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Mortgages-Subrogation-Volunteer

MORTGAGES—SUBROGATION—VOLUNTEER.—Plaintiff bank advanced money to discharge a mortgage on certain land at the request of the mortgagor. Such land was also subject to a dower charge, subordinate to the mortgage by prior agreement. A new mortgage was executed to the plaintiff bank, and contemporaneous therewith the mortgagor agreed to procure a quitclaim deed or postponement of the lien of the dower charge in favor of the plaintiff bank. Subsequent attempts by the mortgagor to perform this agreement were unavailing. The holders of the dower charge obtained a judgment on their claim and for the satisfaction of which seek to have the land sold. This is a suit by the plaintiff bank to restrain such sale, and a prayer that it be subrogated to the position of the mortgagee whose lien had been discharged by the plaintiff's advances. From the lower court's dismissal of the bill, plaintiff appeals. Held: Affirmed. Subrogation will not be decreed for a mere volunteer. *Union Joint Stock Land Bank of Detroit v. Byers* (1939), 100 F. (2d) 82.

Subrogation is said to be a remedial doctrine based on considerations of equity and good conscience applied broadly, as may best serve the purposes of natural reason and justice.[1]

Being a concept of such variable nature, it is obviously futile to attempt a specific enumeration of the instances wherein the doctrine will be invoked. However, the restrictions imposed on its applicability admit of being catalogued.

There must be a full and complete payment of the debt due the creditor to whose position the payor seeks to be subrogated.[2] One primarily obligated

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San Francisco Shopping News Co. v. South San Francisco (1934), 69 F. (2d) 879, writ of certiorari denied in 293 U. S. 606, 55 S. Ct. 122, 79 L. ed. 697.

11 Willis, Constitutional Law, 502.

12 Cooley, Constitutional Limitations (8th ed.), 968.

13 Near v. Minnesota (1930), 283 U. S. 697, 51 S. Ct. 625; Grosjean v. American Press Co. (1936), 297 U. S. 233, 56 S. Ct. 444.

1 Davis v. Schlemmer (1897), 150 Ind. 472, 50 N. E. 373.

2 Vert v. Voss (1881), 74 Ind. 565.

to pay is not entitled to subrogation.[3] Clean hands,[4] absence of laches,[5] and non-existence of the possibility of prejudice to the rights of intervening innocent third parties[6] are, of course, necessary conditions upon the allowance of subrogation. The limitation that subrogation will not be accorded one who has paid the debt of another as a "mere volunteer"[7] and the lack of a definite connotation of the word "volunteer" always creates uncertainty as to the outcome of a subrogation case. It may be said generally that the modern tendency is to limit the conceptual confines of the term to those of the expression "officious intermeddlers", as used in the field of quasi-contracts.[8] The growth and expansion of the doctrine of subrogation resulting from this trend to restrict the meaning of the word, "volunteer", impels a *caveat* against any acceptance, as being exclusive, of the following enumerated type situations wherein the courts have held or declined to hold the payor a "mere volunteer".

It is universally recognized that where one pays the debt of another in the performance of a legal duty imposed by contract or the rules of law,[9] or pays under a practical compulsion of protecting his own interests,[10] he is not a volunteer. On the other hand, the law is just as clear that where a stranger to the obligation pays and such payment was unjustified by the circumstances under which it occurred, he is a volunteer.[11] The intermediate factual set-ups strike the discordant notes in the cases.

Most courts agree that subrogation should be allowed one whose property is wrongfully used to discharge a lien.[12]

Where the lender receives new security that proves defective, a majority of jurisdictions will not invoke the volunteer rule to inhibit subrogation.[13] However, where the new security is what it purports to be, and the lender apparently intended to rely thereon, his rights are confined to the security

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[3] Dill v. Voss (1883), 94 Ind. 590.

[4] Dixon v. Thompson (1912), 52 Ind. App. 560, 98 N. E. 738.

[5] Thomas v. Stewart (1888), 117 Ind. 50, 18 N. E. 505, 1 L. R. A. 715.

[6] Coonrod v. Kelly (1902), 119 Fed. 841.

[7] The principle that "equity will not aid a mere volunteer" has a double meaning that is sometimes confusing. The meaning it has as applied to situations other than subrogation cases is that equity will never decree specific performance of a voluntary undertaking or promise. Jefferys v. Jefferys (1847), Craig & Ph. 139, 41 Eng. Repr. 443.

[8] In this instance, it is of interest to note that the American Law Institute in its *Restatement of Restitution* devotes a section to subrogation, (Sec. 162), treating it as a method of restitution for unjust enrichment. Also see Note (1913), 26 Harvard L. Rev. 261 and Note (1933), 31 Mich. L. Rev. 826.

[9] Jones v. Tincher (1860), 15 Ind. 308. There is a split of authority as to whether a moral duty to pay entitles the payor to subrogation. See Vance v. Atherton (1934), 252 Ky. 591, 67 S. W. (2d) 968, allowing subrogation, and Meier v. Planer (N. J. Equity, 1931), 152 A. 246, denying subrogation.

[10] Arnold v. Green (1889), 116 N. Y. 566, 23 N. E. 1. Bacher v. Pyne (1892), 130 Ind. 288, 30 N. E. 21. The interest which the payor sought to protect need not be a property interest. Avery v. American Surety Co. (1930), 146 Misc. 224, 260 N. Y. S. 828. Where one pays mistakenly thinking that he is protecting his interests, he is entitled to subrogation. Spaulding v. Harvey (1891), 129 Ind. 106, 28 N. E. 323.

[11] Coontoocoak Fire Precinct v. Hopkinton (1902), 71 N. H. 574, 53 A. 797.

[12] Pittsburgh Coal Co. v. Kerr (1917), 220 N. Y. 137, 115 N. E. 465.

[13] Shaw v. Meyer-Kiser Bank (1927), 199 Ind. 687, 156 N. E. 552.

received.[14] At first blush it would appear that the instant case falls under this qualification. On further reflection, though, it must be presumed that the plaintiff bank would not have advanced the funds to pay off the prior mortgage but for the agreement of the mortgagor to secure the subordination of the dower charge. Therefore, it cannot be said that the plaintiff was content to rely solely on the new security received.

Where one advances money in ignorance of a lien junior to the one for the discharge of which the money was loaned, the weight of authority will not apply the volunteer rule to such lender.[15] The cases are about evenly divided as respects allowing subrogation to the lender if he was negligent in not noting the record of the junior incumbrance.[16] It is submitted that those cases denying subrogation in such a situation are unsound. The junior lienor's rights are not impaired when he is restored to his original position and he has no recognizable right to rise upon another's mistake. In the instant case the lender had actual knowledge of the junior incumbrance when he advanced the money, so he can not avoid the volunteer rule by having his case put under this mistake category.

Where one is induced to loan money to discharge a mortgage by the fraud, duress, undue influence, or other inequitable conduct of the mortgagor, the better reasoned cases do not designate such person a volunteer.[17] Could it not be said with as much validity that a breach of contract by the mortgagor as in the case under review is such wrongful conduct on the part of the mortgagor as to take the lender out of the volunteer class?

The instant case held that where one advances money at the request of the mortgagor for the purpose of paying off the mortgagee to which the lender wishes to be subrogated, and it is so applied, such person is a mere volunteer. The court asserted that subrogation is to be given only to one "who had a legal or a moral duty to pay." It is submitted that this crystallization of the principle that subrogation is a doctrine founded in natural reason and justice to be accorded at the discretion of the court is not compatible with currently prevailing economic thought. A court that has its judicial ear to the ground of the modern business man's conception of commercial expediency will often do violence to established legal principles in order to render decisions favorable to money lenders, thereby facilitating credit transactions. This court in the instant case, by according to the holders of the dower charge the windfall of their becoming first lien holders at the expense of the one who advanced funds to the mortgagor to prevent his being foreclosed on, seemed to distort established legal rules (principles of the law of unjust enrichment) in order to bite the hand that feeds our commercial machinery.

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[14] Webber v. Frye (1925), 199 Iowa 448, 202 N. W. 1; Copen v. Garrison (1906), 193 Mo. 335, 92 S. W. 368.

[15] Fowler, Guardian, v. Maus (1894), 141 Ind. 47, 40 N. E. 56.

[16] Allowing subrogation—Prestridge v. Lazor (1923), 132 Miss. 168, 95 S. 837; Wilson v. Kimball (1853), 27 N. H. 300; Williams v. Libby (1919), 118 Me. 80, 105 A. 855. Disallowing—Strastny v. Pease (1904), 124 Iowa 587, 100 N. W. 482; Kuhn v. Nat'l Bank (1906), 74 Kans. 456, 87 P. 551.

[17] Sidener v. Pavey (1881), 77 Ind. 241; Barnett v. Griffith (1876), 27 N. J. Eq. 201.

Fortunately, the decision is only representative of the holdings in a rapidly decreasing minority of jurisdictions.[18] J. M. C.