Mortgages-Subrogation-Volunteer

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Banking and Finance Law Commons, and the Housing Law Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol14/iss5/5

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
burden both the property owners and the city. Both had a duty to prevent fire hazards and to maintain adequate sanitation standards. The ordinance might have been upheld, then, as a reasonable exercise of the police power. Furthermore, one of the main purposes of the religious guaranties in the Constitution was the prevention of religious persecution. Although some restraint was imposed on individual rights, it scarcely seems that there was a denial of them.

Nevertheless, although individual actions must conform to a certain degree to the standards set to govern the conduct of society generally, the Supreme Court evidently felt that ordinances of this kind were too fraught with the possibility of destroying personal liberty. By protecting circulation as well as publication and by including leaflets along with newspapers and periodicals the instant case is a further extension of the great protection accorded by the Constitution to the freedom of religion, speech, and the press. The Court is loath to recognize a social interest to justify any regulation in the direction of censorship.

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. 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. One primarily obligated


11 Willis, Constitutional Law, 502.
12 Cooley, Constitutional Limitations (8th ed.), 968.
14 Davis v. Schlemmer (1897), 150 Ind. 472, 50 N. E. 373.
15 Vert v. Voss (1881), 74 Ind. 565.
to pay is not entitled to subrogation. Clean hands, absence of laches, and non-existence of the possibility of prejudice to the rights of intervening innocent third parties 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" 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. 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, or pays under a practical compulsion of protecting his own interests, 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. 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. Where the lender receives new security that proves defective, a majority of jurisdictions will not invoke the volunteer rule to inhibit subrogation. 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

---

3 Dill v. Voss (1883), 94 Ind. 590.
5 Thomas v. Stewart (1888), 117 Ind. 50, 18 N. E. 505, 1 L. R. A. 715.
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.
13 Shaw v. Meyer-Kiser Bank (1927), 199 Ind. 687, 156 N. E. 552.
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. 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. 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. 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.

14. Webber v. Frye (1925), 199 Iowa 448, 202 N. W. 1; Copen v. Garrison (1906), 193 Mo. 335, 92 S. W. 368.
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.\(^{18}\)

**Promoters' Contracts—Ratification.**—Suit to recover a commission for services rendered in the reorganization and refinancing of Indianapolis Blue Print Co., an Indiana corporation, on the theory that plaintiffs had a contract with the president of that company which defendant had impliedly adopted and ratified after its incorporation. The promoters had agreed to plaintiffs' request for a fee of ten percent of the capital obtained. Plaintiffs also performed the part of the agreement which required them to open a set of books and establish an accounting system for the new corporation (defendant). Held. A corporation may make a promoter's contract its own in the same manner it might itself enter into a contract of a similar nature as one of the original contracting parties, which presupposes an implied ratification in some situations. *Indianapolis Blue Print and Manufacturing Co. v. John J. Kennedy* (Ind. 1939), 19 N. E. (2d) 554.

The uniformity with which American courts display liberality in allowing recovery on promoter's contracts is not reflected in the reasoning upon which the results have been reached.\(^{1}\) Uniformity in the latter respect extends no farther than the obvious conclusion that a promoter's contract is not a corporate obligation of its own force.\(^{2}\) Liability of the corporation and its ability to enforce must be based on a charter or statutory provision which has been properly complied with\(^{3}\) or on some act of the corporation after it is

---


The state of the law in Indiana on this point is unsettled. Several cases hold that the mere loaning of money to a mortgagor to discharge an incumbrance without more will not entitle the lender to subrogation. McClure v. Andrews (1879), 68 Ind. 97; Heiny v. Lontz (1896), 147 Ind. 417, 46 N. E. 465. There is a strong dictum in a recent case that would indicate that Indiana is in accord with the majority view. Kozanjieff v. Petroff (1939), 19 N. E. (2d) 563. Also see Mishawaka-St. Joseph L. & T. Co. v. Neu (1935), 209 Ind. 433, 196 N. E. 85; Warford v. Hankins (1898), 150 Ind. 489, 50 N. E. 468.

Where there is an agreement for subrogation (called "conventional subrogation") with either the creditor, Board of Commissioners of Bartholomew County v. Jameson (1882), 86 Ind. 154, or the debtor, American Nat'l Bank v. Holsen (1923), 331 Ill. 662, 163 N. E. 448, subrogation will be allowed notwithstanding the volunteer character of the payor.

\(^{1}\) See 49 A. L. R. 673 (1927), 17 A. L. R. 452 (1922), Liability of Corporations on Contracts of Promoter.

\(^{2}\) Since a contract requires two competent parties, and parties are not competent within the meaning of this principle unless they are in being, the corporation can not contract as such until it has at least a *de facto* existence. 1 Fletcher, Cyclopedia of Corporations, sec. 205.