SUBROGATION

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CHAPTER I
SUBROGATION IN GENERAL

1. Origin.

To the Romans (Giorgi, "Teorias de las Obligaciones," Vol. VII, p. 176) we owe the doctrine of subrogation, for it is a creation of the Civil Law (Durante *vs.* Eanacco, 65 N. Y. App. Div., 435); in fact it is one of the most beautiful features of that system (Enders *vs.* Brunc, 4 Rand (Va.), 438). But Paulo and Ulpiano failed to give it that perfection as we have it to-day. This doctrine is founded upon equity and justice (37 Cyc., 365). For this reason it found many a master mind, not only in its native home, but also in foreign lands, ready to retouch the little imperfections as he took it from the old Romans. Seeing the great justice and equity enunciated by this doctrine, the common law countries, one by one, adopt and make it their own.

2. Definition.

The word "subrogation" may be applied to both persons and things. When it is applied to persons, we call it "subrogacion personal." It is "subrogacion real" when applied to things. "Subrogacion personal" may be either the substitution of a third person in the place of a debtor by assuming the obligations of the latter, or the substitution of *third person in the place of a creditor by acquiring his rights as such*. The latter one is the technical subrogation, and it is the one that concerns us in this work.

Subrogation transfers to the subrogated the credit with the rights annexed to it, either against the debtor or against third parties, be they sureties or holders of mortgages (Civil Code, Article 1212). It is then the substitution of another person in the place of a creditor so that the person in whose favor it is excercised succeeds to the rights of the creditor in relation to the debt (37 Cyc., 363). Viso defines it as the transmission made to a person of the credits, rigbts and actions which one has against another, the obligation of the debtor remaining unimpaired (Viso, "Derecho Civil," Vol. III, p. 95). More broadly speaking, it is the substitution of one person in the place of another, whether as creditor or as the possessor of any other rightful claim. The substitute is put in all respects in the place of the party to whose rights he is subrogated, subject only to a very narrow limitation.

3. Nature.

The Civil Code considers the substitution of a third person in the place of a creditor as novation (See Spanish Civil Code, Book IV, Title I, Chapter IV, Section 6; 7 Giorgi, 217). With this difficulty in view, we propose to discuss "Subrogation" properly so called in this work. This juridical subject, very appropriately called "pago con subrogacion" by an Italian writer, is one of the most singular, and one of

the most difficult for theoretical writers to handle; for, although it has some of the natures of novation, assignment of credit, and payment, nevertheless it refuses to be governed even by their elementary rules. It is different from novation, because in novation the obligation is extinguished wholly, and another new and distinct obligation take its place (8, Manresa, 436); from assignment of credit, because in assignment, what takes place is a mere transfer of the credit (8, Manresa, 436); from payment, because the obligation is totally extinguished in the act of payment, both on the part of the creditor and the debtor, and nothing takes the place of the once extinguished obligation. Subrogation is a legal fiction by force of which the debt is extinguished in relation to the creditor, but not in relation to the debtor. It has its own characteristics which distinguish it from any other. The payor pays the debt of another without any hope of personal pecuniary gain. It is either his kindnes that prompts him to pay the debt, or his secondary liability as surety or the like. When his benevolence is the cause, it is natural that the doctrine should be interpreted to favor the protection of the debtor, in order that his benevolence may accomplish its purpose. If the cause be the other, the interpretation should be that which gives the best justice to both.

Subrogation necessitates three distinct persons: a creditor, a debtor, and a person who pays the debt in the manner recognized by law. There is no subrogation where a man pays his own debt (Dill *vs.* Voss, 94 Ind., 590). This third person may be a stranger in relation to the obligation, but, in such case, his intention must be clearly shown. Our existing laws do not require any special form so long as the intention can be clearly gathered, except the one provided for in Article 1211 of the Spanish Civil Code. In order to extinguish one obligation by the creation of another, it must be made to clearly appear. This is true both in Civil and Common Law jurisprudence (Zapanta *vs.* Rotache, 21 Phil., 154, 160). Substitution of debtor is never assumed (Martinez *vs.* Covive, 25 Phil., 583).

The right of subrogation does not necessarily rest on contract or privity, but upon principles of natural equity, and does not depend upon the act of the creditor, but may be independent of him and also of the debtor. The right may, however, be modified or extinguished by contract (37 Cyc., 367). The right extends not only to sureties, subsequent incumbrancers, co-debtors, tenants in common, partners and purchasers, but to any person interested in the fulfilment of the obligation (See Chandler *vs.* Green, 101, 111. App., 409).

Summarizing the discussion, we find that subrogation naturally divides itself into conventional (Civil Code, Article 1209, Par. 2) and legal (Civil Code, Article 1209, Par. 1 and 1210). The Spanish Civil Code mentions partial subrogation (Civil Code, Article 1213) which may well be included in conventional subrogation and in legal. To the preceding classification Viso adds judicial subrogation which he defines as the one declared by a judge, adjudicating to a person the same rights and actions which another has (Viso, "Derecho Civil," Vol. III, p. 97).

4. PARTIES TO SUBROGATION.

The parties to subrogation, either legal or conventional, are: the creditor, the debtor, and a third person. In order to have a clear idea who these persons are, we propose to discuss each under the following headings: (*a*) Who are considered creditors? (*b*) Who are considered debtors? and (*c*) Who are considered third persons?

(*a*). WHO ARE CONSIDERED CREDITORS?

A creditor is one who has a right to require the fulfilment of an obligation or contract; a person to whom any obligation is due (Bouvier's Law Directory, Vol. I, p. 475). Creditors may be either preferred, judgment, or simple. Preferred creditors are those, who, in consequence of some provision of law, are entitled to some special privilege in the order in which their claims are to be paid. Judgment creditors are those who have obtained a judgment against his debtor, under which he can enforce execution (Bouvier's Law Directory, Vol. I, p. 475). Simple creditor is one who is neither preferred nor judgment creditor, but has a legal right to demand of another the fulfilment of an obligation or contract. In general, a creditor is one to whom another owes the performance of an obligation; one who has right by law to demand and recover a sum of money or any account whatever (N. Y. Guaranty Trust Co. *vs.* Galveston City R. Co., 167 Fed., 311, 317); one in whose favor an obligation exists, by reason of which he is or may become entitled to the payment of money; every party who has a demand, an account, an interest, or a cause of action for which he might recover any debt, damages, penalty or forfeiture (Waldradt *vs.* Brown, 6 Ill, 397, 399; 41 Am. Dec., 190); in the ordinary and almost universal definition of the word, a person to whom a debt is owing by another person, called a "debtor" (Cardenas *vs.* Miller, 108 Cal. 250, 258, quoting Black's Law Dictionary). In the strict sense, a creditor is one who has a right to require the fulfilment of an obligation or contract for the payment of money—any one who has a debt or demand against another upon a contract, express or implied, for the payment of money (Atwater *vs.* Manchester Savings Bank, 45 Minn. 341, 346; 12 L. R. A., 741). In a more liberal sense, a creditor is he who has a legal demand upon another, without his consent, by mistake or accident, which he is entitled to have, or to a compensation in damages for an implied promise (Stanly *vs.* Ogden, 2 Root (Conn.) 259, 261; in strict literal sense, he who has voluntarily given credit to another, for a sum of money or other property upon bond, bill, note or simple contract (Stanly *vs.* Ogden, 2 Root (Conn.) 259).

(*b*) WHO ARE CONSIDERED DEBTORS?

A debtor is one who owes a debt; he who may be compelled to pay a claim or demand (Black's Law Dictionary, p. 335), or is under obligation, arising from express

agreement, implication of law, or from the principles of natural justice, to render and pay a sum of money to another (Commercial National Bank *vs*. Taylor, 64 Hun. (N. Y.), 499); one who by reason of an existing obligation is or may become liable to pay to another whether such liability is certain or contingent (Sonnesyn *vs*. Akin, 97 N. W., 557, 560); every one who owes to another the performance of an obligation; the person who has engaged to perform some obligation; one who owes anything to another, as money, goods, or services. Debtors may be either natural or juridical persons such as private corporation, public corporation, partnership, both commercial and civil. It may also include an indorsee of a promisory note before maturity (53 N. J. L., 200).

(c) WHO ARE CONSIDERED THIRD PERSONS?

Third person in law is he who has nothing to do with a certain act, transaction, or the like. He has nothing to do with a certain act or transaction spoken of, because he is not a party to it. He is neither an obligor nor an obligee. If he tries to enforce the thing spoken of in the particular act or transaction, the law will not help him to do so, but in its stead say: "You have nothing to do with it; get away from it." And if a party to the particular act or transaction tries to compel him to fulfill those which are made enforceable by virtue of said act or transaction, he (third person) may rest his defense upon the protection of law granted him as third person. As such person he cannot be compelled to perform the obligation, because the law says that nobody can compel him to do that which he is not a party of.

5. WHEN THERE IS NO SUBROGATION.

As we have seen, the doctrine of subrogation is based on the theory of equity and justice; and therefore when there is neither equity nor justice, there is no subrogation. Carrying this doctrine a little farther, we find that the original obligation must be an existing demandable one; otherwise subrogation does not take place. Whatever then is a sufficient cause to invalidate the original obligation, is also a sufficient defense against subrogation (Manresa, "Commentarios al Codigo Civil Espanol"). The Civil Code, Article 1208, with regard to this point says: "Novation (or subrogation: for the Civil Code classifies subrogation as a kind of novation) is null and void, if the original is also so, unless the cause of nullity can be claimed by the debtor only or the ratification gives validity to acts which were null in their origin." Therefore a gambling debt not being enforceable under our laws cannot be a subject of subrogation (Palma *vs*. Canizares, 1 Phil., 604). The same is true when payment is made by deceit and fraud, and falsely pretending that he was authorized. The payor has no right whatsoever to be subrogated (United States *vs*. Gorme, 18 Phil., 323). We are also of the opinion that a debt arising from a transaction of purchase and sale of opium cannot be a subject of subrogation.

CHAPTER II

CONVENTIONAL SUBROGATION

1. DEFINITION.

Conventional subrogation is that which arises by virtue of an express contract between the payor and the debtor or the creditor, that payor shall be subrogated to the rights of the creditor. This kind of subrogation differs from legal subrogation in so far as the latter arises not by virtue of an express contract to that effect, but rather from the automatic operation of a rule of law upon a given set of circumstances (37 Cyc., 367). It also differs from the so-called judicial subrogation, because the latter can arise only by virtue of a judgment rendered by a competent judge, adjudicating to a person the same rights and actions which otherwise belong to another (Viso, "Derecho Civil," p. 95).

2. PARTIES TO CONVENTIONAL SUBROGATION.

As its name indicates, conventional subrogation results from the agreement of the parties, and can take effect only by agreement. Except the special case provided for in Article 1211 of the Civil Code, this kind of subrogation requires the intervention and consent of three persons, viz., the old creditor, the person who substitutes the creditor, and the debtor. The intervention of the first two is justified by the fact that it is between them that the transfer of rights is to take effect. Of the first, because it is his right that is taken from him; and of the second, because it is he who is going to exercise the right of the former. In legal parlance one who succeeds to the right of another by subrogation is called "subrogee." The intervention or consent of the debtor is justified by the fact that the Civil Code considers subrogation of creditor as a novation whereby the old credit is extinguished and a new one takes its place. With regard to the new obligation the consent of the obligee and the debtor is esential. Furthermore Article 1210, No. 2 of the Civil Code provides that there is subrogation when a third person, not interested in the obligation, pays with the express or tacit approval of the debtor.

3. NATURE.

The general rule is that a third person, either with or without interest in the fulfillment of an obligation of another, is subrogated to the rights of the creditor against the debtor for whom he pays (Sanchez Roman, 291). An exception is that mentioned in Article 1159 of the Civil Code which provides that he who pays in the name of the debtor, when the latter is not aware of it, cannot compel the creditor to subrogate him in the rights the creditor possesses. Another exception necessarily follows the first, and that is when the third person performs the obligation contrary to the express will of the debtor. In case the performance is done without the knowledge of the debtor, subrogation as a rule does not take place, but another right arises, and that is the right to be reimbursed by the debtor of what he has paid in the name of the latter. It is, however, clear that the payor may be put in the place

of the creditor as long as the creditor consents to it. This they may do by resorting to an assignment of credit. It is to be noted, however, that in assignment of credits, the new creditor acquires no other rights than those which usually appertain to an assignee.

4. SUBROGATION DISTINGUISHED FROM THE RIGHT TO BE REIMBURSED.

"The right to be reimbursed" gives the payor no other than simple personal action against the debtor. In the case of "subrogation" the payor is put in the shoes of the old creditor. The whole credit is transferred to him with the rights annexed to it, either against the debtor or against third parties be they sureties or holders of mortgages or pledges. More or less the extent of the right to be reimbursed depends upon the knowledge that the debtor has had of the payment made by a third person and above all, of the manifestations of his will with regard to the act of the third person. Whether the performance was known or not, that does not affect the right of the payor to be paid of what the debtor owes. This doctrine is contrary to common law such payment is considered as a gift on the part of the payor to the person for whom he paid. In order that the payor shall be clothed with the full garb of the creditor, the debtor must oppose the payment.

5. SUBROGATION DISTINGUISHED FROM ASSIGNMENT OF CREDIT.

In our discussion of the nature of subrogation we have dwelt a little about the differences between subrogation properly speaking and assignment of credit. Here we endeavor to elucidate what we have said before.

Subrogation is a legal fiction by force of which the debt is extinguished in relation to the debtor. Furthermore, the extinction is not of the debt, properly speaking but of the right of the creditor to demand payment. After the subrogation, the right of the creditor dies, and another creditor takes his place. In assignment of credit the procedure is different. There is no legal fiction to the effect that the debt is extinguished. The debt is merely transferred from one man to another. The debt which the transferee has a right to demand of the debtor is the same debt. The transferee simply represents the creditor.

Another striking difference between the two is that, in subrogation, according to the Civil Code, the consent of the debtor is esential. Without it subrogation does not arise. In legal subrogation the consent of the debtor is given by law. The reverse is true in assignment of credit. It is sufficient that he has knowledge of the transfer of the credit. He cannot refuse (Sentence of Supreme Court of Spain of September 23, 1865; See Prof. Bocobo's "Outlines on Obligations" and Contracts, Outline XVII).

Another difference of no less importance between the two is that in subrogation, being founded on the principle of equity and justice, the amount actually paid by the third person is the only amount that he could recover from the debtor. Suppose for example the debt was ₱120, and to extinguish the debt, by compromise, he

actually paid the creditor the sum of ₱100. In subrogation the payor could not recover ₱120 from the debtor but ₱100 only. But if this were done under an assignment of credit, the payor could recover ₱120 from the debtor, for it was the whole amount of ₱120 that was transferred to the payor.

6. Kinds of Conventional Subrogation.

As we have intimated above, there are two kinds of conventional subrogation; namely, consented by the creditor and consented by the debtor. This classification is expressly provided for in most codes of the Civil Law countries. In the Philippines, however, except in the cases of legal subrogation, the debtor must have been notified of the payment. With regard to this, Manresa says that, in the distinct case in which the debtor ignores the payment (pago), the latter cannot compel the creditor that he be subrogated in his rights, according to the precise declaration of Article 1159. This rule is also applicable when the debtor opposes the payment. Concerning the conventional subrogation consented by the debtor, our laws are in conformity with Civil Law countries. Article 1211 of the Civil Code provides: "A debtor may make the subrogation without the consent of the creditor, when for paying the debt, he has borrowed money by a public deed, stating therein his intent, and setting forth, in the release the orgin of the sum paid."

CHAPTER III

CONVENTIONAL SUBROGATION CONSENTED BY THE CREDITOR

1. Origin.

In Roman law, a person who pays a creditor could be subrogated to the rights of the creditor, provided that the subrogation is done simultaneously with the payment —*quum convenisset, ut mandaretur actiones*. If it is not done at the same time with the payment, subrogation in favor of a third person does not take place; neither could the latter afterward oblige the creditor to cede his rights to the payor. But when subrogation is conceded by the creditor on the act of payment, the third person acquires the rights and actions which appertain to the creditor, as if they have been ceded to him or that he has bought them—*pretuum magis mandatarum solutum, quam action quae fuit, peremta videatur.*

2. Point of View.

In Roman Law as well as in the jurisprudence of most of the Civil Law countries, the consent of the debtor is not at all necessary. It is not however true in the Philippines, for the law in force here concerning this subject is the Civil Code of Spain which denies the existence of this class of subrogation (For extended discussion of this statement, see Manresa's Commentaries of Article 1159). Article 1159 of the Civil Code provides that, if a third person pays in the name of the debtor when the latter is not aware of it, he cannot compel the creditor to subrogate him in the rights

the creditor possesses. In this work we propose to discuss conventional subrogation consented by the creditor in connection with Article 1159 of the Civil Code, that is with the tacit or express consent of the debtor.

3. REQUISITES OF THIS KIND OF SUBROGATION.

This kind of conventional subrogation has two essential requirements. They are.

(a) Consent and capacity of the creditor.

(b) Payment with money of a third person not obliged.

(a) CONSENT AND CAPACITY OF THE CREDITOR.

As in any other kind of contracts, consent of the contracting parties is necessary in order to make it a binding contract. But consent of the creditor may be given by an agent of his. A general agent, almost always, has the power to give consent; but it is not true with regard to a special agent. The consent of the latter may, however, be ratified by his principal, and the effect will be the same as if the consent given by a partner though unauthorized may subsequently be ratified by the other partners (Mechem's "Elements of Partnership," Section 190). If the creditor gives consent, his consent carries with it the acceptance of the payment and the subrogation. He cannot accept the payment and refuse that the third person be subrogated. If the creditor ratifies, he gives consent not only to the payment, but also to the subrogation, unless the payor agrees that he be not subrogated. Laurent is of the opinion that the mere fact of getting the money paid by the third person is an implied ratification of the subrogation. Cashiers, when not expressly authorized, have no authority to give consent to subrogation (Sentencia de Corte de Roma, 29 de Marzo de 1881); but the consent given by the cashier may be ratified by the creditor. It is enough that the person who accepts has, by his own right, the capacity to demand payment of the debt.

(b) PAYMENT WITH MONEY OF A THIRD PERSON.

The money paid must belong to a third person, otherwise there is no subrogation. For if it belongs to the debtor, what takes place is simple payment, and the obligation *'in toto'* is extinguished. There is a great controversy as to whether there is subrogation when the debtor pays the debt as an agent of a third person. Italian legal writers are of the opinion that to allow subrogation would lead to fraudulent transactions. But we hold that in spite of that fact, as a rule, subrogation arises. Only when it is known for certain that there was fraud in the transaction that the legality of the subrogation can be questioned.

4. TO WHOM SHALL PAYMENT BE MADE.

The payment may be made to the obligees, his heirs, assignees, or representatives (Prof. Bocobo's "Outlines on Obligations and Contracts," Outline XII). Article 1162 of the Civil Code provides that payment should be made to the person in whose favor the obligation is constituted, or to some other person authorized, to

receive it in his name." Manresa, says (8 Manresa, 267) that the first of those cases refers not only to the person who may have been the creditor at the time the obligation was created, but rather to the person who is the creditor at the time payment is due, which creditor may be different from the original.

Payment made to a person not "sui juris" is valid in so far as it has benefited him. And if the benefit is equivalent to the value of the obligation, the payment is good in full. Therefore, if in some way or other subrogation is authorized, then subrogation arises. So also payment made to a third person is valid to the extent of the benefit received by the obligee (Article 1163). And if in so doing an agreement is reached that there be subrogation, such payment made to a third person is sufficient to the extent of the benefit. As to whether payment made in good faith to a person in possession of the credit is sufficient, if the possessor of the credit consents to the subrogation, to give effect to that subrogation, authorities are wanting. Concerning this point we hesitate to give an extended opinion. This far however we can say that equity will probably protect the third person (payor) if the fault lies upon the true creditor.

5. FORM.

The Spanish Civil Code as well as that of Guatemala considers subrogation as a novation (Notes on Giorgi's Works). In fact it is put in the first article under Section six of Book LV, entitled "Novation". Article 1203 provides:

Obligation can be modified:

1. By change of object or their principal conditions;
2. By substituting the person of the debtor;
3. By subrogating a third party in the rights of creditor.

As the Civil Code does not provide a special form under which subrogation must undergo, except that provided for in Article 1211, it is but logical that subrogation, with regard to form, shall be governed by that provided for in novation. Article 1204 is the one that governs novation as to form: It provides: "In order that obligation may be extinguished by another which substitutes it, it is necessary that it should be so expressly declared, or that the old and new be absolutely incompatible."

This article does not require any special form. Accordingly novation may be express or implied. The express novation does not require a precise form, so long as it is made clear that there is novation. In conformity with the general principle that novation does not require special formality, Article 1209 says that it shall be necessary to prove it clearly in order that it may be effectual. Therefore there may be oral as well as written subrogation.

As we have said in the first chapter of this work, in novation the old obligation is extinguished wholly, and anotner new and distinct obligation takes its place. In short there is a new contract independent of the old. In this new contract all the

requisites in order to have a valid contract are necessary. We therefore are of the opinion that whether the contract of subrogation shall be in writing or not, shall be governed by the statutes of fraud as provided for in Section 355, of Act No. 190.

CHAPTER IV

SUBROGATION CONSENTED BY THE DEBTOR

1. ORIGIN.

For the Romans an agreement between the lender and the debtor that the money borrowed would be used in paying a former creditor, *ut antecedens dimitteretur*, was sufficient in order that the lender subrogate to the rights of the former creditor, *ut idem pignus ei obligetur, et in locum eius succedat.* If it dealt with the payment of a preferred or privileged credit and especially of a fiscal credit, subrogation was always understood. In both cases, the consent of the creditor was not necessary. Such were the principles of the Roman Law which obtained without alteration under the empire. But such subrogation of the olden days was limited to the transfer of the privilege, and the dominion of the mortgage. It did not transfer all the rights of the creditor like the subrogation of modern time.

2. CAUSES.

The credit is a thing of the creditor while the obligation subsists. When it is extinguished, and the debtor extinguishes it by paying with money of a third person, the rights of the creditor are terminated. Justice is not at all violated by an agreement which tends to preserve the rights of the creditor in favor of the lender in order that he may be reimbursed. If this is just, it is also done for the sake of convenience. For such mode of subrogation permits the debtor to remove a heavier burden, when he finds a lender who is more benevolent, who lends him the money under a less onerous agreement than the debt which is to be extinguished.

3. ADVANTAGES OF SUBROGATION.

1. It is advantageous for the creditor who recovers the credit earlier.
2. It is advantageous for the debtor who is relieved of a heavier charge.

The creditor has no reason to refuse, for it is to his advantage that he is paid earlier. What he cares for is the recovery of the amount owed by the debtor. But suppose he has a special benefit to be derived from the money loaned, may he not refuse? This happens when he lends his money at interest for a stipulated period. If this is the case, he cannot be deprived of the agreement, for to do so is a breach of contract on the part of the debtor. But if the latter is willing to pay the principal with unaccrued interest, the creditor has no reason to refuse.

It is advantageous to the debtor, for he would not have taken the trouble of a change of creditor if the new obligation were as burdensome as the former. The latter obligation may be less burdensome because the latter creditor is his intimate friend and would not hurry him up, or that the rate of interest is less.

4. Nature.

As we have said before, subrogation requires the consent of three persons—the creditor, the debtor, and the payor. But Article 1211 provides for an exception. It does not require the consent of the creditor. It says that "a debtor may make the subrogation without the consent of the creditor, when for paying the debt he has borrowed money by a public deed, stating therein his intent and setting forth, in the release of the origin of the sum paid."

With regard to form this is also an exception to the general rule for, unlike ordinary subrogation, this requires that certain formalities be followed.

5. Requisites.

In order to have a clear idea of the subject, we deem it advisable to make the following classification with regard to the requisites of this special kind of subrogation. They are extrinsic and intrinsic requisites.

A. Extrinsic Requisites.

Extrinsic requisites may further be divided into (1) public deed and (2) receipt of payment. Under these two subdivisions we shall discuss the extrinsic requirements.

(1) In Public Deed.

The loan must be made in public deed. In this public deed must appear his intention that he borrowed the money to pay a certain creditor. But suppose, for example, the money has been given to the debtor, on the agreement that the latter pays the creditor the said sum, without having executed the public instrument, shall subrogation arise? We think that the lender may compel the debtor that the said instrument be made in public deed, but only before payment to the creditor is made. It is a paradox to put in the instrument a statement that the money borrowed shall be used in paying a loan when in fact the payment has already been done. Furthermore, the law in requiring that it be authenticated, takes into consideration the creditor whose consent is not made necessary, and that when at the time of payment all the requisites have not been followed, subrogation does not arise.

(2) Receipt of Payment.

The other requisite is that there be a receipt of payment and that therein be put the wherefrom of the amount. This is to assure the lender that the money was so paid as was intended, in order that subrogation may take place. We think that the receipt of payment need not be in public instrument for the law does not specify that such be so made. But suppose the creditor refuses to put the wherefrom of the money, what shall be done? Although there is doubt about it, we believe that there can still be subrogation so long as it can be gathered that such has been demanded.

The instrument of loan and the receipt of payment may be made in a single instrument, and to do so is advisable in order to remove the danger that the lender be defrauded by the debtor. This is to assure him that the money borrowed is used for its proper purpose.

B. INTRINSIC REQUISITES.

This special class of subrogation, besides its extrinsic requisites has intrinsic essential elements. They are:

(1) Loan made by a third person to the debtor;
(2) That the money is used to pay the debt;
(3) Common consent that money be used to pay the debt.

(1) LOAN MADE BY A THIRD PERSON.

(a) MEANING OF LOAN.

It is true that the law speaks of loan only, but legal writers of fame are not wanting who are of the opinion that subrogation may well be applied to all forms in which a third person furnishes money with an intention of extinguishing the debt. The French Edict of 1609 from which originate the provisions on subrogation in modern codes, speaks in general term, and there is no doubt that, according to that Edict, subrogation may arise from any form of furnishing money. The early writers did not doubt in teaching the extended doctrine. Among the modern authors are Mourlon, Demolombe, Aubry et Reu, and Pacificci-Mazzoni. The French jurisprudenc recognized subrogation in the constitution of a dowry, when it is paid to the husband to extinguish the obligation (See Metz, Oct. 16, 1811, decision cited by Mourlon and other French authors; Cas. Napoles, Jan. 29, 1883, and June 27, 1889).

Against such interpretation are Dalloz and Laurent who explain the difference between the Edict of 1609 that speaks in general term, and that of the modern codes which speak of loan. They say that in subrogation nothing is demonstrative but all are rigid and of the strict interpretation. This statement is backed up by some decisions of the Italian courts. Giorgi, an Italian writer, favors the extensive application. His only reason in taking the side of extensive application is that it does not prejudice the right of third person so long as all the other formalities required by law are followed.

Ordinarily money is the subject-matter in a loan, as well as in the payment. But Larombiere and Giorgi say that any perishable thing that can be an object of a loan is proper subject in this kind of subrogation. Although Article 1211 speaks of money only, still we are of the latter opinion because the Civil Code says in Article 1740—"or money or any other perishable thing" may be the subject of loan.

(b) MONEY OF THIRD PERSON.

But this money or other article of value must be owned by a third person. It is a paradox to speak of a loan when in fact the money is owned by the debtor himself. Furthermore, if a debtor pays with his own money, the obligation *ipso facto* is extinguished *in toto*. To say that the money is borrowed when in fact it is his own, is a lie; and if it is so done, the only object is to defraud. Fraudulent transaction is

neither favored nor recognized by law. If it so happened, the law will declare the fraudulent part void, and therefore there is no subrogation, but simply a fulfillment of an obligation pure and simple.

(2) The Money is Used to Pay the Debt.

A discussion of this topic is somewhat unnecessary, for everybody knows that transaction is not complete until after the money borrowed is used to pay the debt. We insert this topic, however, for another purpose, and that is to make clear a point closely connected with it. We mean to say—when the debtor has two or more distinct and separate debts owed from the same creditor, or from two or more creditors. In order to make an effective subrogation, the money borrowed must be used to pay the very debt agreed upon by the parties as expressed in the instruments, otherwise subrogation is futile. For example: A owes two separate debts from B; namely, ₱200 in consideration of two horses delivered by B to A; and another ₱200 in consideration of an accommodation note made by B in favor of A, of which C is very much interested. If A borrows money to pay the latter ₱200, and this intention is expressed in the instrument of loan, the money must be used to pay the latter ₱200, in order to have a valid subrogation under Article 1211 of the Civil Code.

(3) Common Consent that Money be used to Pay the Debt.

From even a cursory reading of Article 1211, we can deduce that there must be an understanding among the parties. First of all the article says "when for paying the debt." From this we learn that the debtor has an intention to pay a distinct debt. The article further says, "he has borrowed money by a public deed, stating therein his intent and setting forth, in the release, the origin of the sum paid." On making the public deed the consent of the lender must have been given, otherwise the public deed is defective, for there is no consent on the part of the lender. "The release must state the origin of the sum paid," implies that the creditor is by force of law supposed to have given consent. Furthermore, it is understood that when this article is resorted to, the creditor has refused to the subrogation, but the law supplies the consent of the creditor.

CHAPTER V

LEGAL SUBROGATION

1. Origin.

The various phases of legal subrogation had their origin in the Roman Law. For example the subrogation in favor of a subsequent creditor had its origin in *jus offerendi*, a right given to a subsequent mortgagee instead of the right to sell at auction. The lapse of time and the change of circumstances, however, made it necessary to modify some of its essential characteristics, until the right to ask for expropriation was granted to any creditor. The necessity of *ius offerendi* therefore disappeared; and what was left was the subrogation for the benefit of a subsequent creditor who paid

an anterior one, by means of which the subsequent creditor took the place of him who was paid, for no other object than that he be reimbursed of what he had paid. His own credit remained in the same position as it was before.

Like most of the Roman Law legal principles, this one was found to be a doctrine both equitable and just. It found admirers in the continent of Europe and also of America. But the developments, however, in the two continents were not exactly similar. Europe incorporated with it the Civil Law principle, and England and America the Common Law doctrine. We see then the old Roman Law legal subrogation developed differently.

Spain introduced in the Philippines the one developed in Europe. We find this in the Spanish Civil Code now in force here. The Americans introduced here some of their laws on subrogation. We find this embodied in some of the statutes enacted by the Philippine Commission, and in the judicial decisions of the Supreme Court of the Philippines. Our Philippines then become the meeting place of the offsprings of the old Roman Law legal subrogation.

2. NATURE.

The word "legal" in this broad sense signifies something according to law, but when it is used in its strict sense, in connection with subrogation, it means that kind of subrogation which arises *ministerio legis*. It takes place upon the concurrence of the required conditions, without the necessity of an express or implied consent of the parties (Article 1209 of the Civil Code and Manresa "Commentarios del Código Civil Español," Vol. VIII, p. 437).

This is enough to warn us that we cannot speak of legal subrogation aside from the cases expressly authorized by law. It should not be understood however that it is limited to the three cases referred to in Article 1210, for besides these, there are other laws which concede legal subrogation in other cases.

3. SOME CASES OF LEGAL SUBROGATION.

Viso, in his treatise on the Civil Code, gives the following as instances of legal subrogation:

a. In favor of a creditor who pays another preferred creditor (Article 1210, Civil Code);

b. In favor of a person, not interested in the obligation, who pays in the name of the debtor, with the latter's express or implied consent (Laws 32, Tit. XII, 3, Tit. XIV, Partida 5; also Article 1210, Civil Code);

c. In favor of a person who has interest in the fulfilment of the obligation, who pays, without injury to the effect of the confusion in respect to the share belonging to him (Law 34, Tit. XIII, Partida 5, and Article 1210, Civil Code);

d. In favor of an heir who accepts an inheritance with the benefit of an inventory, and pays with his own money the debt of the estate (Laws 7

and 8, Tit. VI, Partida 6). At present this is modified, for whether there is inventory or not, the heir cannot be required to answer over and above the estate of the deceased (Suiliong & Co. *vs.* Chio Taysan, 12 Phil., 13).

Giorgi gives an extended list of instances where legal subrogation takes place, but as he is speaking of the Italian laws on the subject, we deem it not necessary to enumerate them here. (See Giorgi, "Teorias de las Obligaciones," Vol. VII, p. 217).

4. Voluntary Payor.

As we have seen, a voluntary payor cannot exercise the right of subrogation. He must have acted on compulsion to save himself from loss, and it is only on the cases where the person paying the debt of another stands in the relation of a surety or is compelled to pay in order to protect his own interests, or by virtue of legal process that equity substitutes him in the place of the creditor without any agreement to that effect; in other cases the debt is absolutely extinguished (Oliver *vs.* Bragg, 15 La. Ann. 602). Therefore a mere volunteer or intermeddler, who having no interest to protect and without any legal or moral obligation, pays the debt of another, is not entitled to subrogation without an agreement to that effect (Readington *vs.* Cornwell, 90 Cal., 49; Guy *vs.* Duprey, 16 Cal., 195). If he has right at all, it is the right to be reimbursed. But payments made in ignorance of the real state of facts cannot be said to be voluntary, and a person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, or under an honest belief that he is bound, will be subrogated (Muir *vs.* Berkshire, 52 Ind. 149; Cobb *vs.* Dyer, 69 Me. 494). Subrogation is sometimes extended to cases of payment by person not legally bound to pay, but who does so, not as voluntary, but with a well-founded expectation, justified by the conduct or contract of the debtor, that they will be entitled to hold all the sureties for their indemnity which the creditor had against the debtor (Schoonover *vs.* Allen, 40 Ark. 132).

5. Part Payment.

As a general rule there can be no subrogation to the rights of another, unless the claim of that other is fully satisfied (See Chapter on Partial Subrogation). But if by some error or mistake of calculation as to interests or costs not quite enough was paid to meet the whole debt, when the intention was to pay the whole debt, equity would grant subrogation pro tanto (Sower's Appeal, 1 Mona (Pa.), 49, cited in 37 Cyc., 379). The same is extended to one who endeavored but failed to ascertain the exact amount due, and then paid into court a sum in excess of the debt, interest and costs (Snook *vs.* Munday, 96 Md., 514 cited in 37 Cyc., 379). And where a creditor to whose rights subrogation is claimed has been satisfied in full, the fact that such satisfaction has been brought about by two persons will not prevent each from setting up the right of subrogation as against the other to the extent of the payment made by them, although the payments may have been made at different times (Wilkins *vs.* Gibson, 113 Ga. 31).

(*To be continued.*)