MORTGAGES - SUBROGATION OF ONE WHOSE LOAN IS USED TO PAY A SENIOR MORTGAGE

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Mortgages — Subrogation of One Whose Loan is Used to Pay a Senior Mortgage — S mortgaged the property in question to U, then conveyed the land and certain water rights to H, who gave a second mortgage on the land to M. Thereafter H conveyed the land and water rights to F, who borrowed from Z funds to retire the first mortgage, giving to Z a mortgage which it was agreed between F and Z should be a first mortgage, and transferring to Z the water rights as additional security. In an action by M to foreclose, held, Z was entitled to subrogation to the position of first mortgagee as against M, notwithstanding Z did not examine the abstract or record which would have shown the subsequent mortgage to M. Martin v. Hickenlooper, (Utah 1936) 59 P. (2d) 1139.

It is now widely accepted that a stranger may be subrogated to the security interest of a mortgagee, as against a subsequent mortgagee or purchaser, by
force of an agreement made with the mortgagor at the time of paying the mortgage debt. But it is not at all certain that such a stranger will be subrogated to the mortgagee's interest in any given case. There is a "formidable array of confusion in the cases" due, no doubt, to the fact that subrogation is a purely equitable doctrine and the courts will refuse the remedy where the equities of the particular case point to that result even though the case fits into a class to which subrogation has been extended. It has long been said that a volunteer will not be subrogated to the creditor's rights. But one who pays a mortgage debt at the request of the debtor is often said not to be a mere volunteer, and is given subrogation to the rights of the mortgagee in a proper case. In determining what is a proper case for conventional subrogation, the courts look for the existence of an agreement and further look to see if the proper equities for relief are present. Some courts require an express agreement. However, others tend not only to hold an implied agreement sufficient but to imply such an agreement from facts showing merely a purpose or an intention that the money was to be used to pay an existing obligation. Where the right to subrogation


Language of Justice Wolfe in the principal case.

3 Cross v. Bank of Ensley, 205 Ala. 274, 87 So. 843 (1921); Belleclair Planting Co. v. Hall, 125 Ark. 203, 188 S. W. 574 (1916); Beaver County v. Home Indemnity Co., (Utah 1935) 52 P. (2d) 435.


is based on an express contract, it has been held consideration is necessary; 9 but where an implied contract is the basis of subrogation the courts do not bother with the technical requirements of contracts, 10 though it would seem that in an executed transaction of this sort they would all be present. As to the equities of the parties, it is said that the lender is entitled to the subrogation to prevent the junior incumbrance from being raised accidentally to the dignity of a first lien, contrary to the intention of the parties. 11 This position would seem to lend support to those cases 12 which overlook negligence on the part of the lender in checking the record for subsequent incumbrances as did the principal case, in that any such negligence per se does not appear to affect the position of the junior incumbrancer. However, it has been pointed out that the law compels knowledge of the fact that an outstanding incumbrance junior to an existing mortgage will become a first lien on satisfaction of the mortgage, and if the junior incumbrancer can be deprived of such a right, it must be by virtue of a superior equity. 13 Other cases have held that this superior equity is not created by an indifferent or negligent perusal of the record. 14 There seems to be, however, a distinct connection between the effect of such negligence and the presence or absence of an implied agreement between lender and mortgagor. 15 Thus in a case where the court feels the negligence so culpable that the junior lienor should advance to the senior position in preference to the payer, it will refuse to imply an agreement for subrogation of the payer; but where no harm is done and the payer's negligence only "ordinary," the courts are prone to find an implied agreement. This leads to the belief that the courts are departing from the stronghold of nineteenth century intent-jurisprudence by way of the side door. That is, in a case involving no change of position by the junior lienor in reliance on the discharge of the original first lien, the courts will strain the concept of implied intent to the breaking point in order to prevent the junior lienor from claiming a windfall and advancing to the position of first

9 Oetting v. Sparks, 109 Ohio St. 94, 143 N. E. 184 (1924); Underwood v. Metropolitan National Bank, 144 U. S. 669, 12 S. Ct. 784 (1892).


14 Mather v. Jenswold, 72 Iowa 550, 32 N. W. 512 (1887); Rice v. Winters, 45 Neb. 517, 63 N. W. 830 (1895); Owen v. Interstate Mortgage Trust Co., 88 Okla. 10, 211 P. 87, 30 A. L. R. 816 (1922).

encumbrancer, whereas their real reason for giving subrogation to the payer is that they feel he has the superior equities on his side. Yet where the junior lienor has changed his position in reliance on the discharge of the original first lien, the courts will refuse the payer subrogation, though the same factors are present from which to imply an intent that he was to be subrogated. Thus, it appears preferable to approach these cases in terms of justice rather than intent and to invoke the doctrines of fraud and mistake or accident to reach the desired results. Nor would this suggested approach be a rash innovation, for almost every case involving the problem reiterates the maxim that subrogation is a purely equitable doctrine and will not be invoked to work an injustice. By speaking in terms of intent when the actual objective intent of the parties is of so little moment in the final result, the courts are but confounding confusion.

In the principal case, the court split as to the effect of the evidence in showing an implied agreement for subrogation of the lender, but the real disagreement was over giving the lender subrogation as against the second mortgagee when it was denied as against the original mortgagor. The majority in the principal case considered the lender as subrogated to the lien of the old creditor only as security for his debt owing by the new titleholder and not as security for the debt owing by the original mortgagor. The dissenting justices felt that if the lender is to have subrogation at all, it should be to all the security rights of the old lien. This particular point was not fully discussed by either the majority or the dissenting justices, but there would seem to be no sound reason why only a portion of the security rights of the original first mortgagee should not be kept alive for the benefit of the lender if the equities of all the parties point to that result; nor does a sound reason appear as to why the superior equity of the original mortgagor as to the lender should affect the relationship between the lender and the second mortgagee.

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19 Hill v. Ritchie, 90 Vt. 318, 98 A. 497, L. R. A. 1917A 731 (1916); Sidener v. Pavey, 77 Ind. 241 (1881); London & N. W. A. Mortgage Co. v. Tracy, 58 Minn. 201, 59 N. W. 1001 (1894); see to the effect that the result is the same whether fraud or mistake is involved, Louisville Joint Stock Land Bank v. Bank of Pembroke, 225 Ky. 375, 9 S. W. (2d) 113 (1928).

20 See earlier opinion in 40 P. (2d) 213 (1935) written by Justice Moffat who dissented in the principal case.

21 59 P. (2d) 1139 at 1153.

22 Ibid. at p. 1155.