is held, and he is entitled to call for an assignment from that party of the securities he so holds.

But "It has never yet been held," said the Vice-Chancellor, "that a party entering into a contract of suretyship, places himself in such a position with regard to the principal debtor as to entitle him to say to the creditor, I have a right to all securities, past, present, or to come, against the principal debtor; whenever you find yourself in the position of holding securities, hold them for my benefit; you are not to damage

me by any dealing with them. It has not been so held, and Wade *v.* Coope is an authority the other way."

The distinction which is made, in this case, between securities which constitute in part the subject of the contract of suretyship at the time the contract is entered into, and securities which afterwards come into the hands of the debtor, would seem to be well founded. The right of the surety to the benefit of securities which the debtor has by an express or implied agreement appropriated to the debt, is absolute and cannot be varied, but the nature of the creditor's lien upon securities subsequently placed in his hands, must depend upon the agreement between the debtor and creditor alone. The surety is a stranger to it. A debtor may place in the hands of the creditor, property which shall constitute additional security for the existing debt, and also for future loans. He may, by agreement, reserve to himself the disposition of the property; then, if loans are subsequently made, or if the property is sold by the debtor, the lien of the creditor for the existing debt will be at an end; but if, before the property is disposed of, the surety pays the debt or sets himself in motion, he has a claim in equity, to the benefit of those securities which remain in the hands of the creditor. He has this equity not on the ground of contract, but on general principles of natural justice and equity.

If, in the last-cited case decided by the Vice-Chancellor of England,[1] the question had been considered in reference to the right of the surety to be subrogated to the actions of the creditor on payment, the ground for the distinction stated by the court would have been more apparent. When security is received at the time of making the contract of suretyship, the right of the surety to subrogation on payment, rests upon contract, though it is often stated as resting upon a higher and more comprehensive principle, namely, that of natural justice and equity, and it is so stated because there are cases of subrogation where the right is not founded on contract, but depends upon that higher principle. Now, when, after the contract of suretyship is made, the debtor places additional security in the hands of the creditor, the surety on paying the debt is, under

[1] Newton *v.* Chorley, 10 Hare, R. 646.

the contract, entitled to be subrogated to the action of the creditor, and, being thus subrogated by a cession of actions, in exercising the rights of action, he acquires his lien upon all existing securities. If neither the creditor nor the surety had put himself in motion, the debtor might have freely disposed of the additional security; but when either of them moves, the security becomes fixed with the lien, and the debtor's right of disposition is at an end. In effect, therefore, subrogation takes effect by contract — the contract for a cession of actions, — against securities existing in the hands of the creditor whenever they may have been received.

The right of the surety to securities taken after the making of the contract of suretyship, may be likened to the equity of a creditor who has only one security, under the doctrine of marshalling, as against another creditor who, besides that security, has other additional securities sufficient for the satisfaction of his debt. As we have seen,[1] the equity for marshalling securities is merely a rule of the court of chancery for arranging existing assets and securities which remain undisposed of, with a view to the equal advantage of all at the time when proceedings are commenced for marshalling. The right of marshalling does not constitute a lien upon the land which follows it into the hands of a purchaser, with or without notice. So the right of a surety to the benefit of a security given by the debtor to the creditor, after the making of the contract of suretyship, is a mere rule of the court disposing of *existing* securities for the indemnity of the surety. There is no lien in favor of the surety, upon the property given as security without any consideration from the surety, which can restrict the right of the creditor and debtor to convey it absolutely. Such an absolute lien might be prejudicial to the parties, and certainly no agreement can be implied from the original contract of suretyship which can extend the charge to securities afterward placed in the hands of the creditor.

In the case decided by the Vice-Chancellor,[2] the bill sought relief on the ground that the creditor had done an act which

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[1] Racster *v.* Barnes, 1 Younge & C. C. R. 401.

[2] Newton *v.* Chorley, 10 Hare, R. 646.

prejudiced the surety. The additional or supplemental security in that case consisted of a certain rent evidenced by title-deeds, and the act claimed to be injurious to the surety was the giving up the title-deeds by which the rent was created. The supposed injury consisted in depriving the surety of the means of establishing his right to the security, as well as in the relinquishment on the part of the creditor of property appropriated to the payment of the debt, which property, but for the alleged relinquishment of it, might have rendered recourse to the surety unnecessary. But the case was discussed by the Vice-Chancellor, as if the wrongful act had consisted in a transfer or disposition of the property, by which the lien of the creditor was lost. Such, however, was not the fact. The creditor gave up the title-deeds on the promise of the party who received them to return the deeds, and, for aught that appears in the case, the creditor had, at the time of the bringing of the bill, an existing right to the security, and might by a proper action have reclaimed the title-deeds, or recovered the amount of the rent from the wrongdoer.

If the rent had constituted the security given to the creditor at the time of the loan, it would seem that the surety, on payment of the debt, would have been entitled to a cession of the creditor's rights of action, and that when thus subrogated, or by a decree of the court, he would have been entitled to claim the rent, and would have the benefit of the creditor's action against the party who had taken the deeds. Such, at any rate, would have been the rule of the civil law. If, on payment by the surety, the question had presented itself in this form, on the right of the surety to subrogation, against a party not an innocent purchaser, the right must have been sustained, but the court proceeded on the ground, that if the surety was entitled absolutely to the benefit of the supplemental security, he was entitled to claim that no impediment or obstruction of his right should be interposed by an act of the creditor, and that the consequence of such an act was the release of the surety. On the assumption that the surety had by contract a lien on the security, he was authorized to claim relief on account of the difficulty and embarrassment which the act of giving up the deeds would cause him.

In a case[1] decided by a court whose jurisprudence is based substantially upon the civil law, it was held that there is a privity between the surety of a debtor and the creditor (upon the idea, as it would seem, of an express or an implied contract), which compels the latter to preserve all his rights against the debtor unimpaired, when he intends to look to the surety for payment. This obligation on the part of a creditor is a corollary, it was said, of the right of subrogation which the law has established in favor of the surety who pays the debt of his principal. If the creditor fails to comply with this obligation, or does any act which destroys or impairs this right of subrogation to his mortgages or privileges, he thereby releases the surety. Where the vendor, therefore, of slaves sold together, received from the purchaser a note for the price indorsed by a third person as surety for the payment, and subsequently purchased from the vendee a part of the slaves, it was held that the vendor's privilege or lien and the surety's right of subrogation to it were indivisible; that the latter existed entire as to all the slaves for the full amount of the debt, and that it could not be divided and restricted to certain slaves for certain amounts at the will of the original vendor, and that by such repurchase, the indorser was discharged.

Notwithstanding the doctrine which seems so well established, that any act of the creditor which injuriously affects the surety, constitutes a release of the surety, because he is entitled to claim that it shall be strictly performed; it does not follow, *e converso*, that a change which may have the effect to discharge the surety, absolutely puts an end to the right of subrogation. If the creditor does any thing which makes the condition of the surety worse than it would have been under the contract; if he changes the character of the security, or if by a purchase on the substitution of his own liability, he makes what is termed in the civil law, *confusion* by such substitution; or, if he pays the price and thus substitutes the value of the security for the security itself, the surety has indeed his election to consider himself discharged, but the creditor cannot take advantage of his own wrong, or avail himself of a privilege

[1] Hereford *v.* Chase, 1 Robinson, R. 212.

which was designed for the surety. If in the above case decided by the Supreme Court of Louisiana, after the creditor had purchased a part of the property given as security, the surety had paid the debt, he would have been entitled to claim from the creditor substitution to all his existing rights of action. He might claim such of the property as remained undisposed of, and he might proceed against creditors by a bill in equity, or by equivalent process at the civil law for the value of the property purchased.

If the creditor has actually conveyed the security, the question may arise whether the lien still continues in favor of the surety as against purchasers.

If the creditor is in possession of property which he has acquired as security for a debt, and being thus apparently the true owner, conveys the security to another without notice, on principles of equity,[1] the purchaser will hold against the creditor himself and also as against a surety who, having paid a debt for which he was bound, was entitled to demand a cession of actions and subrogation, and yet has not by such cession acquired the right, but relies on his equitable subrogation by operation of law.

But notwithstanding the creditor may have conveyed the property held as security, to an innocent purchaser who has against him a valid title, if the surety on payment of the debt is subrogated to the creditor's rights of action expressly or by a decree of court, the creditor's attempt to convey personal security and thus discharge it of the lien of the surety will be ineffectual, because the right of the surety is absolute and cannot be discharged by any act of the creditor. It is true, the question whether the surety is entitled to be subrogated or not, is an equitable one, but it is to be determined upon equities arising between himself and the creditor. When he is subrogated to the creditor, his right is legal, and he must, therefore, prevail over a naked equity and a subsequent legal title.[2]

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[1] Basset *v.* Nosworthy, reported Temp. Finch, 102; and cases cited in 1 White & Tudor's Leading Cases in Equity, 49.

[2] In the case of McLung *v.* Beirne, 10 Leigh, R. 394, a judgment was rendered for a debt with interest and costs, and on the same day an appeal was allowed; the judgment being affirmed, the surety in the appeal bond paid a sum in satisfaction of the

The same principle applies to a sale of the security by the concurrent act of the debtor and creditor. The surety who has established his right to subrogation, cannot, in respect to property held under the contract of suretyship, be superseded by their joint act.

A very different rule would apply to legal subrogation, or subrogation on an imaginary assignment. The purchaser would have a prior right, and must prevail against a surety who has not acquired a right at law.

Though the release by a surety of his lien upon the security may be effectual as against himself, it cannot prevail against his co-surety.

Where B. and W. were sureties for G., and the latter, to secure them, gave the sureties a lien on two negroes;[1] B. afterwards consented to cancel this lien, and that G. should constitute another lien by way of security on all his personal estate for the payment of certain debts, one of which was the debt for which B. and W. were sureties. G.'s personal estate proved insufficient to pay the debts, and an execution was levied on the property of B. He filed his bill to stay proceedings and for general relief. The court said: "Admitting that B. consented, that upon the execution of the second deed of trust, his own *lien* on the negroes should be released, he did not release, nor was he competent to release it, as it related to W., the co-surety who was no party to the transaction. As to W., therefore, the said deed was in full force."

The court was of opinion, that even if W. had been no party to the judgment sought to be enjoined, nor to the execution, it would be competent to B., after paying off the same, to resort to him as a co-surety for contribution of a

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judgment, and within a year after the affirmance, filed a bill to charge real estate aliened by the debtor, between the date of the original judgment and the date of the judgment of affirmance. The court held that it was not necessary, to entitle the surety to subrogation, that he should have been a party to the judgment. Having paid off the amount due upon it to the party to whom he was bound by the appeal bond, he had a right to demand the cession of every remedy the creditor had for the recovery of his demand from his debtor.

In this case, the right of the surety would have prevailed if merely equitable, because the conveyance by the debtor was after the institution of proceedings, and the purchaser held, subject to prior equities.

[1] West *v.* Belcher, 5 Manford, R. 187.

moiety thereof; and that for the purpose of preventing circuity and getting payment out of the proper fund, it would be also competent to him, as standing in the place of W., to go for such moiety against the negroes conveyed by the deed.

The court was further of opinion, that under that hypothesis, it would be competent for B. to stand in the place of W., and charge the negroes for the whole sum; nothing being more consonant to natural justice, than that the proper debts of every man should be paid out of his own estate in ease of sureties, and that *that* property of the party in particular, should be subjected to the debt, which was bound therefor by a specific existing *lien.* These principles would avail, it was said, to B., supposing him to have released for himself, his *own proper lien* created by the first deed.

It has been held that the discontinuance of legal proceedings by a creditor against the debtor, which, if pursued, might have resulted in the satisfaction of the claim as against the surety, does not exonerate the surety;[1] and yet, if the surety after the commencement of proceedings by the creditor had paid the debt and required a cession of actions, he would have been entitled to claim the benefit of an attachment under which the goods of the principal debtor had been seized. The creditor, it would seem, might discharge process which was not commenced at the instance of the surety, if it is done in good faith and in pursuance of an arrangement for the satisfaction of the debt; and yet, the surety on payment would be entitled to be subrogated to all existing actions of the creditor, and to all liens and securities acquired by the creditor and continuing in his hands at the time of payment. It was no part of the creditor's duty to bring the suit and attach the property of the debtor under the original contract of suretyship, and acting in good faith, he might discontinue the action on the same principle that he would be justified in parting with security afterward acquired, as in the case above cited.[2]

Unless the creditor was put in motion by the surety, he had a clear right to relinquish the property attached.[3]

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[1] Montpelier Bank *v.* Dixon, 4 Vermont R. 599.

[2] Newton *v.* Chorley.

[3] See also, Executors of Baker *v.* Marshall, 16 Vermont R. 522.

The general rule that a surety who pays a debt has an equity to be subrogated to any security which the creditor may have against the principal debtor, is to be understood as having reference to securities specifically charged in reference to that debt alone. If the same security is held by the creditor on account of other debts, the principle applies that the debtor, on payment, may make application of the money (and, in his default, the creditor) to any existing debt; and the surety, on payment of the debt for which he is bound, will have no right to require the benefit of a security which has been appropriated to another debt.

In a case decided by the Supreme Court of Massachusetts,[1] judgments on executions issued were recovered on notes of hand given by Thompson, and indorsed by French. After the levy of the executions, the right in equity of French to redeem the lands which had been taken in execution, was also taken in execution and sold at public auction to Brown, and by him, before the suit was commenced, was duly assigned to the plaintiff. It appeared that at the time this note was taken by the defendants, on a loan made to Thompson, certain other promissory notes were pledged to the defendants by Thompson, as collateral security for the payment of the notes indorsed by said French, and other notes due from Thompson to the defendants. After the defendants recovered judgment against French, they collected a further sum on one of said collateral securities, which they had applied towards payment of certain notes of Thompson indorsed by French, due to them, but in no part towards the payment of the said judgment against French. The question submitted to the court was whether the defendants were bound by the principles of equity to apply the money collected towards payment of the same judgment. The court recognized the rule of equity, that a surety who has been compelled to pay the debt of the principal, is entitled to the security given by the principal to the creditor as a rule founded on natural justice and equity.

The notes pledged, said the court, were given as collateral securities for all loans which had been or might thereafter be

[1] Richardson *v.* Washington Bank, 3 Metc. 536.

obtained. This was the express language and the obvious meaning of the transfer, and no other construction could be given to it. The court were further of opinion, that the defendants were not bound first to apply the money derived from the security to the payment of the loan obtained at the time the security was given, as it did not appear that it was the intention of the parties to give any priority or preference to any particular loan or debt; and that there was no rule of law or equity, by which the defendants were bound to appropriate the moneys collected on the collateral security to the payment of one loan rather than another.

"The general rule," said the court, "is, that when there are several debts, the debtor may direct to which debt any payments shall be appropriated; and if he fails to give any direction, then the election devolves on the creditor. In the present case, no such direction was given by Thompson. We think, therefore, that the defendants had an undoubted right to apply the moneys collected on the collateral securities, in the manner they have done."

In this case, the security was not provided specifically for the debt on which the indorser was bound, but for all debts for which the principal was, or might become, liable. The surety had no claim to the security until after the creditor had been paid the whole amount due to him. Further, in this case the purchasers of the equity of redemption for the lands levied upon, did not acquire, by purchase, the right of the indorser to the security. The equity of the indorser, if it existed at all, was personal, and would have remained in him after the transfer of the right of redemption. This equity of redemption was purchased subject to the debts. If the purchaser had prevailed, he would have gained the land for which he had paid nothing to the indorser, and would have deprived the bank of the security stipulated for.

What the effect of the general doctrine of the application of payments in reference to the rights of the surety might be, the circumstances of this case made it unnecessary to consider. The creditor cannot so dispose of a security as to deprive the surety of his equitable right of recourse to it; but the right of the surety as against the creditor, is merely equitable, and

cannot prevail over a legal right and an equity which is not inferior. The general principle being, that the remedy of the surety who has not acquired a specific lien upon the security for his indemnity, is merely the action of assumpsit against the party for whom he has become charged; there seems to be no rule which prevents the creditor from making application of the funds derived from personal security, according to the principles which regulate the application of payments. When a creditor has two notes against his debtor, one bearing interest, the other for the payment of the principal alone, and has in his hands property for the security of the note bearing interest, the avails of which security he must apply to the debt with interest, when received by him generally in payment; if the creditor, after the making of the two notes, receives the guaranty of a third person as surety for the note not bearing interest, his duty to make such an application of the fund held as security resting upon the implied agreement between himself and the debtor, which is the foundation of the law as to the application of payments, would not be controlled by the simple equity of the surety, whose relation to the fund is founded upon an agreement subsequently entered into. That equity is subordinate to the legal rights of the principal parties.

If the debtor, on the provision of security for several classes of debts, makes no specific appropriation of the security to any one debt, the rules which govern the appropriation of payments seem to be applicable. Any security given by the debtor at the time of a loan would come within the contract of suretyship, and be specifically charged with a lien in favor of that debt, unless it was expressly agreed that it should be held by the creditor as security for other debts. According to the analogous rules on the application of payments, the debtor who, subsequently to the loan, provided security sufficient in amount only for a part of the debts, would have a right to appropriate the security to any one of his debts, and its acceptance by the creditor, binds him to the conditions appointed by the debtor. If the debtor makes no appropriation of the security, the same reason which exists for permitting the creditor to make the application of payments in such a case, apply. The creditor may be generally authorized to dispose of the security and apply

the avails on account, and as he may at his election apply the payments, he may also in like manner appropriate the security.

If the appropriation is made neither by the debtor nor the creditor, the appropriation of the security undoubtedly devolves upon the court according to rules of equity and justice in reference to payments under the same circumstances.[1]

Whatever may be the right of a surety to whom a cession of actions has been made by a creditor, or on his refusal by a decree of the court, when he is not by such a subrogation put in the place of the creditor, the right to subrogation being a mere equity, unless founded on a cession of actions, it cannot be granted to the prejudice of a prior equity.[2]

Watkins obtained a judgment against Johnston as principal, and Walters as his surety. Watkins sued out a garnishment upon that judgment against Field (the complainant), alleging that the judgment remained unsatisfied, and that Field was indebted to Johnston, &c., which was executed upon Field on the 2d day of May, 1843. Judgment was rendered against the complainant by such garnishee, June 9, 1846.

The garnishment was prosecuted for the benefit of Walters as the surety, who, on the 21st of November, 1844, paid the amount due (on the judgment) to Watkins, the respondent, who gave to Walters a receipt in full of the debt, and interest due upon the judgment. The court were of opinion that when Walters paid to Watkins the original judgment, it was extinguished at law as between Watkins, in whose favor the judgment was obtained, and Johnston and Walters the defendants therein; that Watkins, having paid the original judgment before final judgment was rendered upon the garnishment, had Field known that fact and interposed it as a defence, the court of law could have rendered no judgment against him in favor of Watkins for the debt which he owed to Johnston.

The court proceeded upon the ground that the debt was

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[1] The cases on the subject of the application of payments, are collected in 1 American Leading Cases, 268, by Hare & Wallace.

[2] Aldrich *v.* Cooper, 2 White & Tudor's Leading Cases, American Notes, Vol. II. pt. 1, 214.

extinguished by the payment which was made by the surety, although when payment was received by the judgment creditor, that was supposed to operate as an assignment and transfer to the surety of the judgment, and of all beneficial interest which the creditor had therein. But the court were of opinion, that though, as between the principal debtor and creditor, the judgment was extinguished at law; yet, as between the surety and the principal debtor in equity, it was regarded as still in force, and that the surety might, in a court of equity, reimburse himself out of the property on which the judgment constituted a lien in preference to junior incumbrances. But as it appeared that Field, the garnishee, was surety for Johnston on another and different debt which he had been compelled to pay (greater in amount than the debt in question), before Walters paid the judgment of Watkins, the court held that as Walters and Field had equal claims to be protected in equity from loss, they could not compel Field to surrender up to Watkins an indemnity which he held in his own hands.

The question really was, whether at the time of the process of garnishment against Field, the amount to be regarded as his actual indebtedness to Johnston was the same which remained after deducting his equitable claim as surety on the debt which he had paid, or the original debt, without compensation or set-off; and clearly in equity, the actual debt was only that which might remain after all equitable deductions.[1]

Where property was conveyed to a trustee for the security of two distinct debts to different creditors, and afterwards the debtor executed a deed of trust to another trustee of a part of the property conveyed to the first trustee, and also of other property in trust for one of the creditors to whom a new note was given; it was held that a surety on the substituted note, who was also an indorser on the bill of exchange for which it was given, had no claim, on payment of that note, to be subrogated to the security given to the first trustee.

W. Garrard, in 1836,[2] executed a deed of trust to Lassiter, as trustee, to save Taylor, Mason & Co. harmless, by reason

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[1] Newton *v.* Field, 16 Arkansas R. 216; Eppes *v.* Randolph, 2 Call, R. 125.

[2] Houston *v.* Bank of Huntsville, 25 Alabama Rep. 250.

of their acceptance of two bills of exchange, — one drawn by him, and sold to the Huntsville Bank (the defendants in error), the other drawn by W. Arnett in favor of H. Garrard, and indorsed by him and Dillahunty to the Decatur Bank, but solely for W. Garrard's accommodation. In 1837, a statute was enacted authorizing the extension of indebtedness to the banks. Afterwards, in 1838, W. Garrard availed himself of this law of 1837, and thereupon the said W. Arnett, the drawer of the bill, executed his note, payable in three yearly instalments, with Dillahunty and W. Garrard as sureties, and took up the bill of exchange held by the Decatur Bank. At the same time W. Garrard, who was the real principal, executed a deed of trust to J. H. Arnett, embracing a portion of the property contained in the first trust deed to Lassiter, with other property not included in that deed, and with provisions varying from those contained in the first deed. There was no payment of the bills above-mentioned, except by the substitution of the notes. Dillahunty paid a portion of the last-mentioned notes to the bank of Decatur, and thereupon sought to be subrogated to the security which the first deed afforded to the bank. The court held that he was not entitled to such subrogation, proceeding upon the ground that the giving of the note by William Arnett, with Dillahunty and W. Garrard as sureties, and the execution of the trust deed by Garrard to J. Arnett, and the surrender of the bill of exchange by the Decatur Bank to the drawer, was an absolute extinguishment of all liability on the part of Taylor, Mason & Co. as acceptors. This substitution of the notes for the bill was, as to these acceptors, held to be a payment by Garrard, and therefore, that he was, according to the very terms of the trust deed, discharged from all further obligation to them in respect to its payment. There was, therefore, no existing debt to which the sureties on the notes could, upon equitable principles, claim to be substituted. As on the new arrangement and change of securities, the sureties on the original debt seem to have acquiesced in leaving that portion of the security omitted in the second deed of trust, to pay the balance due on the bill to the Huntsville Bank, it certainly would have been unjust to deprive Taylor, Mason & Co., or the Huntsville Bank, of the full benefit of this security, in favor of

parties who had voluntarily cancelled the original demand, by assuming the payment on the faith of a new and different security. But if these equitable considerations had not existed in the case, it is very clear that, as between principal and surety, the renewal and change of the securities wrought no actual payment, the surety would have been entitled to subrogation; and if a balance had remained, after satisfying the Huntsville Bank, the surety would have had a just claim to it.

The case was regarded as similar to an earlier case,[1] decided by the same court, where the principal debtor died, and, after his death, his administratrix and sureties on the original demand made, from time to time, new notes, taking up and cancelling or extinguishing the old. Finally, the sureties were compelled to pay the debt; and the question was whether they should not be subrogated to the rights of the creditor, and be reimbursed out of the estate of the original debtor. The court said there was nothing in the record from which it could be inferred that the creditor (the bank), did not intend to discharge the intestate's estate from all liability to pay the note of which he was a joint maker; and held that they could not, against the direct allegation of the bill, suppose that there was a continuing liability. The creditor, then, could not at law or in equity, have charged the estate of the intestate in the hands of his administratrix, and the surety, whose claim was deduced through the creditor, could not look to any source of reimbursement of which the latter might not have availed himself. The other creditors of the estate might allege an equity founded upon the frequent renewals, to leave the estate to be administered in satisfaction of their debts.

These and other cases show that the right of subrogation is not an absolute one, but may be controlled by a countervailing equity, growing out of agreements implied in the transactions to which the creditor and surety are parties.

In many cases the right to subrogation is determined by the nature of the surety's interest. He may have a legal estate which will render it unnecessary for him to come into a court of chancery for relief, and thus have a preference which equity

[1] Brown *v.* Lang, 4 Alabama R. 50.

would not interpose to give him against another party who has an equal equity.

Under the Roman law, a party who, being liable for another's dues to the fisc, was compelled to make payment, was, as has already been observed, entitled to any privilege or preference provided by law for the State, and he was subrogated to the fisc, payment in such a case not being regarded as the extinction of the debt.

The same reasons which prevail in England against the subrogation of the surety, on payment of a specialty to the privilege of a bond creditor in ordinary cases of private indebtedness, where no express provision is made by law, would seem to exist against the subrogation of a surety to the rights and privileges of the public treasury, so as to give a surety, on payment, the preference which is given by law to the sovereign over private individuals. The effect of payment would seem to be, to reduce the surety to the rank of a simple contract creditor; but the practice of the Court of Exchequer,[1] when a surety pays a debt due from any defaulter to the crown, is to allow him to stand in the place of the crown, and to give him the benefit of the prerogative process against the principal.

In the United States, where a preference is given to the government for any dues to the United States, the principle has prevailed that a surety on payment shall be subrogated to the United States and to the preference given to the government over private citizens who are also creditors.

In the State of Louisiana it was held that a surety on a custom house bond, who paid its amount to the United States (while the code of 1808 was in force), became thereby subrogated to the rights of the United States against the principal, for priority of payment out of the property of the principal.[2]

In the State of New York it was held that the right of subrogation exists in favor of a surety who pays a bond to the United States, and the preference to which the United States may be entitled by law may be preserved in favor of the surety by whom payment of the bond has been made, as against a

[1] Regina *v.* Salter, 1 Hurlstone & Norman's Rep. 274, and cases cited.

[2] West *v.* Creditors, 3 La. An. Rep. 529.

subsequent assignee with notice; but the government, it was said, cannot hold the sureties liable on bonds for duties, and at the same time retain the goods on which duties were payable, as additional security, after proceeding against the surety.[1]

The same rule would apply to debts in favor of the State government, for which a preference had been created by law, and a surety on such a debt would, on payment, be entitled to subrogation. But the principle does not extend to statutory liens created in favor of certain creditors for reasons of policy.

The statutory lien which is given in the State of Missouri for stores and supplies, furnished to the master of a steamboat, does not extend by subrogation to a surety of the master, on a note given for such supplies, who pays the note at maturity. If the party, said the court, might, by a legal assignment of the favored debt, succeed to this right of the original creditor, they were not aware of any legal principle upon which they could hold that the payment made by the surety, instead of extinguishing the debt, with all its accessory obligations, had the effect of continuing in force the statute remedy, and of substituting, in reference to it, the surety in the place of the original creditor.[2]

It was held by the Supreme Court of the United States,[3] that the same right which belongs to the government attaches to the claim of an individual who, as surety, has paid money to the government.

The plaintiffs, at the request of Shelton & Co., executed bonds to the collector of customs for the payment of duties on the goods. The United States collected the debt from the plaintiffs, Shelton & Co. being also indebted, though not bond-debtors, for the duties; it was held that, on general principles of equity, the party who was really the surety would be subrogated to the right of the United States, and have every preference that the United States would be entitled to. In this case the relation of the plaintiffs, not appearing upon the bond, was established by extrinsic evidence and relief given against the

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[1] Dias *v.* Bouchaud, 10 Paige, R. 445.

[2] Hays *v.* The Steamboat Columbus, 23 Missouri, 232.

[3] Hunter *v.* United States, 5 Peters, R. 182.

true debtor on principles of equity, though the plaintiff was not within the provision of the statute for sureties on making payment.[1]

As the effect of subrogation is a transfer of the creditor's right of action to another who has acquired a right to stand in the place of the creditor and exercise his rights, there is a manifest propriety in the rule, that the right to such substitution can only be acquired by full payment.

A surety is entitled to indemnity from his principal against whom he has recourse by a direct action at law. By subrogagation he seeks to acquire the advantage of standing in the shoes of the creditor, and exercising his legal rights, among which is the right to sue, and, as a consequence, the securities are claimed.

What is sought by subrogation is not a mere indemnity, the right to this he already enjoys, being entitled to his action of assumpsit against his principal, whose debt he has paid in part; but a transfer of the creditor's action, and because, on full payment, equity subrogates the surety to the creditor's entire right of action, it has sometimes been claimed that, on the same principle, subrogation ought to take place in his favor, to a certain extent, for a partial payment.

No injustice is done to the surety by withholding subrogation on partial payment. The surety is a debtor, and bound like his principal to full payment. He has no right in respect to the creditor, except on full performance, but is regarded as himself in default. In regard to the debtor, his direct cause of action is a sufficient remedy.

It would be impracticable to give a surety who has made part payment, a right of subrogation to be exercised distinctly from the creditor. To substitute him to the entire right of the creditor would be absurd as well as unjust, and the law does not sanction a division of rights of action. In a case where the question was considered, the court said:[2] "It would not subserve the ends of justice to consider the assignment of an

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[1] Enders *v.* Brune, 4 Randolph, 438.

[2] Hollingsworth *v.* Floyd, 2 Har. & G. 91. See also, Swan *v.* Patterson, 7 Maryland, 167.

entire debt to a surety as effected by operation of law, when he had paid but a part of it, and still owed a balance to the creditor, and the court would not countenance such an anomaly as a *pro tanto* assignment, the effect of which could only be to give distinct interests in the same debt to both creditor and surety."

"Neither in law nor in chancery," said the court in another case,[1] "could a surety call for an assignment from a creditor, or be clothed by mere operation of law with the right of an assignee, unless he had, by paying the entire debt, wholly satisfied the claim of the creditor."

In a case decided by the Supreme Court of Pennsylvania,[2] it was said, "Until the creditor shall be wholly satisfied, there ought, and can be, no interference with his rights or his securities, which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim."

And, in another case,[3] the court say the rule is adopted, not only for the benefit of the plaintiff, but the defendant also ought not to be subjected to the inconveniences which must arise from the trial of several rights in one action, and the rendition of several and distinct judgments.

By the rule in question, it is not to be understood that, if the creditor has been fully satisfied from any quarter, the surety is not, in certain cases, entitled to the aid of chancery for the recovery of indemnity for partial payment, as against a security in the hands of the creditor. The design of the rule is to prevent substitution to the rights of the creditor who has not been fully satisfied.

The right of subrogation cannot be enforced by a surety until the whole debt is paid.[4] But this being done, it was said, the same principle of equity which substituted the surety, on paying the whole debt, in place of the creditor, will equally extend and apply to the surety paying a part, *pro tanto*, to the extent

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[1] Neptune Insurance Company *v.* Dorsey, 3 Maryland, Ch. Rep. 338.
[2] Kyner *v.* Kyner, 6 Watts, 227.
[3] Bank of Pennsylvania *v.* Potins, 10 Watts, 152.
[4] Hardcastle *v.* Commercial Bank, 1 Harrington, R. 374.

of his payment. The case referred to, as one proper for equitable relief is that where full payment has been made by some other person, or perhaps the case where, after part payment has been made by the surety, full payment of the residue has been made by the debtor himself.

It may be that between the creditor who has obtained security, and a subsequent creditor who has no lien thereon, there is collusion to prevent a surety on the debt thus secured, who has made part payment from having recourse to the security; this a court of equity would prevent, so far as was consistent with the debtor's right of transfer.

We may suppose the case of a surety who being bound in that character for a debt which is partially secured by a mortgage on land of the debtor: if the surety purchases the equity of redemption, and pays the value of the land to the creditor, as against subsequent creditors who have obtained a lien upon the land, the surety may be entitled in equity to relief, under circumstances which may arise, and have a right to stand in the place of the creditor. The significance of the rule under consideration really is, that, as against the original parties to the debt, their relative rights and liabilities shall not be varied by partial payment when made by the surety.

The lien of an executor for his own debt on administration, is not permitted to prevail against the equitable right of the surety to subrogation as against the testator or intestate.

Carnes and others were sureties for Banks in a bond to Warrington for 4,000*l.*, which was accompanied with a warrant of attorney to confess a judgment thereon, which was accordingly done, and judgment entered up against all the parties to the bond. The principal in the bond became a bankrupt, and also several of the sureties, leaving a considerable sum due on the judgment. The complainants had been obliged to pay a very large sum on this balance; and Brown, another of the sureties, had paid a part, after which payment Brown had become insolvent. Carnes died without paying any thing on the judgment. The defendants, the acting administrators of Carnes, who was also a large bond creditor on his estate, but as surety only for Banks, paid out of the assets which came to his hands the balance due on the judgment, and had satis-

faction entered thereon, and most of the remaining assets were sold and applied toward payment of his own debt. The court held that the administrator could be in no better situation, than Carnes himself would have been had he then been before the court; he was, therefore, decreed to contribute, notwithstanding his legal advantage.[1]

NOTE. — The right of surety on payment to subrogation, has been extended in England by recent legislation. It is enacted by the Mercantile Law Amendment Act, 1826, 19 & 20 Vict. c. 97, sect. 5, that "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or the performance of the duty; and such persons shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding at law or equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made or loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety, shall not be pleadable in bar of any such action or proceeding by him: provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

Although this act provides that the surety shall be entitled to subrogation to the creditor's rights of action and to his securities, in effect, such subrogation is not wrought at once by operation of law simply by the payment of the debt or the performance of the duty, by the surety. Some actual assignment or cession of actions by the creditor, or a decree of court, is contemplated as necessary at the time of payment. Some act is necessary on the part of the surety to show his agreement to subrogation. The right to sue in the name of the creditor is given, if needed, and on a proper indemnity, showing that some agreement respecting the terms of the assignment is necessary at the time of payment. Therefore unless subrogation is express and made on payment, it cannot have effect.

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[1] Burrows *v.* McWhan, 1 Dessausure, R. 419.

CHAPTER V.

SUBROGATION IN FAVOR OF A SURETY FOR A SURETY.

WHERE sureties are of the same class, and equally bound for their principal, they are entitled to contribution from each other, and when one of them pays the whole debt to his creditor, he may be subrogated to the creditor's actions and securities, but only to carry into effect the principle of equality of contribution. He may avail himself of the creditor's right of action against co-sureties, but only on deducting his own share; but it is otherwise, when a party is a surety of a higher class, a surety to the creditor, for the principal and his sureties, not a co-surety. In such a case, the original sureties and the debtor, are all in regard to him as principal debtors. They have no claim as against him to contribution, but, on the other hand, such surety has a right to be subrogated to every right of action against them and the principal and all the securities, for the purpose of indemnity.

In the following case,[1] a party, by guaranteeing payment by principal and surety, became a guarantor for the principal and surety, and not with the latter. A note was made by one Howe as principal, and Snow and the plaintiff as sureties. After the note was signed by the principal and surety, the defendant charged himself as guarantor by indorsement on the note. The action was for contribution on behalf of a surety on the note against the guarantor; but the court held that the sureties were in effect principals, so far as regards the guarantor, and that the law raised no implied promise on the part of a guarantor to contribute in the case of a surety's paying the note as it does on the part of a co-surety.

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[1] Longley *v.* Griggs, 10 Pick. R. 121.

A person, it was held,[1] may subject himself to liability as surety for a debtor and his sureties, so as to have a superior equity to such sureties; as where a judgment had been recovered against the principal debtor and his sureties, and a third person agreed with the creditor to become surety for the payment of the debt. Judgment having been recovered against one Seymour, on a note, it was partly paid and satisfied, and Ely, the defendant, agreed to indorse the note of Seymour, for the remainder of the principal and interest of the judgment, as further security for that part of the debt; and that for Ely's protection and indemnity, in case he should be compelled to pay that note, he might have the benefit of all the securities held by the bank which had discounted the original note. The second surety in respect to whom the former sureties were to be regarded as the principal debtors, it was held, was entitled to enforce satisfaction of the judgment for his own benefit and protection. The new surety derived his right from the creditor, and acquired the privileges of the creditor, as against both the debtor and the former sureties. There was nothing in this arrangement that would have prevented the previous sureties from paying the debt and thus discharging the liability of the new surety, in which case they would be authorized to ask for an assignment of all the securities which the creditor held for their indemnity.

When a party, interested in the estate of a deceased person, becomes dissatisfied in relation to the solvency of the sureties, and requires new security which is given, the new security, it was said by the court,[2] is only collateral to the former. Such is the very nature and purpose of the new surety's undertaking to make good any loss arising from the former's insolvency—to be the surety of a surety. If, therefore, said the court, the party entitled should recover from the old surety to the full extent of the penalty of the bond, the collateral security must be discharged, and the old surety would have no right of contribution against the new surety. But when it is the surety himself, who becomes dissatisfied with his responsibility, and seeks to be relieved, it is otherwise. The Court of Probate cannot sub-

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[1] La Grange *v.* Merrill, 3 Barb. Eq. Rep. 625.

[2] Field *v.* Pellot, 1 McMullen, Eq. Rep. 369.

stitute a new surety, so as to discharge the former from his contract. But there is nothing to forbid its requiring a new surety, who as between the sureties themselves, shall be the primary one, leaving the former only collateral. When a new surety comes in, a former surety may be, in respect to him, the principal, or if such is the intention, he may become the principal surety. In each case, it is the real surety, who may be entitled, under circumstances, to subrogation, and not the party who is in regard to him in the position of a principal.

George Shoemaker had given his note to the Philadelphia Loan Company, with Nathan Nathans as his indorser; this note was sued, and separate judgments obtained against the maker and indorser, and execution was issued on the judgment against the principal, upon which his real estate was about to be sold, when Pott & Co., the defendants, gave their note to the plaintiffs as collateral security for the judgment. By reason of the acceptance of this note, as security, and the suspending of the sale of the principal's property, the original indorser had been compelled to pay the debt, and it was held that he was entitled to have an assignment of the judgment on the note thus given, to indemnify him for such payment. The case was decided on the ground, that the interposition of the second surety, having been the means of involving the first in the ultimate liability to pay, there was a preponderance of equity in favor of the first surety, who was entitled, therefore, to the benefit of the new security. But, in truth, the parties who came in as volunteers, and by assuming the liability of the principal debtor, discharged the property taken in execution, placed themselves in respect to the surety, in the position of the debtor. They had, therefore, no higher equity, as to the surety, than the debtor himself, whose debt they assumed.[1]

The same principle applies to liabilities assumed by bail, and others, who become sureties in the course of judicial process, for the principal debtor. If they become charged upon their undertakings for the benefit of the debtor, they are regarded in law as representing the debtor, and in that capacity are liable to the creditor, and to the original sureties for the debtor.

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[1] Pott *v.* Nathans, 1 Watts & Serg. R. 155.

In a case,[1] where a debtor of the Huntington Bank gave his note for one thousand dollars, with two indorsers, the note not having been paid at maturity, the bank sued the promissor, and obtained judgment against him, and also sued the indorsers, and obtained judgment against them; the principal gave absolute bail to obtain a stay of execution, after which the bail were sued, and judgment obtained against them. It was claimed that as against the bail who stood in the relation of surety, but not in privity with the indorser who actually paid the debt of the principal, that there was no equity for subrogation; but it was held that the surety who had been obliged to pay one half the debt, was entitled to have an assignment of the judgment against the principal and the bail, to enable him to indemnify himself for the amount thus paid. "Privity," said Gibson, Ch. J., "is perhaps essential to a claim for contribution, but is certainly not essential to the right of subrogation." Referring to the case of Parsons *v.* Briddock, 2 Vernon, 608, he says: "That though both parties stood in the relation of surety towards the principal, they nevertheless stood in an equal equity between themselves, because the bail had so identified himself with the principal, as not to be distinguished from him." In this case, the bail interposed to procure a personal advantage to the principal, and to the detriment of the surety, who, but for this, might perhaps have been exonerated. Subrogation was therefore decreed against the bail, for the full amount paid by the surety.

Bing, the defendant, had executed a bond with one Watkins as surety, but that fact did not appear upon the face of the bond. On a suit against Watkins and Bing,[2] Watkins only was arrested. Smith gave bail for Watkins, and was subjected to the payment of a large part of the debt, the action was brought against Bing to recover this. At the trial, Bing offered evidence that he was only surety for Watkins. The court held that Smith, the bail, could acquire through Watkins no right against a third person which Watkins himself did not enjoy.

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[1] Barnes *v.* Huntington Bank, 1 Penrose & Watts, R. 395.

[2] Smith *v.* Bing, 3 Ohio, R. 33.

By becoming bail for the principal, he gained no right against the sureties.

In a case[1] where a party (Fagg) became a surety upon an injunction bond by reason of which he became liable for the claim against his principal (Fretwell), one Draffin stood in the character of a surety for the principal in a bond to Miller, but no part of the debt was justly due from him. His land, however, was bound for the debt to Miller, and on this ground the defendant claimed a right to be subrogated to the creditor, not only against the principal, but all others liable for the debt, for which was cited 1 Pothier on Obligations, part 2, ch. 6, art. 3, (427), where the general doctrine is stated as to the right of a surety to subrogation. But the court were of opinion that as no part of the debt was justly due from Draffin, the defendant had no claim to subrogation against him, citing another passage from Pothier,[2] where the right is more strictly qualified, as follows: "That all those who are bound for a debt for others or with others, *by whom they ought to be discharged, either wholly, or in part*, have a right, upon paying, to demand a cession of the actions of the creditor against the other debtors." The debt was justly due from the principal in the bond, and not from Draffin, the surety. As against him, therefore, the defendant had no right to be subrogated to the claim of the creditor. But the defendant, by becoming surety for the principal debtor on the injunction bond, became absolutely liable for him in that character, as bail would be on the ground of representation; and if the creditor had actually resorted to the bond of Draffin for satisfaction, he, on the contrary, would have had a right to be subrogated to the claim of the creditor, against the surety of him from whom the debt was due, on the same principle by which the bail was held liable for the principal debtor, in Parsons *v.* Briddock, *supra.*

In another case,[3] the principal in a bond assigned a claim to a trustee, to idemnify his sureties in the bond, in trust that he should collect the amount, and apply the proceeds to the dis-

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[1] Douglas *v.* Fagg, 8 Leigh, R. 588.

[2] Pothier on Obligations, part 3, ch. 1, § 2, (520).

[3] Givens *v.* Nelson, 10 Leigh, R. 382.

charge of the bond. Suit was brought upon the bond, and the sureties contributed, ratably, to its payment. One of the sureties obtained a decree against the principal, for the amount which he paid, and upon this decree sued out a *ca. sa.* which being executed on the principal, he gave a bond to the sheriff with sureties, that he should not depart from the rules or bounds of the prison, &c. This condition was broken, and the bond being thereby forfeited, the sureties thereon became liable. The claim assigned to the trustee being afterwards collected by him, it was held by the court that the surety who obtained the security of the bond for the prison limits, was bound to proceed thereon against the sureties in that bond, and could only come upon the trust-fund for any deficiency in his recovery from them, and that those sureties could have no right to resort to the trust-fund for their reimbursement, except to the extent of any surplus that might remain after the full indemnification of the original sureties. In this case the sureties were of different classes, and the surety of the party imprisoned stood in the place of his principal. So far from this surety having a right to be subrogated to the securities of the creditor against the original sureties, they, as representing the creditor, had a right to prosecute all his remedies against those who had assumed liabilities in relief of the debtor. If property on which execution has been levied, said the court, instead of a sale under the execution, is restored to the debtor on the interposition of a friend as a surety in a forthcoming bond, and his responsibility stands in place of the satisfaction thus intercepted, and on this responsibility he is charged and compelled to pay, it is reasonable that payment should produce the same effect as if satisfaction had been had from the sale of the property levied on. So the taking of the body in execution, though it be not a satisfaction, yet tends to satisfaction, and the sureties in the bond, by becoming bound as such, withdraw the debtor from prison, and enable him by escape from the limits, to deprive the creditor of his lien on the body. Their obligation holds the place of that lien.

Judgment was recovered against the principal obligor in a bond and against two of the three sureties, but not against the third, and a *fieri facias* having been sued out on the judgment,

and levied on the property of the principal, he gave a bond for the forthcoming of the property in which the sureties against whom judgment had been recovered, together with another person, joined him as surety. The execution awarded on this forthcoming bond was levied on the goods of one of the sureties in this bond, who was also a surety in the original bond; it was held that this surety had no right to contribution from the third co-surety in the original bond. In becoming parties to a bond for the property taken on execution, they assumed a new liability for which they had no claim upon the original surety who was not a party to that bond. They received the property which might have satisfied the debt, and by their own act prevented such satisfaction. In this case the third person, who, together with the original sureties, became bound as a surety for the forthcoming of the property levied upon, was compelled to pay the debt on the execution which was awarded on the forthcoming bond, and it was held that he was co-surety *with* the two other sureties for the principal in the forthcoming bond, and that he was not surety *for* those sureties as well as the principal, and that therefore he was entitled to contribution only from the two other sureties, and not to full indemnity from them as principals. The court assumed that the surety for a principal debtor may stand in the relation of principal to a supplemental surety, where such is the intention; but here the bond was a distinct engagement which determined the liability of the parties. If the surety in this bond, who was compelled to pay the debt, was surety, for the principal and the two original sureties, this should have appeared upon the bond. The principal received the property, and the implied agreement, on his part, was with all the sureties, for the delivery or to account, and the implied agreement between the sureties was for a contribution. If the undertaking had been that the third surety should be bound for the original sureties, and they for the principal, this should have constituted the subject of a special provision.[1]

Wigginton, deputy of Lane, sheriff of the county of Fairfax,

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[1] Langford *v.* Perrin; Perrins *v.* Ragland, 5 Leigh, R. 552.

gave a bond to his principal, Lane, for the faithful discharge of the office of deputy-sheriff, with five sureties; but Lane, not being satisfied with this security, Wigginton, and three other persons as his sureties, gave a second bond to Lane with like condition, but on the second bond there was a memorandum indorsed and signed by Lane at the time of its execution, that Lane should not resort to the second bond for indemnity for the misconduct of the deputy in office, so long as the sureties in the first bond should be residents in the State, and it should appear that he could be indemnified without recourse to the sureties in the second bond. Lane, the sheriff, recovered judgment on the first bond, against the sureties therein bound, for the amount of damages sustained by him by reason of the deputy-sheriff's misconduct in office. It was held that the sureties in the first bond had no right to contribution from the sureties in the second bond. The intention of the parties to the second bond was to be bound not as co-sureties, but only if the other sureties did not pay, that is, as surety for the sureties, not as co-sureties with them. The express contract of the parties determined the extent and nature of the obligation.[1]

Walker became surety for the defendant Frazer on an appeal from a judgment in a case in which Vaudry was bail; the judgment having been affirmed, Walker paid its amount. In the mean time Howe, the plaintiff, had obtained judgment on the bail bond executed by Vaudry in the original suit against Frazer. It was held that the surety who had thus paid for his principal was legally subrogated to all the rights of the creditor, and consequently to those against Vaudry as bail of the defendant. "The reason," said the court, "for saying that the subrogation is implied in favor of the party who becomes last bound, is, that he was induced to undergo the responsibility, because the principal's solvency was guaranteed by the person who first bound himself for him. This reason appears cogent, the person who first binds himself gives credit to the principal and would wrong him, who, under faith of this, superadds his responsibility if the former declines to comply with his engage-

[1] Harrison *v.* Lane, 5 Leigh, R. 414; Craythorne *v.* Swinburne, 14 Vesey, 160.

ment to satisfy the debt if the principal does not." The bail here represented the principal, and the subsequent surety became bound for both as principals.[1]

Although it is recognized as a rule of equity in the courts of Kentucky[2] that a surety who has paid the debt, has, as to the person and property of the debtor, a right to take the place of the creditor, so far as to have the same preference over general creditors that the creditor would have had, and may have the benefit of any mortgage, lien, or other collateral security that the creditor has; and though, in general, a court of equity will require the creditor to transfer all such securities to the surety who pays the debt or permit him to use the creditor's name to make them available; yet this principle will not be applied to defeat an interest acquired and held by a third person, when that interest, though subordinate to that of the creditor, is prior in date to the undertaking of the surety; it was therefore held, that a party who first comes in as a surety in an obligation incidental to the prosecution of the legal remedy against the person of the debtor, was, *prima facie*, to be considered as trusting to his principal only, for whom alone he is surety, and that he had no right to be subrogated to the creditor's remedies against a prior surety or incumbrance. The creditor may resort to the person of the debtor in relief of the surety, and he who becomes bound as bail, or otherwise, in discharge of the debtor, represents him, and can have no claim to be indemnified as against the surety.[3]

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[1] Howe *v.* Frazer, 2 Robinson, R. 424.

[2] Patterson *v.* Pope, 5 Dana, R. 241.

[3] "Suppose an individual," said the court, "to procure a credit for another, not by becoming his surety in form, but by giving a mortgage on his own property, to secure the debt of the other. The creditor, instead of proceeding upon the mortgage, proceeds against the debtor, and in the course of that proceeding, the debt is replevied (under the peculiar process of the State of Kentucky), and if ultimately paid by the replevin surety, would he be entitled to go back, for his indemnity, upon the mortgaged property of the stranger, which the creditor had sought to relieve, by coercing the debt from the debtor himself? Or, if a creditor take a mortgage from the debtor himself, and afterwards, upon a further advance of money, takes a second mortgage upon the same land for its security, would the replevin surety, who might pay the first debt, be substituted to the benefit of the creditor under the first mortgage, so as to be preferred to the same creditor's right under the second mortgage? Or if the second

Although, in general, a person who becomes bound for the defendant in an action at law, in any stage of legal process, may subject himself to the liabilities of the party for whom he is bound, in exemption of a prior surety for the debt; still it is true that the debtor himself, is personally liable; the bail and other sureties who have put themselves in the place of the debtor, have no resort to the sureties in the bond or debt which was the subject of the action, but they may claim that the property of the debtor which has been set apart as security for the debt, shall be appropriated for its payment. Such a surety will be entitled to claim that the principal and the sureties in the original bond, are in respect to him as principals, and that he is entitled to stand in the place of the creditor, whom he has paid, and have the benefit of any mortgage or other security as against a subsequent incumbrancer, though he may have become such before the responsibility was assumed by the bail or other surety for the relief of the person of the debtor during the pendency of judicial process, though it is otherwise in regard to a surety who has received property of the debtor on the assumption of responsibility for that.

NOTE. — If property is conveyed by the principal debtor as security for the surety, the creditor may, under certain circumstances, be entitled to the benefit of such security. It may be regarded as a trust for the security or payment of the debt, and to render the security available for the satisfaction of the debt, the creditor may have relief in equity against one of several sureties to whom property has been conveyed by the principal for his individual security.

When the principal debtor has given security to a surety for a debt instead of the creditor himself, it has been said that the creditor has a right to be subrogated to the surety; this is incorrect. Bibb *v.* Martin, 14 S. & M. 87. Subrogation is a right of substitution to the creditor's cause of action. Although a creditor may be entitled to claim that a surety to whom property has been conveyed by the principal debtor, is a trustee for him and that he has a lien upon the security thus given, his right does not depend upon subrogation, and his remedy is direct against the surety and his assignees. If a co-surety pays the debt, he may be entitled to stand in the creditor's shoes and be subrogated

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mortgage was taken by a different creditor, would he be postponed to a replevin surety who had paid the first debt?"

to his remedies against the surety who has, on his individual account, received security from the debtor.

It has been held, in many cases, that if the principal convey property by a deed of trust expressly for the benefit of one of the sureties only, the other sureties have an equity to come upon it, to the same extent that he may. The ground on which this rule rests is that in respect to the principal all the sureties are entitled to indemnity alike, and it is inequitable that one of them should be preferred by him. West *v.* Belches, 5 Munford, R. 187; Hindsill *v.* Murray, 6 Vermont, R. 136.

If the security is given to a surety for a contingent liability which never becomes absolute, neither the other sureties nor the payee can claim the benefit of the security. Where an indorser is discharged from default in giving notice, security given to him cannot be made available to subsequent indorsers. Aguew *v.* Bell, 4 Watts, R. 36.

CHAPTER VI.

SUBROGATION UNDER NEGOTIABLE INSTRUMENTS.

The principles which govern the doctrine of subrogation are applicable to bills of exchange and negotiable notes, so far as such instruments derive their efficacy from the common law. As between the original parties to a negotiable note, the principles of equity and natural justice which require that a surety, who has been subjected to liability for the debt of his principal, shall have recourse against the true debtor, and the security which he has provided for the creditor, is fully applicable. But the law which renders the parties to a negotiable instrument liable to the indorsee on an assignment qualifies such liability by special rules on which it is made to depend. Thus, an indorser who is bound in effect, as surety, for the payment of a negotiable note, is entitled to notice of non-payment by the maker. If the notice required by law is not given, the indorser is discharged. The security in his hands, if the rules of law have not been complied with, ceases to be charged for the debt and may be transferred or charged by the owner with other debts.

If we suppose the case of a second indorser who has been charged with liability and paid the note, but who has, by neglect, lost his recourse against the first indorser who held security for the debt, it is clear that the liability of the first indorser cannot be revived by a cession of actions from the payee. The indorser is discharged by law, and even if the security remaining in his hands would in equity be chargeable, it ceases to be so after a sale or transfer. The rules of law requiring notice of non-payment are established in reference to such cases, and are designed for the protection of commerce. As against the maker, the case is very different where the

creditor has obtained security for the payment of a negotiable note, and has received payment from the indorser who is supposed to have lost his recourse by neglect to give notice of non-payment by the maker. The indorser is in the condition of a surety, and in that character he has a right to be subrogated to the creditor against the maker and to his lien upon the security.

In a case decided by the Supreme Court of the State of New York,[1] the action was brought on a promissory note, by indorsees against an indorser. The note, before it became due, had been discounted by the Chemical Bank on the indorsement of the plaintiffs who, having been duly notified of its non-payment by the maker, paid it and took it up as indorsers. At the maturity of the note the notary of the bank demanded payment of it, and the next day, after making suitable inquiry to ascertain the residence of the first indorser, being told that he resided at one or the other of two places, sent notice to him at both places. The first indorser, however, never received notice, but resided at a different place, and the plaintiffs knew that fact. It was held by the court that the plaintiffs, who paid the bank, stood in the shoes of the bank, in respect to which the notice was sufficient, and were subrogated to its rights.

The case afterwards came before the Court of Appeals[2] by whom it was decided that though inability to discover the residence of the first indorser excused the proper service of notice by the bank, this excuse was not available to the second indorsers who knew the residence of their indorser, and that the defendant was discharged by their neglect to give notice.

It is observable that though this was treated by the Supreme Court as a case of subrogation, the action was not in the name of the bank, and there had been no cession of actions. The action was in the name of the second indorser by whom payment had been made against the first indorser, who, as against the second indorser, was excused by neglect of notice of non-payment by the maker.

The inability of the bank to give the notice which was a

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[1] Beale *v.* Parish, 24 Barb. R. 243.

[2] Beale *v.* Parish, 6 Smith, R. 407.

sufficient excuse to them, was, in its nature, personal, and could not operate in favor of the second indorser, who was bound to give notice to prior parties. Notice from the holder would have been sufficient for all the indorsers; but his inability to give the notice would not excuse notice from a party who was enabled to give it and from whom it was required by law.

A different question would have been presented if, after payment by the second indorser, a cession of actions had been made in his favor by the bank. Or, if on a bill in equity he had sought to be subrogated to the right of the bank.

The indorser was, indeed, in the position of a surety for the maker, but his liability was qualified by the principles of law applicable to negotiable paper. In effect the contract of suretyship was an agreement to be bound not absolutely in that character, but provided a demand should be made duly on the maker at the time and place of payment, and that on failure of payment, notice should be given to the indorser. The law presumes that such notice is needed by the indorser for his own security. It is a condition of the contract on which the liability of the party depends. If by reason of the non-performance of this condition, the first indorser is discharged, it is clear that the second indorser has no equitable claim to be subrogated to the action of the holder whose claim on the first indorser for the default of the maker has not been discharged.

Where security has been provided for the contingent liability of the indorsers of a note holden by a bank against the maker, and the indorsers have, by the laches of the bank, been discharged from liability, the holder cannot claim to be subrogated to such security on the alleged ground that the security was provided for the satisfaction of the indorsers. Being discharged, their lien on the security is at an end.[1]

The right of an indorser to be subrogated to the creditor in payment, is the same as that of any other surety, except so far as it is modified and controlled by the *law merchant*, or by positive regulation of statute.

But in a case where a judgment was obtained against the maker and four successive indorsers, and the property of the

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[1] Hopewell *v.* Cumberland Bank, 10 Leigh, R. 206

third indorser had been seized by the sheriff on execution, and he had paid the money to the sheriff, Mr. Justice Cowen held, at a special term, that the judgment was thereby extinguished; and he denied the motion made by the indorser for leave to sue out an execution on the judgment against the prior parties. The decision was placed upon the ground of a payment by a surety, who has no remedy against his principal but for money paid, or to be subrogated in the place of the creditor by a court of equity. "The very reason," said Mr. Justice Cowen, "why chancery performs the office of subrogation, in favor of a surety who has paid, is because the debt being extinguished, a court of law cannot do it."[1]

In another case the last indorser purchased and took an assignment of the judgment rendered on a note, against the maker and indorsers, and sought to enforce it out of the real estate of an antecedent indorser. Mr. Justice Jewett, on the application in behalf of a junior judgment creditor of that indorser, held that the assignment of the judgment operated as an extinguishment of it, and directed a perpetual stay of the execution. "At law," said the court, "it is well settled that payment of a judgment to the plaintiff or the owner, by the defendant, or by one of several defendants, extinguishes it, although such payment be made by a defendant who is a mere surety. A court of law substitutes such surety in the place of the plaintiff, and allows him to take execution upon such judgment. The judgment is regarded as extinguished against all. An assignment by the plaintiff or owner of a judgment, to one of several defendants in the judgment, works the same consequence."[2]

In a subsequent case[3] the two preceding cases were questioned. The court said, that "the contract which the law implies between principal and surety, is different from that raised between the maker and successive indorsers of commercial paper. A principal and his surety could always be sued jointly, at common law, when they were parties as such to the same instrument. The maker and indorser of a promissory

[1] Ontario Bank *v.* Walker, 1 Hill, R. 652.

[2] The Bank of Salina *v.* Abbott, 3 Denio, R. 181.

[3] Corey *v.* White, 3 Barb. 12.

note could not, at common law, be joined, for the reason that their contracts are separate and different from each other. They can only be joined by statute." The statute preserves the right of the respective parties amongst themselves, as it was before.[1]

The court were of opinion that courts of law should so exercise their jurisdiction as to protect, by subrogation, the rights of a surety.

The general rule is, that a mere volunteer or stranger cannot, by making himself party to an obligation for the payment of a debt, acquire, as against the original debtor, a right to be subrogated to the actions of the creditor.

In a case decided by the Court of Appeals of Maryland,[2] Rebecca Dorsey mortgaged certain real estate to the Neptune Insurance Company to secure an indebtedness of eight thousand dollars. After a decree for a sale the company conveyed their interest in the mortgage to the Baltimore Life Insurance Company. Rebecca Dorsey, the mortgagor, conveyed her equity of redemption to Edward H. Dorsey, who thereafter mortgaged his interest in the property to John Patterson to secure a debt.

Afterwards Edward H. Dorsey passed to the Baltimore Life Insurance Company his three promissory notes indorsed by James Swan for $443.55, being the amount of interest due on the mortgage. These notes were paid by Swan at maturity, and the property having been sold, and the proceeds being more than sufficient to pay the mortgage debt, Swan insisted that to the extent of the notes so paid by him, he was entitled to be subrogated to the Baltimore Life Insurance Company, and that his claim should be preferred to that of the subsequent mortgagee. The court were of opinion that the equitable assignment *pro tanto* in favor of a surety cannot be effected unless he has paid the entire debt of the creditor. But the court were also of opinion that as Swan, the surety, never became the surety of the original principal debtor, but only of

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[1] See Act of April, 1832, § 7.

[2] Swan *v.* Patterson, 7 Maryland, R. 164.

the assignee of the equity of redemption, the right of substitution claimed could not be maintained, but that the holder of the claim must rank as a simple contract creditor only.

But there is one case in which a stranger or volunteer may, by making himself party to a debt, under the commercial law, acquire a right to subrogation, namely, where he accepts a bill of exchange *supra protest*, for the honor of some party to the bill.[1]

Payment, says Chitty,[2] may be made by any one for the honor of the drawer or any of the indorsers, but it is always made after protest, and is therefore called payment *supra protest*, and no person should pay in honor of another, before the bill has been protested for non-payment. Although, with respect to other debts, a stranger who has no interest in them, does not, by paying them, entitle himself to the rights of a creditor, unless he have the consent of the debtor to such payment, yet, with regard to bills of exchange, a stranger, who pays them after protest, acquires all the same rights that the holder of the bill had, although no regular transfer of the bill was made to him.[3]

In a case at Nisi Prius,[4] Lord Kenyon was of opinion that where a bill is taken up for the honor of any one whose name is on the bill, the party who does so is to be considered as an indorsee paying full value for the bill, and, as such, entitled to all the remedies to which an indorsee would be entitled, that is, to sue all the parties to the bill, and he therefore directed the jury to find a verdict for the plaintiff. The party who intervenes to make payment for the honor of any party to a bill is entitled to subrogation, but in order that it may have effect, it is always required that payment should be made after protest, because it is only when the refusal of the debtor is

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[1] Burr *v.* Smith, 21 Barb. 262. Where, after a note had become due, a stranger paid it, but declined cancelling it and took it away with him, nothing being said about burying it; it was held to be payment and satisfaction of the note, so as to prevent a suit being brought thereon by a person receiving it from the stranger.

[2] Chitty on Bills, 408. See also, Pothier, Tr. du Contrat de Change.

[3] Chitty on Bills, 409.

[4] Mertens *v.* Winnington, 1 Esp. 112.

regularly shown by protest, that payment for the honor of a party to the bill can be useful to him.[1]

It is provided, by the French Commercial Code,[2] that he who pays a bill of exchange, by intervention or for the honor of a party to the bill, shall be subrogated to the rights of the holder, and be charged with the performance of the same duties and formalities to which he was bound; that, if the payment by intervention is made for the honor or on account of the drawer, all the indorsers shall be liberated; that if it is made for the honor of an indorser, subsequent indorsers shall be liberated. In this respect the code of commerce derogates from the civil code,[3] which provides that an obligation may be performed by a third person who has no interest therein, provided that such third person acts on behalf of and in discharge of the debtor; or if he acts in his own name, that he shall not be subrogated to the rights of the creditor.

This modification of the general law was prompted by weighty motives, and had for its object to engage the friends of the drawer and indorsers, to render them this service and to preserve, by this means, commercial honor and credit.[4] A stranger, says Pothier,[5] has not only an action against the party to a bill, for whose honor he has accepted it, but the law subrogates him to all the actions which the holder had against those who were charged by the bill, the Ordonnance of 1673 providing expressly that by means of payment, he becomes subrogated to all the rights of the holder of the bill, although he may have had no assignment thereof, subrogation, or order. It is not, therefore, necessary that on payment he should have required subrogation, this being a case in which subrogation takes effect by operation of law.

Although a stranger may intervene and pay a bill for the honor of a party to it, the practice is not unattended by inconveniences, as such intervention may be made for the purpose of

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[1] 5 Massé, Droit Commercial, No. 168.

[2] Art. 159.

[3] Code Napoleon, Art. 1236.

[4] 2 Locré, Esprit du Code de Commerce, p. 237.

[5] Pothier, Tr. du Contrat de Change, No. 113.

gaining an unfair advantage. It is, therefore, says Locré,[1] required by law that payment should be made after formal protest.

And in a case,[2] decided by the Supreme Court of Louisiana, where a stranger to a negotiable note paid the note and then caused it to be protested, Porter, J., said that payment for the honor of the indorser did not confer a right of action, unless the honor of the indorser was then in such a situation that this measure became necessary for its preservation, but the honor of the parties to the note could not in reason, or by law, be in any way affected until a protest for non-payment. Hence any step on behalf of that honor, previous to the protest of the instrument, was premature; it was discharging an obligation before any existed.

Indorsers of negotiable instruments are not to be regarded as co-sureties. The security which is provided for an indorser is not, unless such is the express agreement, to be appropriated as a fund for the security of the debt to which a subsequent indorser has a claim in equity; but merely as security for the individual indorser. Levy procured the plaintiff, Gomez,[3] to accept a bill of exchange for $5,000, payable to one Clark, whose indorsement, as well as the plaintiff's acceptance, was for the accommodation of Levy. The bill was discounted at the Bank of Cape Fear. When the bill was drawn, Levy executed a bond to Clark, the indorser, with a condition to be void in case Levy should indemnify him against loss as surety. To secure this bond Levy executed a mortgage upon his property. The whole of Levy's property was afterwards conveyed to Lazarus and McRae, with notice of the mortgage to Clark, and it was provided in the deed, that out of the property thus conveyed, so much of the debt of Levy should be paid as was indorsed by Clark. Afterwards Levy, with Gomez and Clark as his sureties, gave a joint note to the bank, the holder of the bill for the amount thereof. Gomez paid the whole of this note, and by a bill in equity sought the benefit of the fund

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[1] Vol. 2, p. 240.

[2] Holland *v.* Pierce, 14 Mart. R. 499.

[3] Gomez *v.* Lazarus, 1 Devereux, Eq. R. 205.

created for Clark's indemnity and obtained an assignment from him, and also from the bank, of all their interest in the property. Gomez, by his acceptance, became a principal as to Clark and the bank, but his acceptance being for the accommodation of Levy, as between Levy and himself, he was only a surety. The question was, whether Gomez was entitled to be subrogated to the security provided for Clark. The case was decided according to the rules of priority, as applicable to commercial paper. Gomez stood prior in obligation to Clark, whose liability was to arise only upon the default of the former. He could not claim the security upon being subrogated to the rights of the creditor (the bank), for the creditor, upon receiving payment from him, was bound to assign all its obligations and means for enforcing payment from those who stood prior and equal in obligation to him, and not from those who stood posterior to him. The indorser undertook that the acceptor would pay. The parties were, therefore, held not to be in any sense co-sureties. If the security had been specifically appropriated for the payment of the debt, instead of being provided for the mere indemnity of the indorsers, the decision would have been different.

Where A as surety, signed the note of B, payable to C, and it was indorsed by C, at the request and for the accommodation of B, there being no contract between A and C whereby they agreed to become sureties of B, it was held that A had no right to contribution from C. The order of liability, arising upon the face of the transaction, was regarded as the rule of a court of equity, as well as at law, in fixing the relation of principal and surety, and that of co-surety and supplemental surety; though the relation may be varied by contract, whatever may be the form of the security.[1]

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[1] Smith *v.* Smith, 1 Devereux, Eq. R. 173.

CHAPTER VII.

SUBROGATION AS BETWEEN PARTIES WHO HOLD A FIDUCIARY RELATION TO EACH OTHER.

A GUARDIAN, whose duties to a minor ward may extend over many years, and regard all his transactions during the time of his minority, trustees, who have continuing duties and liabilities to the persons interested in the trusts, and partners, who have a community of property as well as of liabilities, do not, in general, by the payment of any single debt, acquire against the party who was previously bound therefor, a right of subrogation. Their rights and liabilities depend on a final settlement of accounts, and the liability of the principal grows out of the relation, and is direct.

Renussons[1] says, that if the guardian pays in quality of guardian, he extinguishes the debt of the minor. He is not regarded as having made payment from his own funds, but rather from the funds of the minor, for, until he has rendered account, it cannot be known whether he is creditor or debtor of the minor; that depends on the settlement of the account to be made when the minor attains the age of majority. Therefore, having made payment as guardian, he extinguishes thereby the debt. The payment made by a debtor, as debtor, extinguishes the debt, and if the minor has no funds in the guardian's hands, who has made payment from his own funds, he has only an action to recover what he has paid for the minor as guardian, *habet tantum contrariam actionem tutelæ*, and a right to make it a charge in his account. He has not succeeded to the hypothecation of the creditor, and he cannot retain the proceeds thereof against his ward.

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[1] Renussons, ch. 9, No. 23.

It makes no difference if, at the time of payment, the guardian has stipulated for subrogation, for he makes payment in quality of guardian for the minor and as debtor; a debtor, by payment, extinguishes the debt. He cannot stipulate for subrogation against himself. In like manner, if he declares that he makes payment as a stranger, he is incapable of subrogation. He really pays in his quality of guardian, and his declaration is without effect.

In France, according to Renussons, when the guardian has in his hands no funds of the minor, by the consent of such relations of the minor as are by law entitled to direct, the guardian may pay the debt of the minor from his own funds and acquire the right of subrogation. In this country, where the same general rule prevails, it is probable that where the guardian had no property of the ward within his control, he might pay the debt against him from his own funds, and by the authority of a court of probate, acquire the right of subrogation. Such action of a court of probate would be considered as equivalent to a general settlement of accounts, and as ascertaining the liability of the minor. The guardian who, under such authority, made payment from his own funds, would, by subrogation, acquire a right to the security as against the minor.

It remains to be examined, says Renussons,[1] what action a guardian, who has paid his pupil, may have against the other guardians as jointly liable with him, and whether he is subrogated by operation of law (*plein droit*), to the pupil or ward, whom he has paid, without having required or stipulated for subrogation in making payment.

They are, it is to be observed,[2] held responsible for each other's defaults, and if, after the guardianship is ended, one of the guardians is sued by the ward to account and pay what is due, he may demand that the liability shall be divided between himself and the other guardians.

By the civil law, when a ward has several guardians, and in

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[1] Renussons, ch. 9, No. 23.

[2] Ibid. No. 24.

an action against one of them has recovered for the whole amount, the guardian against whom there has been such recovery, if he pays the ward, may receive a cession of actions against the other guardians who have not been condemned. The action is not extinguished, but the guardian who has paid may sue in the name of the ward, for the part due from them, and it would seem that he might sue for the whole amount, when the debt has been lost by their default; but a cession of actions was necessary as subrogation did not, in such cases, take effect as of right.

In a case[1] which occurred in the State of Mississippi, a guardian, who had failed to bring an action against a former guardian, and who was, therefore, held liable to the ward, was substituted to the right of the ward against the former guardian who was in default.

Boyles, the first guardian, misapplied eight hundred dollars, the property of Blackwood, the ward. Orr, being afterwards appointed guardian in the place of Boyles, died without having taken any steps against the former guardian. Alexander was Orr's executor, and also succeeded him as guardian. He failed to proceed at law against the first guardian, and Blackwood sued him and recovered judgment for such neglect. Alexander paid the judgment, and it was transferred to a trustee for his benefit. Smith, the surety of the first guardian on his bond, was sued for the indemnity of Alexander. It was held by the court, that the right of action in favor of the ward was transferred by law, which substitutes the agent, &c., who has been guilty of neglect, to the action of the party injured. But in this case, by the assignment of the judgment recovered against Alexander, a transfer took place, which was equivalent to a cession of actions, and it would have been more regular if the action against the surety, on the first guardian's bond, had been brought by Alexander in the name of the ward. There had been no recovery against the other guardians, because there was no joint liability; the subsequent guardian was not liable for the former guardian's acts, but only for his

[1] Alexander *v.* Smith, 4 Sneed, Miss. R. 482.

own default in not proceeding against him at law. Having satisfied and taken a transfer of the judgment recovered against him, the guardian might, as subrogated to the ward, have brought an action on the bond in his name. The judgment was transferred to the guardian to prevent an extinguishment of the cause of action, and to enable him to recover from the party who was justly liable; but even if there had been no such cession, subrogation would probably have been held to take effect by operation of law.

A trustee, whose liability and duty grows out of a single debt, may be held liable as an agent to his principal for any default relating to that single subject, and may, on payment, be entitled to subrogation, but the liability of a general trustee is not thus regarded. He is not ordinarily called upon to account for each several transaction, and he is not subrogated to the rights of the original creditor for any default as on payment and satisfaction made by himself, because the creditor preserves his own rights of action. The trustee is not subrogated because, though by his default he may have laid a foundation for future personal liability, he is not actually fixed with liability, and the debtor continues liable directly to the creditor himself.

The principle of subrogation does not apply to transactions between partners.[1] Where partners borrow money to be used in the business which they are jointly carrying on, it becomes a partnership fund, and however they may stand on the security given to the lender, they are accountable to each other as partners. The relation of principal and surety can have no place between them. It does not alter the case that the partner received the proceeds of the note. The possession of one is, in law, the possession of both. The subsequent loan of the fund to a third person does not change their relations. Even the misapplication of a partnership fund by one of the partners cannot make the other a surety if he was not so before. And if a partner, after paying a partnership debt, might be substituted to the rights of the creditor as against his

[1] Bailey *v.* Brownfield, 20 Penn. R. (8 Harris), 41.

co-partner, still, as injustice might be done by allowing the surety to be subrogated without first accounting to his co-partner for the profits of the business in which they were jointly engaged, there must, therefore, it was said, be a resort to some process in a court of law or of equity, by which, on a final settlement of accounts between partners, the balance due to one of them may be ascertained.

The same principle extends to dormant partners whose liabilities in respect to subrogation are the same as those of ostensible partners. When there are ostensible partners, and also a dormant partner, and a promissory note is taken from the known partners, an action upon such an instrument may be brought against all the partners, and a surety who, as such, pays the money on it, is entitled to the usual remedies of sureties against all. He may be subrogated to the remedy on the contract, or he may have his action for money paid for the use of the partnership, and the promissory note so taken and signed by the ostensible partners and their surety is competent evidence.[1]

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[1] Hill *v.* Voorhies, 22 Penn. R. (10 Harris), 68.

CHAPTER VIII.

OF THE RIGHT OF SUBROGATION IN FAVOR OF INSURERS TO THE RIGHTS OF ACTION OF PARTIES INSURED.

THE right of subrogation exists in favor of an insurer who has been subjected to liability and made payment on a policy of insurance, on the happening of the loss, to all actions against the person by whose negligence or wrong the loss was caused.

In a case before the King's Bench,[1] Lord Mansfield said, "every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer uses the name of the insured."

The plaintiffs were insured by the Springfield Mutual Fire Insurance Company, against a loss by fire on a dwelling-house near the railroad track of the defendants.[2] The action was trespass on the case (founded on Stat. 1840, ch. 85), to recover the amount of a loss which the plaintiffs sustained by fire, alleged to have been communicated to their dwelling-house by a locomotive engine of the defendants. The insurers requested the plaintiffs to commence a suit against the defendants to compel payment by them of the plaintiff's loss, and offered to indemnify the plaintiffs from costs and to save them harmless, in reference to said suit. The plaintiffs refused to commence a suit, as requested, but demanded the amount of their loss of the insurance company, who paid the same, first notifying the defendants that they did not intend thereby to relinquish any claim which they might have against the defendants for the

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[1] Mason *v.* Sainsbury, 3 Doug. 63. This case was approved of in Clark *v.* Blything, 2 B. & C. 254.

[2] Hart *v.* Western Railroad Corporation, 13 Met. R. 99.

amount, in their own or in the plaintiffs' names. The insurance company, in the name of the plaintiffs, then brought the action to recover the amount paid by the company to the plaintiffs. After the action was commenced the plaintiffs executed a release to the defendants, of any claim which they might have against them on account of the loss declared upon in the action. The court were of opinion that the owner and the insurer were, in respect to the ownership and the risk incident to it, in effect, one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause, that if, therefore, the owner demands and receives payment of that very loss from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which the owner holds for the common benefit, to the assurer. If the owner first applies to the insurer and receives the whole loss, he holds the claim against the railroad company in trust for the insurer. "When such an equity exists," said the court, "the party holding the legal right is conscientiously bound to make an assignment, in equity, to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected." In regard to the right of the insurance company to sue in the name of the assured, we think the cases fully affirm the position, that by accepting payment of the insurers, the assured do implicitly assign their right of indemnity from a party liable to the assured. It is in the nature of an equitable assignment, which authorizes the assignee to sue in the name of the assignor for his own benefit; and this is a right which a court of law will support, and will restrain and prohibit the assignor from defeating it by a release." It is observable that the court fully sustain the doctrine of subrogation by operation of law. So that no actual cession of actions is necessary from the party who, having a claim against another for a debt, or for indemnity for a wrong receives satisfaction from a third person who is collaterally liable, but payment itself, operates in equity as an assignment.

In the Supreme Court of Maine, it was decided that where property is wilfully burned by a third person, no action can be

maintained against the wrong doer for the money paid by the insurer in his own name.[1] On this subject a difference of opinion existed in England. An insurance company having paid the insured the amount of loss, sued the Hundred; it was held by Lord Mansfield and Buller, J., Willes and Ashurst dissenting, that the office was not entitled to recover.[2] Buller, J., said: "The insurer, it is said, stands in the place of the insured. But how? To use his name subject to all his disadvantages. A right of action cannot be transferred. Can the insurer bring an action immediately on the loss occurring? If he can, it must be a vested interest; if not, he cannot by payment subsequent, which is his own act, entitle himself." Ashhurst, J., said: "The insurer may also bring an action in his own name, because when he has paid, he is damnified." Willes, J.: "If the insurer had an original right, he may elect to sue in his own name or in that of the insured." Lord Mansfield said: "The assignee must sue in the name of the assignor by which the defence is not varied. There is no instance of an action in the name of the insurer, while numberless actions have been brought by owners of ships when many of them must have been insured." Judgment was rendered for the defendant and unanimously affirmed in the Court of Exchequer Chamber. There is a distinction between the case of an insurer and that of a co-debtor. It cannot be said that the claim is extinguished by the necessary effect of payment made from a debtor. The insurer is not like a surety, a debtor, and it is true that when he has paid, he is damnified. The case is distinguished from that of a co-debtor in another respect; a cession of actions is not necessary. The right of the insurer results from the wrong.

There can be no doubt that the assurer is entitled in equity[3] to be subrogated to the right of action of the assured on pay-

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[1] Rockingham Mutual Fire Insurance Company *v.* Bosher, 39 Maine, R. 253. To the same effect is Conn. Mutual Life Insurance Company *v.* New York and New Haven Railroad Company, 25 Conn. 265.

[2] The London Assurance Company *v.* Sainsbury, 3 Doug. 245.

[3] The equity does not arise out of the contract of insurance, but from all the circumstances of the case. Kernochan *v.* The New York Fire Insurance Company, 3 Smith, R. 428.

ment, and to sustain, in the name of the assured, any action to which he was entitled by reason of the loss, and it seems to have been generally understood that as the right of action existed in favor of the party sustaining the injury, the action could only be brought in his name; but a different rule prevailed in a case decided by judges of great eminence in the Privy Council, where the action brought in the name of the party subrogated, was sustained against him who had caused the loss to the assured. A church in Lower Canada,[1] having been in great part destroyed by a fire which was occasioned by the negligence of the respondents' servants, and being at the time insured by a policy effected by the *curé* upon the church and sacristy; the *curé* and one of the *marguiliers-en-charge*, by a notarial instrument, transferred to the appellants, the "Quebec Fire Insurance Company," who had granted the policy, in consideration of the payment by them of part of the amount of the damage sustained by such fire, the right to sue and claim from the respondents the amount so paid. It was held that this constituted a valid subrogation of the debt due to the insurers according to the French law prevailing in Lower Canada; and that an action brought in the name of the insurers, upon the notarial act against the respondents, might be supported; that the subrogation might be made by the *curé*, &c., as persons who had a power to give a discharge, though they could not cede or assign by way of sale, any of the rights of the church without further authority; and that although the plaintiffs had already paid the amount of the loss absolutely, this payment, which by virtue of the contract in the case was indemnity, was not such a payment as extinguished the debt, as it was supposed to do in the case of a surety paying the debt of his principal, and that, therefore, there might be a subrogation afterwards. This case is important, as an instance of a cause of action founded partly upon a claim originating in the acts of the party subrogated to the creditor (or party to be indemnified), and partly on the original right of action in the creditor himself, and differs alike from cases where the mere right of the creditor

[1] The Quebec Fire Insuracen Company *v.* St. Louis, 7 Moore, P. C. Cases, 286.

passes by assignment, the action being in the name of such creditor, and from cases where the subrogated party proceeds upon a right of action in his own name, founded on the equity resulting from the satisfaction of the claim of the former creditor. The nature of the subrogation in such cases is well explained by Pardessus.[1] The right of an insurer who has paid the amount insured on a fire insurance, to recover the same from an incendiary or from a neighbor who by his negligence communicated the fire to the premises, which he regards as incontestable, exists not in virtue of a legal subrogation, for the insurer who has paid, has not done so by reason of his being bound with or for the author of the wrong, but is founded upon those equitable considerations which it is the duty of courts to apply to all cases which they are required to decide in the absence of legal provision. In the instance, for example, of an incendiary, there can be no question that the owner of the house burnt, may recover from him the amount of damages thus caused. The precaution which he has taken to insure himself cannot discharge the wrongdoer from liability. On the other hand, it would not be just that the assured already indemnified by the assurer should receive indemnity also from the incendiary. Therefore, it is to the assurer that the indemnity is due. By the effect of the insurance, he has become the party interested, that the property insured shall not be subjected to the damage insured against. The injury which that property has suffered, has fallen upon him. He is the true party injured, and he alone has a right to reparation. With what justice, says this writer, can it be refused him. There is more of subtlety than of good sense in the idea that he does not found himself upon a subrogation to the rights of the insured. It is not indeed a case of legal subrogation. It is a case where the rule applies, that no one can free himself from the duty to repair the damage which he has caused, nor be enriched at the expense of another.[2]

Other French writers have considered the claim of the assured as absolutely extinguished by the payment made by

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[1] Droit, Commerc. No. 595.

[2] 2 Alazet, 391, No. 480.

the insurer and therefore incapable of assignment, because a right which a man cannot exercise himself, he cannot assign to another. It must indeed be conceded that in the case stated by Pardessus, the right supposed to exist by subrogation in the insurer, is not distinguishable in this respect, from that of a surety who pays the debt and claims to be subrogated to the creditor by operation of law; and the case of the Quebec Insurance Company *v.* St. Louis, must have proceeded upon the ground that a satisfaction which absolutely extinguishes the creditor's right of action, gives at law a new cause of action to the party in whose favor an equity results by payment, and that a right equivalent to that of subrogation, exists by operation of law. Mr. Baron Parke, who delivered the opinion of the Privy Council, said that "the payment of the amount of the loss by the insurance company, which in this case, by virtue of the contract, is indemnity, is not such a payment as extinguishes the debt, as it does in the case of a surety paying the debt of his principal, and, therefore, there might be a subrogation afterwards." It is certainly true that upon the principles recognized in the case of Hart *v.* The Western Railroad Corporation, above cited, payment by the insurance company would not extinguish the claim of the injured party against the wrongdoer, but the very foundation of the action brought by the Quebec Insurance Company was, that the claim for wrong had been satisfied. Suppose that St. Louis, the wrongdoer in this case, with a view to provide indemnity for possible loss, had bound himself to pay a certain sum, in the event that a fire resulted from the exercise of his business, giving as security a mortgage on land, and that the Quebec Insurance Company having authority so to do, had become sureties for him as principal on the bond. On the ordinary principles of subrogation, as understood in France and most of the United States, the surety on payment and satisfaction of a loss when it happened, would be entitled to an assignment of the claim of the injured party, and might bring an action in his name. Payment in such a case would not have extinguished the action. But if the surety had paid and satisfied the claim, and had afterwards resorted to the *actio mandati* in his own name, the very foundation of the action would have been the extin-

guishment of the original cause of action, and the surety must have counted upon it. The case supposed differs from that which was heard before the Privy Council, in the circumstance that there was no privity in the latter case between the insurance company and the defendant, by whose negligence the loss was caused. If the insurers, after paying the loss, had brought an action in the name of the party insured, it would have been an ordinary case of subrogation, where privity is not necessary, the right resting upon natural justice and equity. But the action having been brought in the name of the insurer, it was necessary for him to show satisfaction of the debt and to establish the liability of the wrongdoer by the effect of the assignment of the cause of action. This was not indeed a case of subrogation; if, in the case supposed, the insurance company had, as sureties, paid the loss on the insolvency of the principal, they might, by a cession of actions, have acquired the right of the obligee and would have been considered purchasers as at the Roman law of the name (*nomen*), and so would have been entitled to sue in the name of the obligee, and as succeeding to his place. Or they might exercise their legal remedies and resort to the action *mandati* or *negotiorum gestorum*, or the action of assumpsit at the common law; but the only mode in which the surety could prosecute his remedies against the security given by the principal, was by bringing an action in the name of the obligee. Such was not the course taken by the plaintiffs, the insurers, in the Quebec Fire Insurance Company *v.* St. Louis. The action was brought by the insurers in their own name, and to sustain that action, it was necessary to allege that the plaintiff had assumed and satisfied the loss, and that by reason thereof, a new liability had arisen against the wrongdoer. There appears to have been an attempt to combine the principle of subrogation with the legal remedy by action, which a surety, or one who may be said to stand in the relation of surety, acquires by satisfying a debt or liability with which another is justly chargeable. But the absence of privity between the insurer and the author of the loss, would seem to be an insurmountable objection to any action in the name of the insurer against the party who has caused the loss paid by the insurer. Though the insurer has

paid and satisfied the loss, as between himself and the insured, according to the terms of his contract, there was no express engagement on the part of the wrongdoer, and none can be implied to reimburse the insurer, and the satisfaction of the loss cannot, when made by a stranger, be alleged as the foundation of liability to an action *ex contractu*. The French writers are not agreed on the question whether the assurer in such a case may be subrogated to the rights of the party assured, it being affirmed by Toullier[1] and others, and denied by Duranton, Massée,[2] &c.; but Toullier, whilst admitting the right of subrogation, states that the action must be brought in the name of the assured.

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[1] Toullier, Vol. VII. No. 75.

[2] Duranton, Vol. XII. No. 181; Massée, Vol. V. No. 254.

CHAPTER IX.

OF SUBROGATION IN FAVOR OF A LEGATEE.

We have seen that by the Roman law, where the testator bequeathed or devised property to a person which was hypothecated to a creditor, as it was the presumed intention that the heir should pay the debt and leave the property unincumbered to the object of the testator's bounty, the legatee might pay the debt himself and obtain from the creditor a cession of actions for the purpose of proceeding against the heir as subrogated to the rights of the creditor, and that if the creditor had refused to make cession of actions and subrogation, it might be decreed by a court. The same right of subrogation in favor of a specific legatee, and also in favor of one to whom land has been specifically devised, exists at the common law.

It was held by Lord Chancellor Macclesfield,[1] that if the testator by his will give a lease, or a house, or any specific legacy, and leaves a debt by mortgage or bond, in which the heir is bound, the heir shall not compel the specific legatee to part with his legacy in ease of the real estate; but though the creditor may subject this specific legacy to this debt, yet the specific or any other legatee shall, in equity, stand in the place of the bond creditor or mortgagee, and take as much out of the real estate as such creditor, by bond and mortgage, shall have taken from his specific or other legacy.

It was held by Lord Chancellor Talbot,[2] that though the heir shall always prevail to have the personal estate applied to the payment of debts when no prejudice is done to simple

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[1] Tipping *v.* Tipping, 1 Peere Wms. R. 729.

[2] Lutkins *v.* Leigh, Cas. Temp. Talbot, 53.

contract creditors or legatees, yet the widow and the legatees would have had a right to apply to the Court of Chancery, and to stand in the room of the mortgagee, if he fall upon the personal estate, that being the proper fund for the legacies, and to have so much of the real estate as he had of the personal.

On these authorities it was held by Mr. Chancellor Walworth,[1] that as between a legatee, either pecuniary or specific, and the heir at law, if a debt chargeable both on the real and personal estate is paid by the executor out of the personal property, in the first instance, the legatee will be permitted to stand in the place of the original creditor *pro tanto*, and may recover the amount of his legacy, or to the extent of the personal estate so appropriated, out of the real estate descended to the heir, and that if the debt is a specific lien upon the land, as in the case of a mortgage, the legatee may, in some cases, stand in the place of the mortgagee who has exhausted the personal estate, even as against the devisee.

In Culpepper *v.* Aston, 2 Cases in Chancery, 115, the Lord Chancellor held that when the trustees has sold land appointed or conveyed to pay debts, the heir is entitled to have the lands after the debt is paid, but that a purchaser buying the land is not concerned, whether there be sufficiency or not; if he buy and pay, though there were sufficiency to pay the debts out of the personal estate, that yet he should hold the lands against the heir, and the heir must take his remedy against the trustee; and so if the matter rests in account between the heir and trustee, his purchaser is safe, though the money is misspent by the trustee. It is otherwise when there is *lis pendens* between the heir and trustee to have an account.

When the executor has authority to sell land for the payment of debts, in a case where land is mortgaged for a debt, and a legacy is given by the will equal in amount to the mortgage debt, if the executor sells the land mortgaged to pay the debt charged upon it, and afterwards misapplies the money, and the mortgagee recovers the debt from the property which turns out to have been sufficient to pay the debts, the legatee

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[1] Mollan *v.* Griffith, 3 Paige, R. 405.

ıas a right to stand in the place of the mortgagee. Can the ɔurchaser hold against the legatee? It would seem that if the egatee has, by a cession of actions, become regularly subro-ɡated to the mortgagee, he may hold against the purchaser. The purchaser prevails against the heir, in virtue of his legal estate, but the estate of the mortgagee, to which the legatee is subrogated, is prior in time.[1]

The right of the legatee to hold against the purchaser, seems to depend in this case upon the fact that he is legally subro-ɡated to the mortgagee and represents him, so that, in truth, the question is merely one of priority. If the legatee has a mere equity, that it would seem could not prevail against a purchaser without notice, who relied upon the authority given to the executor by the will.

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[1] Culpepper *v.* Aston, 2 Cases in Chancery, 115.

CHAPTER X.

SUBROGATION IN FAVOR OF A STRANGER.

It was a subject of much discussion at the civil law, whether it was necessary for a surety to stipulate for subrogation with the debtor and procure his consent, or whether it was sufficient for the surety to stipulate with the creditor alone for that purpose. On the one hand it was said, that though it is true that where there is a change in the person of a creditor, and a stranger is to become the new creditor, the debtor is principally interested in the change, yet the surety is not such a stranger that the accepting of a surety implies a request to the surety on the part of the debtor to pay the debt for him, and that, therefore, there is no necessity to require anew his consent to subrogation; that it is reasonable that the surety should have the privilege of discharging himself by payment of the creditor, and that in doing so, he should stipulate for subrogation to his rights. On the other hand, it was said that though it is true that the surety has become such at the implied request of the debtor, the law gives him the *actio mandati*, and not a right to subrogation unless it is expressly stipulated for, and that that stipulation ought to be made with the debtor, who has the principal interest in the matter; that the creditor who has no other intention than to recover payment, thereby extinguishes the debt, and that he cannot transfer to another a right which is extinguished.[1] But it has generally, under the civil law, been considered sufficient, in conformity with usage, for the surety to stipulate for subrogation with the creditor, as the surety cannot, in any just sense, be regarded as a stranger, and his

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[1] Renussons, Ch. 6, No. 31.

rights arise from his liability as a debtor to the creditor himself.

By the civil law, a stranger might, of his own proper motion, pay the amount due from a debtor, without the authority of the debtor himself. This was the case where payment was made on the account of the debtor, that is for the purpose of discharging him, and to extinguish the debt. It is otherwise, when it is the purpose of the stranger to make payment on his own account, and be subrogated in place of the creditor, to acquire his debt and exercise his rights.[1] In that case, he has no right to offer payment on his own account, for the purpose of recovering from the creditor a cession of actions and subrogation. He has, then, no right to offer payment without the authority and express consent of the debtor, and the creditor may with justice refuse to receive the payment which is offered to him. A stranger is permitted to pay another's debt, it is said, from motives of humanity, to benefit the debtor, and he therefore ought not to be admitted to do this for his own advantage, and for the purpose of acquiring the rights of the creditor. It would be unreasonable to give a stranger the right, without the consent of the debtor, to offer payment of the debt to the creditor merely, that he may be subrogated in place of the creditor and acquire his rights. This would be to coerce a creditor to sell his debt contrary to his mind. A creditor cannot be constrained to receive payment of his debt except by the debtor, or on account of the debtor, or from a creditor of the debtor himself, or by a purchaser from the debtor in possession of the property charged. He cannot be constrained by a stranger who intends to make payment on his own account and acquire the debt and be subrogated in the place of the creditor. To be admitted to this right, the stranger must acquire the authority and consent of the debtor. Therefore if a stranger makes payment on his own account without the consent of the debtor, although the creditor has been content to receive payment of the debt, the payment will operate only to liberate the debtor, and the stranger, who may have paid for the debtor, will not be

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[1] Renussons, Ch. 10, No. 4.

subrogated to the rights of the creditor, but will have only a personal action to be reimbursed for that which he has paid for the advantage of the debtor. He can, at the civil law, maintain the action *negotiorum gestorum*, to recover the money which he has paid. So if a stranger has made payment of the debt, having the authority and consent of the debtor so to do, this payment will operate only to discharge the debtor. The stranger will have indeed an action to be indemnified for what he has paid for the debtor by his request, and also for his services, but he cannot claim in that case subrogation to the rights of the creditor. The debtor, in giving another authority to make payment for him, has only the intention to procure his own discharge from the debt, and to extinguish all liability thereon, and he who has made payment, has had no intention to acquire the rights of the creditor, nor to acquire his debt, since he has made no stipulation to that effect with the debtor. His only claim upon the debtor is in virtue of the mandate and authority. He has an action for his indemnity, but can assert no claim to the rights of the creditor which have been discharged and extinguished by payment. But if the debtor who has given his authority and consent to a stranger to make payment for him, has agreed that he shall be subrogated to the rights of the creditor; the stranger who afterwards makes the payment will be subrogated if the payment is made with the express declaration of the subrogation in the release made by the creditor.

A stranger who desires to be subrogated to the rights of a creditor, ought to stipulate expressly for subrogation; and this may be made in different modes. For example, says Renussons,[1] Mœvius, a stranger, lends money to Titius to pay a debt of 4,000*l.*, which he owes to Sempronius, by an obligation made with a notary; and Mœvius, who lends his money, desires to be subrogated to the rights and securities of Sempronius. Mœvius may, by one and the same notarial act, lend the money to Titius, the debtor, and, at the same time, make payment to Sempronius, who will hold Titius discharged. The

[1] Renussons, Ch. 10, No. 13.

act must state that Sempronius has received the sum of 4,000*l.* from Titius, who was debtor by a former act, and that the same has been lent and furnished by Mœvius, and that Titius, who is present, consents that Mœvius shall remain subrogated to the rights and securities of Sempronius. Or this may be done at different times by two separate acts. For example, Mœvius, who is a stranger, may pass the first act by which he lends to Titius the sum of 4,000*l.*, and promises to pay the amount in discharge of Sempronius to whom he was indebted by a former act, and stipulate that in making payment to Sempronius, he shall remain subrogated to his rights and securities. He is, therefore, to make payment to Sempronius and receive from him a discharge, in which he must declare that he makes payment for and in discharge of Titius, who had agreed to subrogation to him by a former act.

Or if Mœvius, who is bound to pay the 4,000*l.* to Sempronius in discharge of Titius, cannot make payment to him because he is not present or for some other cause, he may deliver the money to an agent with a power of attorney, authorizing him to make payment to Sempronius, the creditor, in discharge of Titius. And in this case, the attorney making payment must cause it to be stated in the writing of discharge that he makes payment as attorney for Mœvius, for, and in discharge of the sum of 4,000*l.*, in pursuance and execution of a former act by which Titius had consented to subrogation in favor of Mœvius. But if the attorney does not execute the mandate of Mœvius, but dissipates or embezzles the funds, or if he pays on his own account and not as attorney, Mœvius will not be subrogated. He will only have the action *mandati* to recover the money which he had placed in the hands of his attorney.

A person who has lent money to a debtor for the purpose of discharging a debt, may, as we have seen, be subrogated by the debtor to the creditor's rights, and if the party who has agreed to advance the money for the purpose, employs it himself in paying the debt and discharging the incumbrance on land given for its security, he is not to be regarded as a volunteer. He is not, after such an agreement with the debtor, a stranger in relation to the debt, but may in equity be entitled to the benefit of

the security which he has satisfied, with the expectation of receiving a new mortgage or lien upon the land for the money paid.

A mortgaged land to B for a debt of about $2,000, A being indebted to C for about $20,000. C recovered judgment for this amount, and levied on the land subject to the mortgage.[1] Afterwards C paid the debt thus secured by mortgage, and caused the mortgage deed to be discharged of record. The plaintiff had lent the money to C, to enable him to redeem the mortgage; C gave his note to the plaintiff for the amount of the money thus lent, and relying upon the validity of the title acquired by the levy of execution in his favor, gave him a mortgage of the same land to secure the payment of the note, instead of procuring a transfer of the mortgage from B, to the lender of the money on payment. The levy of the execution for the debt of $20,000 having been adjudged to be defective, the plaintiff sought relief either by repayment of the money advanced to redeem the mortgage, or by a surrender of the lands themselves. The court were of opinion that the payment by C, made with money borrowed from the plaintiff, of the mortgage to which the land which had been levied upon was subject was not voluntary, and that after the levy of execution was decided to be void, the plaintiff was entitled to equitable relief. The agreement between the debtor and the party who advanced the money, gave him an equitable claim to subrogation, which should have been regularly made by a transfer of the mortgage on payment.

A factor of the debtor who pays the debt, is presumed to have acted as agent for the debtor, and, therefore, by payment, to have extinguished the debt. He cannot, by payment, acquire a right to legal subrogation, and if there is no agreement for express subrogation, he is regarded as a mere volunteer.

Where the factor of a person who was indebted with the defendants on two promissory notes, gave his acceptance for drafts which, when paid, were to be in full for the amount due on the notes, and the acceptances were duly paid to the creditor (the Carrollton Bank), and the notes delivered up by the

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[1] Paine *v.* Hathaway, 3 Vermont, R. 212.

bank to the factor, and subsequently transferred by him to the plaintiff who claimed the payment of the notes from the defendant, under the allegation that, on payment of the drafts by the factor, the notes were delivered to him for the express purpose that he might be subrogated to the rights of the bank, and enjoy the same recourse which the bank might have exercised against all the parties to the notes until their final payment, it was held that the factor was not entitled to be subrogated. There was no express conventional subrogation, and there was no legal subrogation, because the whole transaction consisted in the payment of the debt by one who from his relation must be presumed to have extinguished the debt, and not to have had the design to keep it on foot against the principal or his surety.[1]

If the party in this case did not act as representing the debtor, he was a volunteer, and whatever recourse he may have had against the debtor, he could not, as a stranger to the debt, be subrogated by law. If he advanced his own money to pay the debt, at the request, express or implied, of the debtor, he might have been expressly subrogated by him with effect, on the same principle that the lender is subrogated who pays the creditor on an agreement with the debtor for subrogation.

Although the law gives to a debtor the privilege of procuring another to be substituted in the place of the creditor who is then bound to receive the amount due, subrogation does not in such a case take place by operation of law.

It was held in Louisiana,[2] that a party who furnishes money for the payment of a debt, does not acquire the rights of a creditor who is thus paid. The legal claim belongs not to any one who may pay a debt, but only to him who, being bound for it, discharges it. A stranger who pays a debt, if he shows no conventional subrogation, cannot claim the benefit of legal subrogation.

The purchaser of land seized and exposed to sale on an execution issued upon a judgment by which the debt is discharged, is not subrogated to the rights of the judgment cred-

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[1] Harrison *v.* Bisland, 5 Robinson, R. 204.

[2] Nolte & Co. *v.* Their Creditors, 7 Martin, R., N. S. 602.

itor. Such an act, said the court,[1] cannot be distinguished from payment made to the creditor without a sale of the debtor's property, by a person not having an interest to discharge the debt. Subrogation does not arise in favor of a purchaser on a forced sale.

Where a purchaser executed a mortgage on property purchased, to secure the payment of a bill drawn in favor of the vendor for the price, one Toledano, a third person, and the acceptor of the bill paid it at maturity, without any assignment from the creditor, and it was held that the mortgage ceased to have any operation against other mortgage creditors.[2] If it was intended that Toledano the acceptor, it was said, should have the benefit of this mortgage on paying the draft, there should have been a special agreement to that effect in the notarial act. Whatever secret equities may have existed as between the parties, as the public were to act upon the record as it stands, the party, as against subsequent mortgages, was to be regarded as paying his own debt. If the acceptor paid the draft from his own funds, he might be regarded as a new creditor making a loan to the debtor for the purpose of being subrogated to the former creditor, if such an intention was manifested, but this could only be by express subrogation. On a loan of money to pay off an existing debt to another creditor, it depends upon the agreement whether the lender is to be substituted to a former debt and its securities. There is no equity between the parties as on a contract of suretyship from which a legal right to subrogation could result.

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[1] Childress *v.* Allen, 3 Louisiana, R. 477.

[2] Salaun *v.* Realf, 4 La. Ann. R. 576.

CHAPTER XI.

OF THE NATURE OF THE RIGHTS ACQUIRED BY SUBROGATION.

When property is specifically bound as security for a debt in favor of a creditor, the surety on payment acquires by subrogation, on a cession of actions or a decree of court, the same right, and may exercise the same privileges as were enjoyed by the creditor himself; therefore, there can be no conveyance to a purchaser which will divest the right of the surety.

In a case heard in the English Court of Chancery,[1] where in consideration of a sum of money advanced by Bowker to Bull, the latter, together with his wife and daughter, conveyed certain land in mortgage to Bowker, the deed to whom contained a power of sale by him, in case of default of payment of the sum secured or the interest. There was also a proviso, that as between Bull on the one hand, and his wife and daughters on the other hand, Bull should be primarily liable to the payment of the money lent, and also that the hereditaments of which he was seised in fee should be primarily liable to the same. Bowker afterwards obtained a mortgage from Bull for a further sum, and a question was whether he was entitled to consider himself as mortgagee of the land for the latter sum also. The Vice Chancellor, Lord Cranworth, held that the mortgagee, Bowker, must be postponed to the children of Bull, who, according to what appeared on the face of the deed, were mere sureties for the father. "It is quite clear," said the Vice-Chancellor, "that a surety, paying off the debt of his principal, is entitled to a transfer of all the securities held by the creditor,

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[1] Bowker *v.* Bull, 15 Jurist. 4, 20 Law Journal, 47.

in order that he may make them available against the debtor as the original creditor might have done. On these grounds, he said, the daughters were certainly entitled, on paying off the first mortgage, to have all the securities made over to them, in order to enable them to reimburse themselves out of the father's separate property comprised in that deed, whatever portion of the mortgage debt they might have been obliged to pay; and that this was a demand certainly prior in point of date to the last mortgage. It was urged at the bar, on behalf of Bowker, that this right of a surety is only a potential equity, which, though it may be assented to by the party himself, cannot bind third persons; but I cannot, said his Lordship, agree to this. The equity gives to the surety a right to call for the transfer of the securities, and so binds those securities, into whatever hands they may come, with notices of the change.

Perhaps in a case like this, where the foundation of the claim for relief was not a legal right, but a mere equity, the securities would only be bound in the hands of a party to whom they came with notice; but where a party has been subrogated by a cession of actions to the legal rights of the creditor, or where, on payment by the surety, subrogation takes effect by operation of law, the surety stands in the place of the creditor, clothed with the legal right, and must prevail even against a later incumbrancer with notice.

The mortgagee, it was held, could only make his subsequent security available by redeeming the securities in the ordinary way.

But there is a distinction between cases where the security is subject to a general charge only in favor of the creditor, and those cases where the charge on the security is specific, and the surety is regarded as having an absolute lien upon it for his indemnity.

A surety, who had paid and satisfied a judgment recovered against the principal, brought his bill claiming to be subrogated to the rights of the judgment creditor, and the benefit of the judgment against a purchaser of personal property.[1] The

[1] Dozier *v.* Lewis, 27 Mississippi, R. 679.

court held that though the surety, paying the debt of his principal, was entitled to the benefit of all the security and the lien of the creditor, he could not extend the lien or security beyond their effect and operation in the hands of the creditor; and that a judgment conferred a mere right of satisfaction out of any property of the defendant then held or subsequently acquired, which operated as a charge upon the property from its date and empowered the creditor to have it taken in execution. As against a purchaser, this right depends upon the fact that the property shall be actually taken in execution; and if that is never done, the creditor's claim is nothing more than a debt of record. A purchaser would be entitled to hold the property. A surety had no right to claim that such a purchaser is to be held as a trustee and accountable for the value of the property. The judgment creditor had no claim upon the property as a trust, and the surety, seeking to be subrogated to the rights of the creditor, would, therefore, acquire no right to the judgment as a lien, because the creditor had none. In this case the charge was not specific, and, therefore, the equity was indeed merely potential, and not absolute as it would have been if the property had been actually taken in execution.

When a surety is expressly subrogated on payment by the creditor to his rights, he may exercise all the legal remedies of such creditor as assignee.[1] Norton and Soule had both signed a joint and several note to one Abbot for the proper debt of Soule only. Norton being in fact only his surety, though not named in that character in the note, Soule, to secure the payment of the debt, mortgaged his land to Abbot, the deed to be void on his payment of the money. Soule being afterwards sued for the balance, was taken in execution and discharged upon taking the poor debtor's oath. After this, Norton agreed with the creditor to pay him the amount of his judgment if he would assign that and the execution to him, which was done accordingly. Having also obtained an assignment of the mortgage, he brought his writ of entry as assignee to have possession of the land against Soule who had always remained

[1] Norton *v.* Soule, 2 Greenleaf, R. 341.

in possession. It was contended that the payment made by Norton must be considered as having satisfied and extinguished the original debt, and of course extinguished the mortgage and completely defeated the estate claimed in virtue of it. The court were of opinion that the payment by the surety had not, necessarily, the effect to extinguish the original demand, and sustained the action. The decision which gave the surety, to whom the mortgage had been assigned, an action at law as subrogated to the creditor, may be regarded as conformable to the real equity of the case and the intention of the parties.

The right of a surety to be subrogated to an equitable lien of a creditor, would seem to rest upon the same ground as in the case of a legal charge upon the land by mortgage or otherwise. Such a lien exists on a sale of land in favor of the vendor for the purchase-money. It was held in a case [1] where the sureties of a purchaser had made payment for the land which the vendor had agreed to convey on receiving the purchase-money, that the sureties were entitled to the security.

Where the creditors had a right, in the first instance, to enforce payment either by resorting to the reserved lien on the land or to the sureties of the purchaser, it was held that as they had elected to make their debt out of the sureties, these would, as against the purchaser, be equitably entitled to enforce the lien for reimbursing the sum from which they would have been exonerated, had the creditors, as in conscience they ought, said the court, resorted to that instead of the personal security.[2]

If the law, from motives of policy or otherwise, gives the creditor the right of affirming a sale which constitutes the consideration of a note signed by a surety, or rescinding it at his option, the privilege which the law gives to the creditor, may be exercised by the surety who has made payment. Where, as in Louisiana, the creditor has, in certain circumstances, a right to require a rescission of a sale on payment by the surety, he is subrogated to the vendor's right, and may require a rescission of the sale.

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[1] Kleisen *v.* Scott, 6 Dana, R. 137.

[2] Burk *v.* Chrismah, 3 B. Monroe, R. 50.

"The rescission of the sale," said Martin, J.,[1] "is a means of securing the payment which the vendor, the creditor of the price, has; this right is an accessory of the claim, and would pass by the sale or transfer of it." "The subrogation has, in our opinion," he adds, "the same effect."

It is observable, that in this case the action was not in the name of the original creditor, but in the name of the indorser. The plaintiff claimed the right of rescission as a consequence of subrogation. The action, in the name of the assignee, was sustainable on the same principle as the action of ejectment in the name of the surety, who had acquired a right to be subrogated in the above case of Norton *v.* Soule. It was incident to the right gained by subrogation.

Where an indorser on notes given for the price of property purchased by the maker, is compelled to pay them, he will be subrogated to the right of the creditor to maintain an action against a subsequent purchaser of the property, to rescind the sale as simulated and fraudulent. The creditor might have attacked the sale because it was made while he was a creditor, and as the conditional liability of the indorser existed at the date of the sale, it was just that when he subsequently was compelled to pay, he should be considered as standing in the place of the creditor and subrogated to his right to maintain the action.[2]

In the State of Louisiana,[3] it is held that subrogation, whether legal or conventional, invests the person in whose favor it takes place, with all the rights, actions, privileges, and mortgages of the creditor against his debtor. One who has paid the debt due to a plaintiff and been expressly subrogated to his rights, may take out execution against the defendant. Such an express subrogation is equivalent to an authority to use the plaintiff's name in prosecuting the suit for the recovery of the debt. Whenever a party has become subrogated to the creditor's rights, it would seem that any action that is brought on a cause of action existing in behalf of the creditor before subro-

[1] Torregano *v.* Seguira's Syndec. 2 Martin, R., N. S. 162.
[2] Groves *v.* Steel, 2 La. Ann. R. 480.
[3] King *v.* Dwight, 3 Robinson, R. 2.

gation, must be in the name of the creditor except in peculiar circumstances; but the creditor's right of property, or his lien or interest in the security, passes to the party subrogated; therefore, every right incident to property may be exercised by him in the same manner and to the same extent as the creditor might have done before subrogation. He may sue in his own name for injuries done to the security. The effect of subrogation is to clothe him with the rights of an assignee.

Where, on payment by a surety, an express cession of actions is made to him by the creditor, there is no anomaly in regarding him as standing in the place of the creditor as an assignee. He is then clothed with the rights of the assignee, and may sustain such actions as are incident to a right of property thus acquired. When subrogation takes effect by operation of law, the law gives to it the effect of an assignment which may even be supposed, as in Pennsylvania.

The circumstance that a surety is a co-defendant with the principal in a judgment against them both, cannot, upon his paying it, preclude him from being subrogated so as to have the benefit of it for the purpose of obtaining payment from the principal or out of his property, and such a surety becomes by such payment subrogated to all prior liens, and to all the rights and securities of the creditor as if he were a purchaser, either against the principal debtor or his co-sureties.[1] The imaginary assignment made in such cases of the security, enables the surety to apply it by direction of the court, in a way to cast the burden on those who ought to bear it.[2]

In a case before the Supreme Court of the United States,[3] it was held to be an established rule of equity, to compel a creditor to assign the cause of action on payment by a surety, and thus to make an actual substitution of the sureties, so as to perfect their claim at law. This, the court said, fully affirmed the right to succeed to the legal standing of the principal, and after establishing that principle, it was going but one step further to consider that as done which the surety has a

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[1] Erb's Appeal, 2 Penrose & Watts, R. 296.

[2] Croft *v.* Moore, 9 Watts, 451.

[3] Lidderdale *v.* Robinson, 12 Wheaton, R. 594.

right to have done in his favor, and thus to sustain the substitution without an actual assignment.

The right acquired by a creditor in the security given for a debt, results from contract, and, together with his liability, may be qualified by the terms of the agreement. He may charge himself with various duties in regard to the security. He may bind himself, as mortgagee, to receive and account for the mesne profits of land, or he may, as bailee, assume all the duties and liabilities of an agent in disposing of personal property. As the law was originally understood, the equitable right of a surety being founded upon a cession of actions, depended upon an express contract. What is the nature of the right which the doctrine of subrogation by operation of law gives to the surety as a consequence of payment? The only legal contract which can be implied between the surety and his principal, is that of indemnity. The right of subrogation is merely an equity. It may be greatly for the advantage of the surety to resort to his principal for reimbursement, rather than as subrogated to the creditor to assume the liabilities which may result from the possession of the security. Does subrogation, by operation of law, necessarily transfer the security to the surety on payment by him? It seems impossible to give this effect to legal subrogation. On payment, the surety has an option to resort to his principal or to become substituted to the creditor's rights. Some act, therefore, is necessary, on the part of the surety, to manifest his election and to show his acceptance of the right which the law gives him. This has been repeatedly decided in the State of Pennsylvania, in regard to the bar of the statute of limitations which takes effect unless the surety does some act showing his intention to put himself in the place of the original creditor.[1]

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[1] Although, in the State of Pennsylvania, subrogation takes effect by operation of law in a proper case, some act seems to be necessary on the part of him who is entitled to it, to manifest his election to avail himself of this equitable right. The legal remedy of a surety having been lost in a case (Rittenhouse *v.* Levering, 6 Watts & Serg. R. 190), by reason of the bar of the statute of limitations, the surety claimed the equitable right of subrogation which was not within the operation of the statute, and only affected by the presumption of payment arising from lapse of time. The court held that where the surety has done no act before his claim is barred at law, mani-

If the surety, after payment, neither resorts to his action against his principal, nor takes any steps to be substituted to the creditor's rights, what then becomes of the creditor's lien? The creditor, being paid, has no further interest in the property. By his contract he is directly responsible only to the principal debtor, and he must deliver possession to him unless, at the time of payment by the surety, he asserts his right of subrogation. The very effect of payment is to restore the property, if personal, to the debtor, unless some act is done by the surety in assertion of his right, and this act must be shown to have been taken at the time of payment, just as a cession of actions to be effectual must be made at the time of payment.

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festing his intention to put himself in the place of the original creditor, and thereby subrogate himself to his rights, the remedy is only for money paid; that where he has omitted to bring suit in proper time, or to do some acts equivalent thereto, he cannot afterwards be subrogated to the rights of the creditor. "The error," said the court, "on this head, arises from the assumption that *ipso facto*, on payment of the money, the surety is subrogated to the rights of the creditor; whereas, the remedy is not *primâ facie* on the bond, but for money paid; although the surety may, if he chooses, invoke the aid of the equitable principle of subrogation." The court were of opinion that the right of sureties would be barred by analogy in equity, when the legal right was barred at law. In Fink *v.* Mahaffey, 8 Watts, R. 384, after the lapse of ten years, and when the legal remedy of the surety, who had been subjected to the payment of the debt, was barred by the statute of limitations, and after verdict against the surety in an action at law, application was made by the surety to the court to be substituted in the place of the plaintiff in the original judgment which he had paid, to enable him to recover it from the principal who was the surviving defendant. The court held that as the doctrine of subrogation was one of mere equity, it could not be enforced at the expense of a legal right.

The operation of the statute of limitations is to be considered in regard to the creditor's right of action, and also to the surety's right of recourse against his principal on payment, or to equitable relief by subrogation. If the creditor has commenced a suit against the surety before the time of limitation, but recovers judgment after that time, it may be said that the surety cannot be subrogated with effect to an action at law which is barred; but a court of equity would undoubtedly give relief to the surety, on the ground that the creditor's action against him was brought within the time of limitation. As against the principal, the equitable right of the surety would, by analogy to the claim at law originating in his favor by payment, be barred when the direct action was barred. Where subrogation takes effect by operation of law, some act may be necessary on the part of the surety to show his election as to the acceptance of subrogation at the time of payment, so as to preclude the claims of subsequent purchasers or incumbrancers; but as between the surety and his principal, it will be sufficient if that election is manifested at any time before the direct action in his favor is barred, for the equitable remedy will be barred in analogy to the bar at law.

The power of the creditor to transfer, ceases by payment. If the surety has afterwards any lien on the security, it must be on property in the hands of the debtor. This would seem to be impossible, because it passes to the debtor discharged of the creditor's lien by the act of payment, and the surety is subrogated, if at all, to a lien of the creditor.

Those cases in which it has been held that where the surety has omitted to bring suit in proper time, that is, within the time of limitation, he cannot afterwards be subrogated, are not to be understood as affirming that the surety has his election to be subrogated at any time before the bar takes effect, but merely as deciding that, as between the parties, the action for the debt is barred. But suppose that after the debt is paid by the surety, who at the time of payment declined to receive the security, the debtor, who has received possession, assigns it to a purchaser with notice, can the surety, as against the purchaser, claim within six years his right of subrogation? If so, the proprietary right is suspended in favor of an equitable lien which is contingent upon the election of the surety. Such, however, is not the character of a lien; without possession, it has no validity as against creditors or purchasers.

It may be that if the security remains in the hands of the parties, the surety will, in some cases also, be entitled to relief in equity; but if the creditor, to whom land has been mortgaged for the security of a debt, on receiving payment from a surety who then disclaims the right of subrogation, makes a new loan on a second mortgage of the same land, and the surety, on failing to recover from his principal, seeks relief in equity against the property in the hands of the creditor, he will, on principles of equity, be postponed to the mortgage on the new loan. By his disclaimer, the creditor has been induced to make a further loan, and the surety has lost his priority.

When subrogation is construed by courts to take effect by operation of law, this construction is made in reference to an agreement existing between contracting parties. In the contract of indebtedness, the surety is a debtor, and from the very nature of the case he can have no legal right under the contract. The law does not make payment by the surety equivalent to a

cession of actions, for that would be to change the scope of the contract. It merely provides that a formal agreement shall be unnecessary. The effect of the contract of suretyship between the parties is, that if payment shall be made by the surety, the principal debtor shall be liable to him in a proper action, and that he shall at his option have the right to sue in the name of the creditor, or have also the creditor's lien on the security given by the debtor. The law does not so change this contract as to make subrogation absolute on payment, but in effect it provides that the surety shall, on payment, have an optional right. The law, in providing for subrogation independently of any act of the creditor, contemplates some act by the debtor manifesting his option at the time when the interest of the creditor is about to cease by payment. At the time, therefore, when a cession of actions would be effectual, if necessary, some act of acceptance on the part of the surety is required to establish his legal right. Subrogation, whether express or by operation of law, requires the agreement and consent of the surety. Practically, then, there is little difference between the two kinds of subrogation, except that the law presumes the cession of actions when it takes effect by operation of law. Under each system, the equitable lien of the creditor can only pass to the surety when he determines his election and becomes a party to subrogation. The surety has his election between subrogation and a direct recourse to the principal on payment, and the election to be subrogated must be made at the time of payment. Subrogation by operation of law cannot, it would seem, take effect on a presumed acceptance by the surety, a presumption requiring a disclaimer to prevent that effect. This would be to substitute a new contract, a contract of bailment or agency, with uncertain advantages, and, perhaps, onerous duties for an equity which is to be called into action by the surety when subjected to liability.

Under each system, the right which passes to the surety is a mere lien. Being such, the surety has only that right in the property which the creditor has in a pledge, and it can only be made the subject of a set off, when on a final decree of a court of equity the avails of the property are to be disposed of on a

settlement of all demands between the parties, as in a case where the debtor was permitted to set off a debt due from the surety to him on another account.[1]

It has been held in Pennsylvania,[2] that a creditor of the surety, who has a lien by a judgment on the property of his debtor, acquires no lien thereby on the property to which the latter has been subrogated by law. The interest of the surety is regarded as a mere lien, and his right is such as may at any time be divested by the debtor for whom he is bound, or has made payment; and yet, in this same case, an assignment to a creditor of the surety was held to be effectual. It might be held such as an agreement to transfer the amount due from the debtor to the surety, or there might properly be an assignment of the pledge as a lien. When a surety has paid a debt for which he was bound in that character, an assignment of the security may be made to him by the debtor in satisfaction of his consequent liabilities, and the surety will thereby acquire an absolute right to the property; but no such right is acquired by an assignment from the creditor, nor can it result from that imaginary assignment which the law supposes, on payment by the surety. Nothing passes in such a case but a lien.

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[1] Neff *v.* Miller, 8 Barr, 347.

[2] Harrisburgh Bank *v.* Gorman, 3 Barr, R. 300.

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