SUBROGATION

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(Continued from February number)

CHAPTER VI

SUBROGATION IN PARTICULAR CASES

1. Persons Interested in the Administration of Estates.

A person who, being interested in the administration of an estate, pays claims against the estate, is entitled to subrogation of the creditor's right to recover the amount paid (Chaplin *vs.* Sullivan, 128 Ind. 50). Where a widow paid claims against her deceased husband's estate, she is entitled to subrogation to the rights of the creditors whose claims were so paid (Jefferson *vs.* Edrighton, 53 Ark. 545). So when some of the heirs, after division of realty, discharge a debt which is a common liability upon the realty, they are subrogated to the creditor's right to proceed against the land of the others (Winston *vs.* McAlpine, 65 Ala. 377; Jonness *vs.* Robinson, 10 N. H. 215). *Cestuis que trustent* under a will, whose income is taken to pay debts of the estate are entitled to be subrogated to the rights of the creditor (Amory *vs.* Lowell, 1 Allen (Mass.) 504). Where legatees pay off and discharge a judgment against the executors of the estate, which constituted a lien on the estate, they are subrogated to the rights of judgment creditors (Place *vs.* Oldham, 10 Mon. (Ky.) 400; Mitchell *vs.* Mitchell, 8 Humphr. (Tenn.) 359. In some case of mixed sale of property under a decree for the payment of debts, where the trustees making the sale have exceeded in their payments their cash receipts, they may be subrogated, as to the excess of the rights of the creditors paid off (Ellicott *vs.* Ellicott, 6 Gil and J. 35, as reported in Century Digest, Vol. 44, p. 3487).

2. Persons Liable for Loss or Injury Caused by Fault of Another.

A person liable for and who has paid for a loss or injury caused by fault of another is subrogated to the rights of the injured party against the wrongdoers. So are libelants, when they pay the injuries caused by another, are subrogated to the rights of the injured (Cornell Steamboat Co. *vs.* The Jersey City, 43 Fed. 166). Also an executor liable for the default of his co-executor is entitled to be subrogated to whatever compensation he has a right to (Albro *vs.* Robinson, 93 Ky. 195). The case of Holness *vs.* Balcom, 84 Me. 226, holds that where a consignee recovers judgment against a carrier for failure to deliver goods upon which he had lien for advances, the same having been wrongfully attached, the carrier is subrogated to the rights of the consignee and may maintain an action against the officer who levied the attachment. With regard to subrogation by other persons who pay, see following; cases: State *vs.* Greene, 101 Ind. 352; City of Cambridge *vs.* Handsom, 186 Mass., 54 Vega S. S. Co. *vs.* Consolidated Elevator Co., 75 Minn. 308, 43 L. R. A 843; Gulf, C. and S. F. Ry. Co., *vs.* North Texas Grain Co., 74 S. W. 567.

3. PERSONS JOINTLY LIABLE.

(*a.*) GENERAL RULE.

Cases are in conflict as to whether subrogation arises by the mere fact that a joint debtor performs fully the obligation, his remedy being a suit for contribution (See 44 Century Digest, on "Subrogation," p. 8, et set.). But the majority of cases is that when one or more of the debtors discharge the common liability, after maturity, the law raises the duty and subrogation of payment of a proportionate share which may be enforced by subrogation (Wiston *vs.* McAlpine, 65 Ala. 377; Summer *vs.* Rhodes, 14 Conn. 135; Shropshire *vs.* His Creditors, 15 La. Ann. 705; Dobyns *vs.* Rowley, 76 Va. 537). In this case each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay, and as a surety for his creditor as to that part of the debt which the other joint debtor ought to pay, and as a surety for his creditor as to that part of the debt which the other joint debtor ought to discharge. And as such he has the right to be subrogated to the securities held by the creditor that exist in behalf of a surety who pays in excess of his share of the burden (Owen *vs.* McGehee, 61 Ala. 440; Newton *vs.* Newton, 53 N. H. 537).

(*b.*) Co-OWNERS.

Where a co-owner pays off an incumbrance on the common estate, equity will consider the incumbrance still existing in order to enforce contribution from the other co-owners. As we have said in the general rule that each co-owner ought to contribute only his proportionate share, and beyond this he is considered as the surety of the remaining part, and if one is called to pay more than his proportionate share, he is entitled to stand in the shoes of the satisfied creditor to the extent of the excess. The case of Williams *vs.* Harlan, 88 Md. 1, holds further than this. It says that one who furnished money to a co-owner to be used in placing improvement on the land with full knowledge of co-owner, is entitled to be subrogated to the right of the borrowing co-owner, as against the others, to enforce an equitable lien for the improvements created as contemplated. (Read this decision in connection with Article 1210 of the Civil Code.)

(*c.*) PARTNERS.

A partner who on the dissolution of the partnership pays partnership debts is subrogated to the creditor's rights in the joint property to obtain contribution (Rowlett *vs.* Greive, 13 Am. Dec. 296; 8 Mart. (La.) 483. If there is an agreement to the effect that one shall pay a firm debt, the others become sureties for him and upon making a payment, is subrogated to the rights of the creditor against his co-partners. This is due to the fact that the payor is considered principal and surety. (For contrary views, see American Digest, Decenial Edition, Vol. 18 on "Subrogation," Section 3 (3).) But as a general rule in the states where the civil law has a hold, subrogation is favored. For example the case of Hall *vs.* Gaiennie, 18 La. 442, holds

that a partner, who pays a judgment against the firm on account of an acceptance in the firm's name by a co-partner for his private account, may by subrogation to the creditor's rights from such co-partner.

A surviving partner who has paid joint judgments against himself and the estate of a deceased is entitled to subrogation to the amount equitable due from the estate of the deceased partner (Harter *vs.* Songer, 138 Ind. 161). And 37 Cyc. 398, citing several decisions, say that the converse is true, for where partnership creditors proceed against the estate of a deceased partner, his representatives will stand in their place and be substituted to their rights against the other partners. But the decisions are agreed that in any event, a partner who has paid a firm debt is held not to be entitled to subrogation against his partner until an account has been settled between them.

(*d.*) JOINT MORTGAGORS.

A joint mortgagor who has paid the entire debt is substituted for the place of the plaintiff on a sale of the premises to the extent of the amount he has paid over his proportionate share. So the case of Randolf *vs.* Starke, 51 La Ann. 1121, holds that where joint debtors mortgaged their common property in its entirety for the whole debt, and one pays the whole debt, he is subrogated, as against the other. Where a mortgage is discharged on payment by one of the joint mortgagors, it may be treated as still subsisting for the protection of the party making the payment, or the delinquent's share in the mortgaged property may be regarded as subject to a lien for the amount paid for his benefit (Look *vs.* Horn, 97 Me. 283).

(*e.*) JOINT JUDGMENT DEBTORS.

Some American decisions have refused subrogation to one joint debtor who pays off the entire debt. But 37 Cyc. 396, citing a long line of cases is of the contrary opinion. It says, "But the better and more generally followed rule of the civil law is to the contrary." The case of Theus *vs.* Armstead, 116 La. 795, holds that one of two debtors in solido on payment of a judgment against his co-defendant to the extent of his portion of the debt, including interests and costs. That of Buchanan *vs.* Clark, 10 Gratt, (Va.) 164, holds that where one of two debtors fails to keep his agreement to pay to the creditor money received from the other, and a judgment is rendered against them, the latter on payment by him of the judgment, is entitled to be subrogated to the rights of the creditor in enforcing the judgment against the former out of the land which the former had conveyed after the rendition, as against alliances who have no better equity.

One of several debtors, against whom judgment is rendered, may advance the amount of the judgment and contract for the control of the execution, and will be protected until he is reimbursed of his proportion of the demand (Morris *vs.* Evans, 3 Am. Dec. 591). But it is held that to entitle a joint debtor on a payment to sub-

rogation to the results of the judgment creditors upon a purchase by him of the judgment, it must apperar, that it was his intention in making the purchase, to acquire these rights (Huggins *vs.* White, 7 Tex. Civ. App. 563; 27 S. W. 1066).

4. PARTIES TO BILLS OR NOTES.

Our Negotiable Instruments Law (Act No. 2031) has only one provision which expressly mentions subrogation. Section 175 of the said Act says, "Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter." But both in American and English jurisprudence may be found hundreds of decisions giving the right of subrogation to persons other than the payer for honor. For example, it is a settled principle that an indorser, who is actually bound, by paying a bill or note, becomes subrogated to all the rights under the note against prior parties. The case of Azarraga *vs.* Rodriguez, 9 Phil. 637, holds that an indorsee is subrogated to the rights of the indorser. One who is bound as indorser for the payment of a note secured by pledge, is legally subrogated to all the rights of the pledges by the payment of the note (Woodward *vs.* American Exposition R. Co. 39 La. Ann. 566); and an indorser on a note will be subrogated, on paying the note, to the rights of the owner in a mortgage given him as security. Where the money of an indorser of a note upon which judgment is obtained is used to satisfy the judgment, the indorser has a right to be subrogated to plaintiff's rights and to keep the judgment alive. "No entry on the judgment of such payment is required in order that the indorser may have the right of subrogation; and an entry of satisfaction made by plaintiff without the authority of the indorser, will not defeat the latter's right to enforce the judgment in his favor against the land of the principal debtor; and one who indorses a note to pay a judgment with the express understanding that the judgment shall be assigned is subrogated to the rights of the judgment creditor." (37 Cyc. 401.)

If the makers and indorsers are insolvent, the holders of the negotiable paper may be subrogated to the rights of such indorsee arising under a chattel mortgage given them by the makers to secure them against loss because of their liability as indorsers. The case of Harmony National Bank's Appeal, 101 Pa. St. 428, holds that where a mortgage is given by the maker of a note to secure the indorsers and both become insolvent, the holder of the note is entitled to the benefit of the security; but he can have no higher rights than could the indorser. It is not necessary that the payment should have been made in money. Anything which the creditor is willing to accept in satisfaction of the debt is sufficient (37 Cyc. 402 and case cited).

5. SURETIES.

(*a*.) GENERAL RULE.

By security a person binds himself to pay or to comply with some obligation for a third party in case the latter fails to do so (Article 1822, Civil Code). By virtue of such payment, the surety is subrogated in all the rights which the creditor had against the debtor (Article 1839, Civil Code; Manresa, Comentarios del Código Civil," Vol. XII, p. 299). The case of Somes *vs.* Molina, et al, 9 Phil. 653, illustrates this principle. Riva was indebted to Molina upon a contract. At maturity of the contract Molina commenced an action and obtained a judgment in *nisi prius* court against Riva. Riva appealed from said judgment. Somes, the surety, was compelled to pay the indebtedness of Riva to Molina. Held; That by virtue of such payment by Somes he was thereby subrogated to all the rights which the creditor Molina had against the debtor Riva. The court further said that the law is well established that a surety is entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment, and to stand in the place of the creditor, which such surety has satisfied the obligation of the principal.

This subrogation to the remedies and remedial rights of the creditor, attaches for the purpose not only of enforcing reimbursement from the principal but of obtaining a contribution from a co-surety (Article 1844, Civil Code; Whitehead's Succession, 3 La. Ann. 396; Campbell *vs.* Pratt, 5 Wheat, 429). Co-sureties who pay are subrogated proportionately. (Commonwealth Bank *vs.* Potius, 10 Watts (Pa.) 148). For further reference, see De La Serna, "Derecho Civil y Penal," Vol. II, pp. 398-399; Sanchez Roman, "Derecho Civil," Vol. IV, p. 436; S. del Viso, "Derecho Civil," Vol. III, pp. 514-518.)

The surety is subrogated without any special agreement to that effect and although bound by a different instrument than the principal (12 Manresa 299, 300; Havens *vs.* Willis, 100 N. Y. 482); and he need not signify his election and acceptance of such right; but it is sufficient if he shows suretyship, payment of the debt, and a right held by the creditor, in the absence of some act by him which amounts to a waiver (Watts *vs.* Eufaula National Bank, 76 Ala. 474). But the surety cannot acquire greater rights than the creditor possessed, and if the creditor has lost a lien on the assets of the principal, the surety does not acquire any (Coltraine *vs.* Spurgin, 31 N. C. 52). See also Articles 1839, 1840, 1841 and 1842 of the Civil Code.

(*b*.) WHEN THERE IS NO SUBROGATION.

Many authors are agreed that subrogation does not take place in the following cases:

(1) If the surety paid without the intention of being paid by the principal;

(2) If the security has been constituted for the benefit of the surety;

(3) If the surety made the security against the will of the principal debtor.

With regard to the first case there is no controversy, for the payment may be considered as a donation, and that the surety exercises his right granted him by Art. 4 of the Civil Code, which provides that "rights conceded by the laws may be renounced provided they are not contrary to public interest or order, or prejudicial to a third person". But how can the intention be ascertained? We are of the opinion that this intention must have been express and not implied.

In the second case, the benefit is for the surety himself and therefore he has neither legal nor moral right to demand from the principal debtor what he has paid. In fact he is paying his own principal obligation.

Looking upon its face it appears easy to justify the third case. The agreement is directly between the creditor and the surety. The debtor is not a party to it, and should not be bound, for a contract is of no effect without the consent of the contracting parties. But Article 1823 comes in and allows the constitution of a suretyship even against the opposition of the principal debtor. However, if we put some more deliberation, we may justify the provision of the code. Usually in contracts where consideration and obligation arise, consent is necessary. But, in suretyship made against the will of the principal debtor, it is gratuitous. Therefore he is not prejudiced even though his consent is not given. Furthermore, the payment made by the surety does not make any alteration on the part of the debtor's debt. Consequently the principal debtor must pay, for, in this case, the surety who paid the debt may be considered as a representative of the creditor to demand the payment.

(4.) The case of Somes *vs.* Molina, 15 Phil. 133 adds another case where subrogation does not arise. This case holds that a surety cannot exercise the right of subrogation until the debt which the principal debtor owes to the creditor has been fully paid.

The weight of authorities is that he is not entitled to be substituted to the right of the creditor until he has paid the debt for which he is surety, or has at least secured the payment of the debt due by his principal, because until payment of the debt is made, he is regarded as in default to the creditor. (See Justice Carson's dissenting opinion in Somes *vs.* Molina, 15 Phil. 133). But if the surety pays a part of the debt, and the principal the balance, the surety will be subrogated to all the benefits which the creditor had against the principal to the extent of his payment, and in general it is sufficient if the balance of the creditor's debt has been otherwise satisfied (In re Lawrence, 5 Fed. 349).

(*c.*) PAYMENT MUST HAVE BEEN MADE UNDER COMPULSION.

In order to be entitled to subrogation the surety must have been under some legal obligation to pay, unless he pays with the consent of the debtor that he be subrogated, for a surety who pays a debt for which he is not liable is not entitled to subrogation. In so doing he occupies the position of a stranger who pays a debt of another, when the latter is not aware of it (Article 1159, Civil Code). The only right that such volunteer has is to be reimbursed of what he has paid. This condition exists when

the surety pays subsequent or other debts of the principal. However, one paying a debt under mistaken belief that he is bound as surety is entitled to subrogation (Lyth *vs.* Green, 21 N. Y. App. Div. 300; Coperhart *vs.* Moon, 38 N. C. 178).

(*d*). To WHAT THE SURETY IS SUBROGATED.

As we have said in the first chapter of this work, the subrogee is put in the shoes of the creditor to whose rights he is subrogated. As an amplification of the rule of the same principle we may say that a surety has the right of subrogation to all the securities which the creditor had against the principal debtor to the extent necessary to protect him from the loss, viz., to all defenses which his principal had, to all means and remedies which the creditors possessed to enforce payment of the debt secured from the principal debtors, to the remedies and rights which the creditor had, not only against the principal but against others, and as against his co-sureties, in the same manner as against the principal debtor (Article 1844, Civil Code). The surety's right of subrogation extends to mortgages and other liens held by the creditor, and to funds or other property of the principal in the possession of the creditor and to rights of action. But in taking the place of the creditor he is subject to all limitations for he can acquire no greater rights than the creditor had at the time of payment. If the creditor was a preferred creditor, the surety upon paying the debt is entitled to the same preference to which the preferred creditor was entitled (Smith *vs.* Harbin, 124 Ind. 434, 24 N. E. 105; Lidderdale *vs.* Robinson, 12 Wheat. 594.)

"A surety is entitled to be subrogated to rights and privileges and securities which belong to the principal whose debt he has paid in so far as those are connected with the debt, such as the right of set off, or defense, or to have a judgment against the principal reviewed, and to have the benefit of any fund or collateral provided by the principal for the payment of the debt. But the surety is entitled to subrogation only in regard to the contract upon which he was surety; and a surety for the purchase-price of property cannot interpose as a defense the failure of the title to the property, and he cannot, unless the principal is insolvent, thus bringing the matter within the scope of equitable set-off, make a demand in favor of the principal not connected with the subject of the action or growing out of the same transaction." (Taken from 37 Cyc. 427-428).

If one of several sureties pays the debt, and insists upon contribution by his co-surety, he must also permit the co-surety to be subrogated to his rights under the the creditor's mortgage (Stanwood *vs.* Clampitt, 23 Miss. 322). And if a co-surety takes counter security from his principal for his own indemnity, this will not bar his right of action for contributions against his fellow surety; but the party contributing will be entitled to be subrogated to the benefit of the counter security (Pauling *vs.* Kaighn, 23 H. J. Law 480, as reported in Century Digest, Vol. 44, p. 3472).

(*e.*) EXTENT AND LIMITATION.

While it is a general rule that a surety paying off a debt, shall stand in the place of the creditor, yet this general rule has some limitations. It should not be understood that the surety may recover beyond what he has in fact paid. Subrogation is founded on principle of benevolence, and therefore the surety should not be allowed to enrich himself to the prejudice of the debtor.

Thus if the debt is ₱10,000, but through compromise on the part of the surety and the creditor, the latter agreed to cancel the debt on the payment of ₱9,000. The surety paid the ₱9,000 and the debt was cancelled. Here the surety cannot recover from the debtor the whole ₱10,000 but only ₱9,000. This is the limitation which Paragraph 2 of Article 1839 of the Civil Code imposes upon subrogation, which is also just and equitable.

The surety, however, may exercise another right which is granted him by Article 1839, but his right is not granted him by virtue of subrogation, but one which is strictly personal. These are the rights to legal interest from the time that the payment was made known to the debtor, the expense to the surety after the latter has given notice to the debtor that he has been required to pay, provided those expenses do not arise from his own fault, and for damages and injuries when proper.

Before leaving this subject of extent and limitation, we had better examine Article 1853 of the Civil Code as it affects subrogation. That article provides that a surety may set up against the creditor all the exceptions which pertain to the principal debtor and which may be inherent in the debt, but not those which are purely personal in respect to the debtor. According to this article the surety has the right to set up against the creditor all the exceptions which appertain to the principal debtor and which may be inherent in the debt. But suppose for example, in spite of his knowledge of such defenses, the surety pays the whole debt, may he recover that amount which could have been covered by the defenses of the principal debtor? If we analyze the doctrine of subrogation, we have to hold that he cannot. The creditor cannot claim the whole amount, for the debtor has lawful defenses to set up. Therefore if the surety takes the place of the creditor, he should not be allowed to recover what the creditor could not recover from the debtor. It was his own fault for not setting up those defenses and for his own fault he should suffer and not the debtor.

6. SURETIES FOR PARTICULAR CLASSES OF PERSONS.

(*a.*) SHERIFFS AND OTHER OFFICERS.

The sureties of sheriffs and other officers stand in no less position than the sureties of other persons. Thus sureties of a sheriff who have been compelled to pay a judgment, because of the sheriff's failure to return an execution, are subrogated to the rights of the sheriff to recover the amount from the plaintiff and his attorney who subsequently recovered the amount of the judgment from the judgment debtor (Sayless *vs.* Taylor, 36 Tex. 307). And when the sureties of a sheriff discharge a

judgment obtained against them by plaintiff in the execution for default of the principal, they are subrogated to all the rights of plaintiff both against the plaintiff and defendant in execution. And if sureties are compelled to pay a debt by reason of the neglect of the sheriff to collect it from the principal debtor, they will have a right of action against the sheriff and his sureties on his official bond. And so are the sureties of a defaulting tax collector who have been compelled to make good the default of their principal entitled to be subrogated to the rights of the State or county, and to have the lien created by the bond in favor of the State or county enforced by their indemnity (Turner *vs.* Teague, 73 Ala. 554). Likewise the sureties of an insolvent clerk of the court, on a breach of trust by their principal, will be entitled to be subrogated to all the remedies and securities that were in the power of the creditor against one who coöperated in the breach of trust (Bunting *vs.* Ricks, 22 N. C. 130; 32 Am. Dec. 699). The same rules of subrogation apply to sureties of other officers who have been compelled to answer for the default of their principal.

(*b.*) SURETIES ON JUDICIAL BOND.

The sureties in an action for the recovery of possession of personal property is, upon payment of the obligation, entitled to be subrogated to the rights of original creditors. In Habbard *vs.* Security Trust Co., 38 Ind. App. 156, 78 N. E. 79, it was held that where a surety on a delivery bond for property levied on was required to pay the amount of the judgment, he is subrogated to all the rights of the original creditor as against the property or its proceeds. When a judgment is affirmed on appeal, the sureties on an error or appeal-bond, being liable, may at any time pay the judgment, and upon doing so they become subrogated to all the rights of the judgment creditor at the time of payment (Black *vs.* Epperson, 40 Tex. 162). Also a prior surety is entitled to be subrogated to a bail or other security given for the purpose of obtaining a delay or suspension of legal proceedings against the principal though he has assented to the giving of such new security (Clay *vs.* Schnitzell, 5 Phila. 441, as reported in Century Digest, Vol. 44, p. 3482. For extensive discussion of this point, see 37 Cyc. 435 and cases cited in the footnote). A surety on an appeal bond who pays a debt on execution is subrogated to the rights of the creditors (Somes *vs.* Molina, 9 Phil. 653).

(*c*) SURETY OF SURETY.

A surety for a surety as provided for in Article 1846 of the Civil Code, takes the place of the surety in the case that the latter is in default, and as such he is burdened with the same liabilities and clothed with the same rights that the defaulting surety has. Therefore whatever the defaulting surety is entitled to be subrogated, he is the legal substitute.

For example A owed D a debt of ₱10,000. B stood as surety of A, but D, believing that B would not be able to pay such a big sum, required a surety of the surety B. And C, a friend of A and B, became the surety of B. When the debt became

due, both A and B were bankrupt. C therefore was required to pay the debt. As such he was entitled to be subrogated to all the rights of the surety B. Whatever defenses the principal surety had concerning the debt, C, the surety of surety, was substituted.

(*d*) GUARDIANS.

Act No. 190, Section 561, requires a guardian to give bond. If the surety pays the debts of his principal he has the right to be subrogated to all the ward's securities and rights against the principal (Gilbert *vs.* Neel, 35 Ark. 24). Sureties on a bond of deceased guardian are entitled to subrogation to the rights of the wards to subject the guardian's homestead to sale for the payment of claims owing by him in his fiduciary capacity. And where the deceased guardian was the father of the wards, and they were his sole heirs, such right of subrogation may be made available to defeat an action by the wards against the sureties on a claim due from the father as guardian (Luck *vs.* Aitken, 13 S. W. 1097). The co-sureties for a guardian have the right of subrogation as between co-sureties as any other set of co-sureties. We base this conclusion upon the language of Article 1844 and 1845 of the Civil Code. These two articles speak of co-sureties in general.

(*e*) EXECUTORS OR ADMINISTRATORS.

A surety of an administrator who has disbursed his fund for the benefit of the estate may be subrogated to the right of his principal (Clark *vs.* Williams, 70 N. C. 679). And if a surety on an administrator's bond has been compelled to pay the debts of the estate by reason of his principal's misapplication of funds, he is entitled to be subrogated to the rights of the creditors against property purchased by the administrator with the funds misapplied (Pierce *vs.* Holzer, 65 Mich. 263). But a surety for an executor or administrator must exhaust his remedies against the executor or administrator individually before resorting to the assets of the estate, for here it is the executor or administrator for whom he stands as security that becomes his principal debtor.

(*f*) TRUSTEES.

A surety of a trustee may be subrogated to the right of the latter to be reimbursed from the trust fund for money properly paid out in its behalf by the trustee; and a surety of a trustee, who has been compelled to account for the defalcation of his principal, is entitled to be subrogated to the rights of the *cestui que trust*, against one who has wrongfully appropriated part of the trust estate. (Quoted from 37 Cyc. 434).

(*g*) SUCCESSIVE SURETIES.

One who becomes a surety in the course of legal proceedings against the principal has no right of subrogation against the original surety for the debt. Thus the case of Dent *vs.* Wait, 9 W. Va. 41, holds that if the principal debtor brings in a second surety in such a way as to discharge the first one, and the second surety afterward pays the debt he cannot come upon the surety who has been discharged upon the

ground of subrogation, although he may upon the principal. The reason for this is that the new surety by joining the principal in a bond by which he obtains time in the collection of the debt, changed the terms upon which the original surety was bound and prejudiced his rights (Moore *vs.* Lassiter, 16 Lea (Tenn.) 630). He is, however, entitled to be subrogated to creditor's rights against him.

7. Persons Discharging Incumbrances on Property.

(*a*) General Rule.

A person is not supposed to keep silent and inactive, when he sees that by so doing his rights and obligations will be prejudiced. Thus the law clothes him with protection whenever he does an act which would tend to ameliorate the approaching danger. The Penal Code exempts him from criminal liability when he does an act for self-defense. The Civil law likewise gives him protection. Thus a person who, in order to protect his own interests or rights in property, is compelled to pay an existing obligation, such as a mortgage or other lien, is entitled to be subrogated to the rights of the creditors whose debt he has paid and to the lien of the incumbrance discharged. The same rule applies where one having an interest in land discharges the lien of a judgment or decree thereon.

(*b*) Subsequent Creditor.

A subsequent creditor may pay prior creditors, and if he does it in order to protect his interest he is subrogated to all the rights of the prior creditor. But in order to have a benefit in the transaction the creditor to whom he has paid must have a preferred right, otherwise he is not placed in any better position. The debt which he has paid must be charged against the same property as that charged in his favor, otherwise he is not protecting his own securities. The money which the subsequent creditor used in payment, must be his; but a borrowed money satisfies the condition. If the money is not his, as we have seen in the preceding chapters, the owner and not the subsequent creditor has the right to be subrogated or to be reimbursed as the case may be.

But suppose for example the prior creditor refuses to receive the payment, what may the subsequent creditor do? Well, he may go to the debtor and resort to the rights granted the debtor by Article 1211, that is by resorting to subrogation consented by the debtor. (For the discussion of this kind of subrogation see pages 27-32.)

(*c*) Purchasers of Incumbered Property.

As a general rule a purchaser takes the place of the vendor with regard to the property he has purchased; and the vendor cannot transfer to him any right which he did not actually possess at the time that the dominion was transferred. As a transferee of the rights of the vendor, he may pay the incumbrances of the property, and after paying the incumbrance he is subrogated to the rights of the holder of the indebtedness. And if the purchaser immediately resells the same property to another purchaser who diligently pays the price to the incumbrancers, he is considered to have

done so for the first purchaser, and consequently he is subrogated to the rights of the incumbrancers (Giorge, "Teorias de las Obligaciones," Vol. 7, p. 245). A purchaser in bad faith is not subrogated, for bad faith does not confer rights.

In all these cases the purchaser must not only have, by his payment, extinguished an incumbrance or charge upon the estate purchased, but, before he can be subrogated to the rights of the party holding such incumbrance, lien, or charge, the purchaser must be able to show that his payment was made either as the result of compulsion or for the protection of some interest he had in the property that was threatened or imperilled by the incumbrance, lien, or charge (Roberts *vs.* Best, 172 Mo. 67; 72 S. W. 657).

(*d*) PURCHASERS AT EXECUTION OR OTHER JUDICIAL SALES.

A purchaser at an execution or other judicial sale is subrogated to the rights of the creditor, and upon paying off incumbrances, is entitled to be subrogated to the rights and liens of the incumbrancer paid off. Thus in the case of Lane *vs.* Hallum, 38 Ark. 585, where a judgment creditor purchased under his judgment the debtor's land, on which there was an attorneys' lien against the debtor, and the creditor afterwards paid off the lien, the court held that he could be subrogated to the rights of the attorneys and would be entitled to an execution on their judgment rendered against the debtor for their fee. But the execution debtor will not be subrogated to the rights of the debtor of the holder of the prior lien by paying the debt which it secures, for by so doing, he is discharging his own debt. It does not make any difference who the purchaser is; provided said purchaser uses the funds of the execution debtor, subrogation does not take place.

(c) JUNIOR MORTGAGEES.

A subsequent mortgagee is interested in the property mortgaged. Therefore he is included as one of those who may pay incumbrances in order to protect his rights in the property mortgaged. If he pays a prior mortgagee, he is subrogated to the rights of him whom he has paid. Thus it was held in Bank of the United States *vs.* Peter, 38 U. S. 123, that where a junior mortgagee, to save his lien is obliged to satisfy prior mortgagee, he stands as the assignee of such mortgages, and may claim all the benefits under the lien that could have been claimed by his assignor. But the case of Campbell *vs.* Foster Home Association, 163 Pa. 609, should be noted. In this case an agent, with power of attorney to sell lands, made a mortgage thereon, and, without the knowledge or consent of his principal, applied the proceeds to the discharge of a prior valid mortgage. The court held that the second mortgagee should not be subrogated to the mortgage discharged.

8. OTHER PERSONS WHO HAVE RIGHT OF SUBROGATION.

The right of subrogation in general is extended to many more other persons than those we have already discussed. For example a person, with an honest purpose to relieve the wage-earner, who pays the wages already earned is subrogated

to the rights of the employee paid. Thus the case of Putnam *vs.* News Pub. Co., 9 Ohio Dec. 479, found in footnote of 37 Cyc. 478, holds that one who carries on the business of a publishing corporation under an agreement whereby the directors and himself are to contribute money for that purpose, which the directors fail to perform and who, relying upon their assurances of performance pay the employees out of his own funds, will be subrogated to the right of such employees to preference when the proceeds to the sale of the corporation's property is distributed by a receiver according to the laws relating to estates of insolvent debtors. Likewise a part owner of a vessel who pays the wages of seamen, may be subrogated to the rank of the seamen as against the mortgagee of the share of another part-owner.

A possessor in good faith who makes improvements on the land is entitled to be reimbursed for the improvement. As such he is considered a creditor. His right may be enforced by subrogation (Pratt *vs.* Thornton, 28 Me. 355). This rule holds good in favor of him who is under a duty to preserve the thing but not to a possessor in bad faith.

Article 638 of the Civil Code extends the right of subrogation to donees. It says "the donee is subrogated to all the rights which in case of eviction, should belong to the donor." This is but natural, for as soon as the donation is fully perfected, the personality of the donor with regard to the thing donated disappears. And in the event that the ownership of the thing donated is questioned, the donee is the proper man to defend his title for the property is his. And in so doing he may exercise directly all the action which the donor may take advantage of.

Another provision of the Civil Code which has to do with subrogation is that of Article 867. It provides: "When the testator bequeaths something pledged or mortgaged for the security of an exigible (mature) debt, the payment of the same shall fall upon the heir. If the legatee pays such debts because the heir has not done so, the legatee shall be subrogated in the place and right of the creditor to make claim against the heir thereof." According to this article it is the heir that is to pay the debt of the estate, and not the legatee. But as the legatee is interested in the thing bequeated to him, in order to safeguard his right in the property, he may discharge the burden. By so doing the article above cited gives him a right to recover what he has paid by means of subrogation.

Article 125 of the Penal Code provides as follows: "Notwithstanding the provisions of the next preceding article, the principals, accomplices, and accessories, each within their respective class, shall be liable *in solidum* among themselves for their quotas, and subsidiarily for those of the other person liable.

"The subsidiary liability shall be enforced, first against the property of the principals; next, against the property of the accomplices, and lastly against that of the accessories.

"Whenever the liability *in solidum* or the subsidiary liability has been enforced, the person by whom payment has been made shall have a right of action against the others for the amount of their respective shares."

Following the general principles enunciated on page 41 of this work, we have to say that the person by whom payment has been made in the last preceding paragraph is subrogated to all the rights and actions of the party offended.

There are some provisions of the Code of Commerce which directly concern subrogation, but they are more or less repealed by some acts of the Philippine Legislature. For example Article 413 of the said code provides that an insurer against fire, after paying the damages suffered because of fire, is subrogated to the rights and actions of the owner of the property insured against the author of the fire or those responsible for it. (Act No. 2427, Section 204.) Whether the repeal of those provisions is wise or not, we deem it not our duty to make any comment.

CHAPTER VII

PARTIAL SUBROGATION

1. ITS STATUS IN OUR LAW.

Article 1213 of the Civil Code provides that "a creditor to whom a partial payment has been made, may enforce his right for the balance, with preference to the person subrogated in his stead by virtue of the partial payment of the same credit." With regard to this article Manresa in his Commentaries of the Spanish Civil Code says: "This article presupposes the possibility of partial subrogation, as it speaks of the subsistence of the rights of the original creditor, and expressly recognizes, even though to consider them preferred, the co-existence of those which the third person subrogated acquires." But our Supreme Court, with Justice Carson rendering a strong dissenting opinion, has held in the case of Somes *vs.* Molina, 15 Phil. 137: that the surety cannot exercise the rights conferred by subrogation until the debt which the principal debtor owes to the creditor is fully paid." Our Supreme Court in pronouncing this doctrine cited the following: Supreme Court of Spain, July 9, 1897 (No. 37); Wilcox *vs.* Bank, 7 Allen 270; London and N. W. American Mortgage Co. *vs.* Fitzgerald, 55 Minn. 71; Lumbermen's Ins. Co. *vs.* Sprague, 59 Minn. 208; 27 Am. and Eng. Ency. L. 205. As to how far should this ruling of our Supreme Court be extended, the dissenting opinion of Justice Carson furnishes a credible dissertation.

2. IN WHAT CASES APPLICABLE.

Partial subrogation may take place in both conventional and legal subrogation. It exists in all cases where there is valid partial payment. We speak of valid partial payment because the creditor can neither be compelled to receive partial payment, nor to subrogate the payor in the rights the creditor possesses, when the debtor is not aware of the payment. Therefore if the creditor accepts, there may be partial sub-

rogation. This is also true when the contract itself provides that there shall be partial subrogation. We have no reason to doubt that there may be partial subrogation if the right granted by paragraph two of Article 1169 is taken advantage of. (In connection with this chapter our discussion on part payment (p. 37) should be read, for in that discussion may be found the general principles on the subject.)

CHAPTER VIII

CONCLUSION

Summarizing the various points that we have endeavored to bring out in this work, we give the following as our conclusion:

1. There are various provisions scattered here and there in our laws whose letter seems to call them subrogation, when in fact they are not, for technical subrogation is the substitution of a third person or one secondarily liable in the place of the creditor either by virtue of a clear agreement or by other circumstances which conclusively prove that the parties understood to have a subrogation, or by operation of law.

2. The general rule is that there is subrogation, although the debtor does not expressly give his consent, but the payor cannot compel the creditor to subrogate him in the rights the creditor possesses. But the creditor alone without the consent of the debtor, either express or implied, cannot authorize a subrogation. What he may do is an assignment of credits.

3. The debtor alone may give consent that the payor be subrogated to the rights of the creditor. In order to do this the formalities required by law must have been strictly followed, otherwise subrogation does not arise.

4. Legal subrogation is the one that is being resorted to more frequently than the conventional subrogation. This right is granted by law for no other reason than to give equity and justice to the payor and the debtor. But the payor must have, more or less, an obligation to pay the debt either to protect his own interests or to fulfill an obligation which he is legally bound to perform because of the default of another.

5. The parties may agree to a partial subrogation. Their agreement is the law to govern their transaction so long as it is not against law, moral, or nature. (See Article 1091 of the Civil Code; Alcantara *vs.* Aline, 8 Phil. 111; Hijos de I. de la Rama *vs.* Inventor, 12 Phil. 44.) But with regard to a strictly legal subrogation, the case of Somes *vs.* Molina, et al., 15 Phil. 137, puts us in a limbo of doubts. It is however, expressly decided in that case that a surety cannot exercise the rights conferred by subrogation until the debt which the principal debtor owes is fully paid.

Whether our development of the subject justifies these conclusions or not, we leave it to our readers to answer. We have done as well as we could, and we must beg their generous indulgence if at any point we have failed to reflect accurately the existing trend of the law.