Maryland Law Review

Volume 3 | Issue 3 Article 1

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Maryland Law Review

VOLUME III APRIL, 1939 NUMBER 3

THE EQUITABLE DOCTRINE OF SUBROGATION

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Subrogation is a principle conceived in equity. It is a doctrine of great importance and of extensive application. The etymology of the term, from two Latin words, "sub" meaning "under" and "rogare" meaning "to ask" indicates the origin of this doctrine in the Civil Law. This, of course, explains its origin as an equitable doctrine.

One of the dictionary definitions is:[1]

> "In Law the act or operation of law in vesting a person who has satisfied, or is ready to satisfy, a claim which ought to be borne by another with the right to hold and enforce the claim against such other for his own indemnification."

The best generally known synonym for the word is "substitution", or an assignment by operation of law. A concise statement of what is connoted by the word is:[2]

> "Subrogation is simply a method of preventing unjust enrichment."

Mr. Justice Miller in a leading case in the Supreme Court of the United States describes the doctrine a little more fully in the following language:[3]

> "The doctrine of subrogation is derived from the civil law, and 'It is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the

* Of the Baltimore City bar. A. B., 1899, Johns Hopkins University; LL.B., 1906, University of Maryland.

[1] Century Dictionary.

[2] *Note* (1913) 26 Harv. L. Rev. 380; *Note* (1926) 39 Harv. L. Rev. 381.

[3] Aetna L. Ins. Co. v. Middleport, 124 U. S. 534, 538-9, 31 L. Ed. 537, 542, 8 S. Ct. 625, 629-30 (1888).

> benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another. . . . It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers; or of one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another.' Sheldon, Subrogation, pp. 2, 3.
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> "In section 240 it is said: 'The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own.' "

The text writers say that subrogation arises in two instances, first, legal, that is by operation of law; and, second, conventional, that is by contract or acts of the parties. A third classification can be properly added in Maryland because of the rights given to subrogation by statute. Discussion of the subject, therefore, will be under these three heads.

LEGAL SUBROGATION

This branch of the topic is one that merits the most comment, as the other two might properly be dealt with under other subjects. The word "Legal" is, of course, here used as distinguished from the other two classes, "Conventional" and "Statutory". It is not used in contra-distinction to "Equitable".

Subrogation is perhaps more easily conceived in connection with specific instances, of which the two following are typical:

1. A has a second mortgage on the realty of B. The taxes on the property are in default. In order to prevent the state from selling the property for the tax lien, A is compelled to pay these charges. If later there is a sale by way of foreclosure of the first mortgage, and if this sale produces funds insufficient to pay even the first mortgage, then under the principal of subrogation A is entitled to be reimbursed for what he paid for taxes before the claim of the first mortgagee is satisfied.

2. Perhaps the greatest class of cases in which rights of subrogation are enforced involves payment by sureties. A typical instance of the application of this right arises where A was surety for B's obligation to the State. A is compelled to pay B's obligation. A, having paid the State, becomes thereupon subrogated to any rights that the State may have as creditor of B. Therefore, if A as subrogee of the State files a suit to recover for the State's rights to which he is subrogated and the claim has not been enforced for more than three years, A, the surety, is not bound by the statute of limitations, because the principles of subrogation confer upon A the State's exemption from the operation of the statute of limitations.

The essential ingredients of the legal right of subrogation are, therefore, two:

1. The person claiming subrogation must have an interest to protect, and be not merely a volunteer.

2. The right of subrogation exists as to such persons by operation of law without the creditor's consent and even against his wishes.

The principal discussion of the subject arises in connection with the persons entitled to assert the right. All the authorities state that a mere volunteer cannot claim subrogation. The difficulty, of course, is in determining who is a volunteer. The following quotation from a law review discussion of general application shows the difficulty of the question by saying:[4]

> "The term is usually applied to any person who is refused subrogation."

[4] *Note* (1913) 26 Harv. L. Rev. 261.

The most satisfactory method, therefore, of determining who are included and who are excluded by the term is to deal with the specific classes of cases in which subrogation has been permitted or refused.

General Creditors

Considering the right of a general creditor from the point of view of the origin of the doctrine of subrogation to prevent unjust enrichment, and also from some of the decisions on the subject in Louisiana, where the Civil Law still prevails, it would seem to be good law to state as a general proposition (but not necessarily as Maryland law) that a general creditor is as much entitled to the right as someone holding a lien or claiming in some other capacity. In Louisiana there are some decisions where this phase of the matter is discussed and the court of last resort, as well as the Circuit Court of Appeals for that Circuit have determined that a general creditor is entitled to the right of subrogation under appropriate circumstances.[5]

In the *Zeigler* case the court decides in favor of the general creditors' rights in the following language:[6]

> "The theory of this subrogation is that the creditor of inferior rank, in making the payment to the mortgage creditor, has an interest in the property of the common debtor, the pledge of both creditors. Until the superior mortgage debt is discharged, the creditor of inferior rank gets nothing. He is concerned, therefore, in making that payment of the superior debt which prevents a sacrifice of the common pledge, and affords the creditor who makes the payment the opportunity to make the property bring enough to pay and have a surplus after the superior debt is satisfied. The whole reasoning on which this legal subrogation rests, points to the ordinary creditor as entitled to it, and excludes the contention that the legal subrogation is restricted to the second or third mortgage. The reason of the subrogation in favor of the creditor whose mortgage is inferior exists, with equal if not greater force in favor of the ordinary creditor whose payment stops the sacri-

[5] Zeigler v. His Creditors, 49 La. Ann. 187, 21 So. 666 (1896); Iberville Planting, Etc., Co. v. Monongahela, 168 Fed. 12 (C. C. A. 5th 1909).
[6] Ziegler v. His Creditors, 49 La. Ann. 187, 188, 21 So. 666 (1896).

> fice of the property under the writ of the superior creditor. In Boileux, Toullier, Marcade, and others of the French commentators, we find the most emphatic recognition of this subrogation of the ordinary creditors.'"[7]

In Maryland the law seems to be at variance with what is outlined above. In *McNiece v. Eliason*[8] a general creditor of a decedent's estate filed a bill against a mortgagee to be allowed to pay off the mortgage and to be subrogated to its lien. A demurrer to the bill was sustained on the ground that the general creditor had no such right. Judge Fowler in rendering the opinion of the Court uses the following language:[9]

> "There can be no doubt upon the general question here involved. The doctrine is thus expressed by Mr. Pomeroy (3 Eq. Juris., Sec. 1212) 'The payment must be made by or on behalf of a person who has some interest in the premises, or some claim against other parties which he is entitled in equity to have protected'."

The Maryland Court of Appeals, however, had previously accorded the right of subrogation under facts which are no more compelling than in the case of a general creditor. In *Robertson v. Mowell,*[10] the sister of M had paid direct to the mortgagee of M's land a part of the mortgage. She did so, if not by the express previous request of her brother, yet with his knowledge and his acquiescence therein, and with the full understanding and agreement between them that when she had paid the whole mortgage debt she

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[7] The author of this article had a vigorously contested case in the Federal Court of Maryland, in which the right of a general creditor was litigated and decided in his favor. The case was argued twice in the Circuit Court of Appeals, as at the conclusion of the first argument, apparently the court was not able to decide it upon the case as then submitted. Eventually, the rights of the general creditors were established to get reimbursement from the assets of the bankrupt manufacturing corporation, a total of $35,000., which was advanced to the corporation when it was in failing circumstances, for the purpose of satisfying an income tax claim. Guaranty Trust Company of New York v. Carl R. McKenrick, et al., 5 Fed. (2nd) 553 (C. C. A. 4th 1925).

[8] McNiece v. Eliason, 78 Md. 168, 27 A. 940 (1894).

[9] *Ibid,* 78 Md. 168, 176.

[10] 66 Md. 530, 8 A. 273 (1887).

was to have the mortgage assigned to her as her security. The Court allowed her subrogation to the extent of the payments she had made and outlined the principles involved in the following language:[11]

> "It is true, she was under no legal obligation to make this payment, but under the circumstances stated she cannot be regarded as a mere stranger or volunteer officiously intermeddling with a matter which in no way concerned her. There are no intervening incumbrances or rights of creditors to be interfered with, nor any superior or equal equities to be displaced. In the case referred to the court said: 'The law of substitution is not founded on contract or agreement, but upon the equitable powers of the court. It is in the nature of equitable relief to protect a meritorious creditor, who had paid the debt of another, against loss or damage.' In most cases it is applied in behalf of one who is under an obligation of some kind to pay the debt of another, as a surety who is obliged to pay the debt of his principal, or one who is obliged to pay a lien or incumbrance on property purchased by him. 'But', say the court, 'it is not necessarily confined to these cases, but may be applied on equitable principles in behalf of one who at the instance and request of the debtor, pays a lien or incumbrance which he was under no legal obligation to pay, provided it does not interfere with intervening rights and incumbrances.' In our opinion, Mrs. Davis must be regarded as such meritorious creditor of her brother, to the extent of the payment on the mortgage debt thus made by her, and that this is a case which clearly falls within this equitable doctrine of substitution."

Most of the other cases in which the right of subrogation is allowed are clearly outlined and may be generally classified as listed below.

Rights of a Surety

The subrogation rights accorded a surety as above outlined comprise probably the largest class of cases. This class will be more particularly discussed below, because a surety's right in Maryland is enforced by virtue of a statute

[11] *Ibid*, 66 Md. 530, 538.

passed in 1763, which will be dealt with later under the third topic. However, as generally typifying the right accorded the subrogee, attention is here directed to *Orem v. Wrightson,*[12] which is a leading case in Maryland and in the law generally.

Other Persons Entitled to Right

Eliminating general creditors, and bearing in mind the general application of the doctrine of subrogation, which is an equitable principle to prevent unjust enrichment, there are many classes of cases established by numerous decisions of the Maryland Court of Appeals, wherein persons are entitled to be substituted to a creditor's rights under the subrogation doctrine.

A well established class of cases is that of junior or subsequent lienors, whose rights have been passed upon in several cases.[13] This class also includes the lien of vendors.

Executors, administrators and trustees who over-pay obligations of the estate are subrogated to the rights of creditors thus paid.[14]

A tenant in common, or a life tenant who pays a precedent obligation on property owned in common, or subject to the remainder, is entitled to the right of subrogation.[15]

A widow who pays off a vendor's lien from the proceeds of devises and bequests (which are prior to the claims of general creditors) is subrogated to the rights of the creditors thus paid off.[16]

When a bank paid to the receiver of an insolvent firm the firm's deposits in the bank, and for payment of the bank's loan retained certain collateral securities, which were found to be the property of customers of the insolvent firm,

[12] 51 Md. 34, 34 A. R. 286 (1878).

[13] Reigle v. Leiter, 8 Md. 399, 405, 63 A. D. 705 (1855); Price v. Hobbs, 47 Md. 359 (1877); Reimler v. Pfingsten, 28 A. 24 (Md. 1893); Wurlitzer Company v. Cohen, 156 Md. 368, 144 A. 641, 62 A. L. R. 358 (1928); Milholland v. Tiffany, 64 Md. 455, 2 A. 831 (1885).

[14] Billingslea v. Henry, 20 Md. 282 (1862); State v. Graham, 115 Md. 520, 81 A. 31 (1911); Carroll v. Bowling, 151 Md. 59, 133 A. 851 (1926); Elliott v. Elliott, 6 G. & J. 35 (1832).

[15] Hogan v. McMahon, 115 Md. 195, 80 A. 695, A. C. 1912C 126 (1911); Meyers v. Building Asso., 139 Md. 607, 116 A. 453 (1921); Parsons v. Urie, 104 Md. 238, 64 A. 927, 8 L. R. A. (N. S.) 559 (1906).

[16] Durham v. Rhodes, 23 Md. 233 (1865).

the owners of the collateral were entitled to be subrogated to the bank's right to a lien upon the deposits surrendered by the bank to the receiver.[17]

Similarly, when bonds were issued and sold, secured by a deed of trust, with the understanding that the property to be acquired from their proceeds was to be conveyed to the trustee under the deed of trust for their security, though the deed of trust securing such bonds was invalid, the holders of the bonds were entitled to be subrogated to the lien of other deeds of trusts of the same property to the extent that such proceeds were used for the stated purpose.[18]

Even in the case of conveyances set aside because fraudulent, if a grantee pays cash as part of the consideration for the transfer, such grantee is entitled to be subrogated to the rights of creditors of the fraudulent grantor to the extent that such cash consideration is used for payment of the claims of such creditors.[19]

When a third person lends money to a tenant in common for improvements to realty at the request of the other tenant, such a person is subrogated to the rights of the co-tenants, and is entitled to a lien on the realty for the amount so expended.[20]

While there are no decisions in Maryland on the subject, under the general principles above referred to, it seems to be good law that where an agent acting in good faith and for the benefit of the principal, but without authority, has incurred obligations, or made payments for the benefit of the principal, the agent is subrogated to the rights of those whose claims have been so paid.[21]

Limitations on the Right

The right of subrogation, with its origin in the Civil Law, is merely an equitable right. It is not enforced at the expense of a legal right.[22] In this State the Court of Appeals

[17] Records v. McKin, 115 Md. 222, 80 A. 899 (1911).
[18] Orrick v. Fidelity & Deposit Company, 113 Md. 239, 77 A. 599 (1910).
[19] Chatterton v. Mason, 86 Md. 236, 37 A. 960 (1897); Cone v. Cross, 72 Md. 102, 19 A. 391 (1889).
[20] Williams v. Harlan, 88 Md. 1, 41 A. 51, 71 A. S. R. 394 (1898).
[21] 1 Mechem, Agency, 1198.
[22] Sheldon, Subrogation, 5-6.

in a number of cases has enunciated the principles just stated, and has refused substitution ". . . when by so doing it will work an injury upon other persons by destroying their legal or equitable rights."[23]

From the above, it is clear that the right of subrogation is not granted against a superior equity or a legal right, but that a judgment creditor has no such superior equity as entitles him to the benefit of this principle.[24]

It would hardly seem necessary to cite authorities for the statement that if the creditor in connection with whose rights subrogation is claimed has no rights thus to be equitably conveyed to the person claiming subrogation, no right of subrogation can arise.[25]

Subrogation being a right to which a person claiming it is substituted by virtue of equitable principles, this right exists as to securities, which the creditor did not have or did not know about at the time his obligation was incurred.[26]

Extent of the Right

This phase of the matter could probably be summarily disposed of by saying that the equitable doctrine of subrogation when applied accords to the subrogated person all of the rights of the creditor to which the subrogee becomes thus entitled. But there are several decisions by the Maryland Court of Appeals worthy of special comment in indicating the manner in which the right of subrogation is dispensed.

This is particularly of interest in connection with the subrogation rights conferred when the State is the creditor whose rights are thus equitably assigned. A second mortgage creditor in paying off the first mortgage could thus unquestionably protect his interest by taking an assignment

[23] Holt v. State Roads Commission, 124 Md. 66, 91 A. 874 (1914); Snook v. Zentmyer, 91 Md. 485, 46 A. 1008 (1900); Milholland v. Tiffany, 64 Md. 455, 2 A. 831 (1885); Niedig v. Whiteford, 29 Md. 178 (1868); Green v. Western National Bank, 86 Md. 279, 38 A. 131 (1897).

[24] Grangers' Mutual Fire Insurance Company v. Farmers National Bank, 164 Md. 441, 165 A. 185 (1932).

[25] Poe v. Philadelphia Casualty Company, 118 Md. 347, 84 A. 476 (1912).

[26] B. & O. R. R. Co. v. Trimble, 51 Md. 99 (1878).

from the holder of the first mortgage, provided the holder of the first mortgage, as would normally be the case, is agreeable to executing such a paper. In dealing with the State as creditor, however, there is normally no accredited agent from whom an assignment could be secured. For instance, if a tax claim is thus paid off, there is no one from whom an assignment can be secured. The right of subrogation must, therefore, follow, if at all, from the application of settled principles. The leading Maryland decision on this question is the one in which the creditor was accorded the State's exemption from the application of the statute of limitations to it.[27]

We are also familiar with cases in which a Federal Government lien by reason of an income tax liability or a State's priority in the distribution of the assets of a decedent's estate devolves upon the subrogee.[28]

Two other Maryland cases show interesting circumstances in which subrogation was allowed.

In *Packham v. German Fire Insurance Company,*[29] an insurance company had become subrogated to the rights of an insurer by paying his fire insurance loss claims on furniture and fixtures. The rights to which the insurance company was subrogated (of course, those of the insured) comprised a claim against a third person tort feasor, who by a negligent fire had destroyed or damaged the insured's furniture and fixtures and merchandise, and caused him a loss of profits. The insurance covered the furniture and fixtures only and had nothing to do with the merchandise and loss of profits. The insured endeavored to handle his claim against the tort feasor in such a way that he could therein by settlement recover against the latter for the loss of merchandise and loss of profits, but not for the furniture and fixtures. In connection with this, he sued the insurance company, but the appellate court, applying the equitable doctrine of subrogation to the circumstances, felt that there

[27] American Bonding Company v. Mechanics Bank, 97 Md. 598, 55 A. 395, 99 A. S. R. 466 (1903).

[28] Guaranty Trust Company v. McKenrick, 5 Fed. (2nd) 553 (C. C. A. 4th 1925); Orem v. Wrightson, 51 Md. 34, 34 A. R. 286 (1878).

[29] 91 Md. 515, 46 A. 1066, 80 A. S. R. 461, 50 L. R. A. 828 (1900).

could be no recovery, as by reason of having disentitled himself to sue against the tort feasor for loss of furniture and fixtures, he had thus voluntarily destroyed a right to which his insurer was entitled under the equitable doctrine of subrogation, and the insurer's right of recovery for his damages, being an indivisible right, he could not recover against the fire insurance company.

The case of *Western Maryland Railway Company v. Employers' Liability Assurance Corporation*,[30] is in principle analogous to the case just cited. The insurer had there paid compensation awarded an injured workman. The railway company (or its controlled subsidiary) was claimed to be responsible as tort feasor. Article 101, section 58, of the Maryland Code gave the right of subrogation to the Employers' Liability Assurance Corporation upon payment of the injured workman's claim, and gave it the primary right to sue the tort feasor, but also provided that when this claim was satisfied, any excess recovered belonged to the injured man.

The railway company tried to settle the injured man's claim, and had actually paid him therefor, but refused to make any settlement with the Employers' Liability Assurance Corporation, claiming that it had the right to deal directly with the injured man, and owed nothing to the insurance company.

In an injunction suit, the appellate court held in substance that the right against the third party liable, to which the insurance company was by statute subrogated, was an entirety and that having recognized its liability to the injured workman by making a payment to him, the railway company had to this extent paid the injured workman money belonging to the subrogated insurance company, and that, therefore, the prayer of the bill demanding an injunction was proper.

Necessity for a Demand

As outlined above, the subrogee is entitled to his right whether or not he knows of it at the time of his incurring a

[30] 163 Md. 97, 161 A. 5 (1932).

liability, or whether or not the security that he is claiming may thereafter accrue.

But there are two cases that deal with demands in special facts. *Stump v. Warfield*[31] was an ejectment suit, and a defense was made by way of a plea on equitable grounds. There was a claim for subrogation under circumstances that dealt more particularly with different mortgage rights. The Court said:[32]

> "Under no principle of equity could they be subrogated for such purposes or on such terms, but if entitled to be subrogated at all, it would only be to the extent of that mortgage, and in order to have made this plea a valid one on that theory, it should at least have alleged that they had made demand on the plaintiffs for the amount of that mortgage, which had been refused, or show their willingness to have surrendered the property upon payment thereof."

On the other hand, in *Heighe v. Evans*[33] where the holder of a part interest in an equity of redemption as part of his subrogation rights wanted to pay off the mortgagee's claim, he had no right to demand an assignment of the mortgage. The case in question turned upon the factual issue of whether or not the person claiming the right of subrogation had made a condition of his tender a demand for an assignment of the mortgage. The foreclosure sale questioned by this litigation was sustained, because the tender of payment was conditioned upon an assignment being given; and such a tender must be unconditional. The purport of the decision seems to be that one properly asking subrogation to the lien of a mortgage is so entitled as a matter of right, and there is no necessity as a condition of the demand to request that a written assignment be executed.

Where Subrogation Is Refused

What has been outlined above doubtless makes clear the principles underlying the granting in equity of the right of subrogation, but as supplementing these settled prin-

[31] 104 Md. 530, 65 A. 346, 118 A. S. R. 434 (1906).
[32] *Ibid*, 104 Md. 530, 550.
[33] 164 Md. 259, 164 A. 671, 93 A. L. R. 81 (1932).

ciples there are several decisions by the Maryland Court of Appeals further illustrating the negative side of the subrogation doctrine.

A recent case is *Harford Bank v. Hopper's Estate.*[34] A bank claimed subrogation. It had made loans to the sole heir of a deceased person, who was also the administrator. The proceeds of the bank's loans had been used by the borrower to pay off creditors of the decedent's estate, but the borrower was under no compulsion so to do, and the bank had no understanding that the loans were to be used for this purpose. It was held that subrogation could not be allowed. The Court said:[35]

> "To the same effect, in 60 C. J., 716, it is said: 'The payor must have acted on compulsion, and it is only in cases where the person paying the debt of another will be liable in the event of a default, 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.' "

In two other cases[36] it was held that where a third party, who was in no way connected with a mortgage, lends money to the mortgagor on the latter's credit and takes no assignment of the mortgage, such person is not entitled to the right of subrogation of the mortgage lien against a subsequent mortgage.

Subrogation Claims Arising in Law Cases

There is no clear decision or statement in Maryland as to how far equitable doctrines apply in the law courts. Sheldon, the foremost text writer on Subrogation, does not deal with this subject, but contents himself with the general statement that subrogation is an equitable right.[37]

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[34] 169 Md. 314, 181 A. 751 (1935).

[35] *Ibid*, 169 Md. 314, 325.

[36] Virginia v. C. & O. Canal Co., 32 Md. 501 (1870); Swan v. Patterson, 7 Md. 164 (1854).

[37] One of the encyclopedias collects cases showing a diversity of opinion as to whether or not the right of subrogation can be claimed or administered in law cases. 60 C. J. 824. Sheldon, Subrogation, 5-6.

It is noteworthy that in one of the leading Maryland decisions,[38] an insurance company, entitled to assert the right of a creditor, to whose rights it became subrogated by payment of the claim, sought affirmative enforcement of its rights in a court of equity. The right in question, however, was a breach of trust. There was no discussion in the opinion on the question of equitable jurisdiction *vel non.*

There are, however, several decisions in Maryland showing a trend towards permitting litigation of the right of subrogation in law cases under appropriate pleadings. In *Packham v. German Fire Insurance Co.*,[39] the right of subrogation was asserted by the insurance company as an affirmative defense in an action at law. A special plea setting out the facts was then filed and was held to be a sufficient answer to the case. This plea, the record shows, was not filed by way of defense on equitable grounds.

Again, in *Maryland Trust Company v. Poffenberger,*[40] the defense of subrogation was raised by a special plea on equitable grounds in an action at law. The suit was brought on the indorsement of a promissory note. The refusal of subrogation was claimed as a defense. It was held to be insufficient, as the claim of the right by the defendant annexed as a part thereof conditions which the equitable doctrine of subrogation did not permit. The defense so pleaded was held not to be an answer to the case.

In *Stump v. Warfield,*[41] an action of ejectment was brought to recover possession of a tract of land. A defense was made by way of plea on equitable grounds, in which a right of subrogation was claimed. The claimed right was held improper under the circumstances of the case, which have been referred to above.

In the first two cases there was no discussion as to the propriety of litigating questions of subrogation in a law court. But, in *Stump v. Warfield,* the Court said, after discussing the merits of the defense of subrogation:[42]

[38] American Bonding Company v. Mechanics Bank, 97 Md. 598, 55 A. 395, 99 A. S. R. 466 (1903).
[39] 91 Md. 515, 46 A. 1066, 80 A. S. R. 461, 50 L. R. A. 828 (1900).
[40] 156 Md. 200, 144 A. 249, 62 A. L. R. 546 (1928).
[41] 104 Md. 530, 65 A. 346, 118 A. S. R. 434 (1906).
[42] *Ibid,* 104 Md. 530, 532.

> "The peculiar circumstances of this case are such that it would have been almost impossible to properly set up the claim of subrogation by the plea on equitable grounds, so as to do justice between the parties."

In the leading case of *Orem v. Wrightson,*[43] the right of subrogation was allowed in the Orphans' Court. Also, in bankruptcy there is no doubt but that subrogation rights may be fully claimed.[44]

We point out below in this article the two situations in which subrogation is allowed in Maryland by statute. In both of them this right is asserted fully in actions at law. In one of them,[45] giving sureties the right to proceed upon their claim at law, the appellate court has held[46] that a surety must proceed under the statute and cannot legally recover the money paid by him in a suit in the name of the obligee against himself and his co-obligor.

Under the statute in Maryland,[47] providing for the general qualifications of declarations in actions at law, there is the following stipulation:

> ". . . provided, that every action for damages wherein the judgment or any part thereof, which may be recoverable, shall inure to the benefit of any person claiming the same by reason of subrogation, shall be prosecuted in the name or names of the real party or parties in interest so claiming by subrogation; and upon petition of any defendant to said suit or action, the Court shall order any person having such right by subrogation to be made a party plaintiff."

It will appear from the above that plaintiffs in actions at law when claiming by way of subrogation are required to reveal fully the connections of all parties with the case. There is a significant absence, however, of any obligation on the part of substituted or actual defendants to file of record on the pleadings their real connection with the case. Thus,

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[43] 51 Md. 34, 34 A. R. 286 (1878).
[44] Guaranty Trust Company v. McKenrick, 5 Fed. (2nd) 553 (C. C. A. 4th 1925).
[45] Md. Code, Art. 8, Sec. 5.
[46] Martindale v. Brock, 41 Md. 571 (1874).
[47] Md. Code, Art. 75, Sec. 3.

insurance companies litigating on behalf of defendants the many automobile accidents are in complete obscurity.

Looking at the matter as an entirety, the author ventures the opinion that in Maryland there would probably be no case in an action at law where the question at issue was only of subrogation, in which the Maryland Court of Appeals would not, under appropriate pleadings, permit complete litigation of subrogation rights. This is said in spite of what was decided in *Stump v. Warfield.* The issue in this case was remitted to an equity court for an adjudication of the rights involved. This was by reason of the fact that a law court in an action of ejectment could not deal adequately with the complex rights of the various parties concerned in the case.

CONVENTIONAL SUBROGATION

Conventional subrogation can arise in many instances. It is said to be synonymous with assignment.[48] As such, a discussion of the principles involved more properly belongs to the latter subject. Thus, transposing one of the instances given above, if A as holder of a second mortgage on the property of B pays off the first mortgage, and has it assigned to him by the first mortgagee, the rights claimed would be adjudicated on the basis of the written assignment and not by virtue of any principle of equitable subrogation.[49]

There are, however, some decisions in the Maryland Court of Appeals of which brief mention might here properly be made. Probably the most numerous cases in which rights of conventional subrogation arise in Maryland are under the specific provisions of fire insurance policies. For instance, the present standard fire insurance policy used in the State of Maryland, and in some other States, contains at its conclusion the following provision:

> "This Company may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this Company."

[48] 60 C. J. 704.

[49] Alexander v. Fidelity & Deposit Company, 108 Md. 541, 70 A. 209 (1908).

This provision is, in view of the nature of the fire insurance contract as one of indemnity, merely declaratory of the common law, but as the subject of an express stipulation in the contract is, of course, a right by way of conventional subrogation.[50]

In *Svea Assurance Co. v. Packham*,[51] under "the peculiar circumstances of this case" the right of subrogation was refused the insurance company because one company of eight or nine insurers on the risk wanted to block the right of subrogation claimed by all the other insurers, and the Court held that that decision was an exception to the general rule that the release of wrongdoers by the insured makes him liable to the insurer for the amount paid.

There are four decisions in Maryland litigating various questions arising in connection with the standard mortgage forms upon fire insurance policies. The principal clause of this somewhat extended policy form affixed to fire insurance contracts when the mortgagee is the insured, is a stipulation in substance that any default in the contract of insurance on the part of the mortgagor does not defeat the rights of the mortgagee under the policy. These decisions pertain more particularly to questions of mortgage and fire insurance law.[52]

Statutory Subrogation

Subrogation of Employer and Insurer Paying Injured Employee.

By the provisions of Article 101, section 58 of the Maryland Code, where the employer (and insurer) pays the compensation awarded by the State Industrial Accident Commission to an injured workman, if the accident to the workman grows out of circumstances creating a legal liability

[50] Baltimore American Underwriters v. Beckley, 173 Md. 202, 195 A. 550 (1937), in which a right was enforced.

[51] 92 Md. 464, 48 A. 359, 52 L. R. A. 95 (1901), growing out of the same facts as Packham v. German Fire Insurance Co., 91 Md. 515, 46 A. 1066, 80 A. S. R. 461, 50 L. R. A. 828 (1900).

[52] Frontier Mortgage Company v. Heft, 146 Md. 1, 125 A. 772 (1924); Royal Insurance Company v. Drury, 150 Md. 211, 132 A. 635, 45 A. L. R. 582 (1925); Mutual Fire Insurance Co. v. Dilworth, 167 Md. 232, 173 A. 22 (1934); Grangers' Mutual Fire Insurance Co. v. Farmers National Bank, 164 Md. 441, 165 A. 185 (1932).

in some third person, the employer (and his insurer) may enforce for their benefit the liability of such third person. The section makes further detailed provisions as to the rights thus created by statute, but the insurer has been determined to have a first lien upon the proceeds of the recovery for its payments under the award.

This Maryland statute is of interest, because the other forty-seven States in the Union have dealt with this situation in many different ways. In some of them the only recovery against the third person is what the insurer has paid. There is no allowance to the injured workman in the event of a recovery over and above the compensation insurance paid. It is hardly within the scope of this article to deal with these varying provisions.

Workmen's Compensation insurance is a contract of indemnity. In Maryland the rights of the insurer are crystallized by this statute. It has been held that this section does not create a new liability, but merely designates the manner of enforcing a liability already existing and changes the parties benefited.[53]

Subrogation of Sureties

Article 8, Section 5, of the Maryland Code provides as follows:

> "The surety in any bond or other obligation for the payment of money or promissory note, or the endorser of any protested bill of exchange, who shall pay or tender the money due thereon, whether the whole be due or part has been previously paid, shall be entitled to an assignment, maintain an action in his own name against the principal debtor."

A surety's right to subrogation exists independently of statute and this act, originally enacted in 1763,[54] is merely declaratory of the common law.[55]

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[53] Clough & Malloy v. Shilling, 149 Md. 189, 131 A. 343 (1925). Many other decisions are cited under this statute in the 2nd volume of the Code and in the 1935 supplement. It would serve no useful purpose to list them here.

[54] Md. Laws 1763, Ch. 23, Secs. 7, 8.

[55] Watkins v. Worthington, 2 Bland 509 (1828).

Generally above, in connection with the right of subrogation, apart from statute, we have outlined the extent of the rights of a surety paying the debt.[56]

In *American Bonding Company v. Mechanics Bank,* the Maryland Appellate Court, in outlining the extent of the right of subrogation to rights and remedies against third parties, uses the following language:[57]

> "That the doctrine of subrogation does go to the extent of giving to the surety, who has paid the debt of the principal, the benefit of the rights and remedies of the creditor against all persons who were liable for the debt is both asserted by text writers and sustained by the authority of many decided cases. . . . This is especially held to be true of the sureties of a fiduciary who are compelled to answer for his breach of trust and they have repeatedly been subrogated to the rights and remedies of both the trustee and the *cestui que trust* against the fiduciary and those participating in the wrongful act."

One settled principle in connection with the surety's right to subrogation is that the surety must pay the whole debt to be entitled to this right. A surety cannot demand a *pro tanto* assignment.[58]

The surety's right of subrogation is not limited to relations of a formal suretyship, but applies to all persons upon whom there is a fixed liability, whether surety, endorser, acceptor or guarantor, to pay a debt which was due, and which the principal debtor ought to pay.[59]

In the case of *Maryland Trust Company v. Poffenberger,*[60] the Maryland appellate court refuses the application of the right of subrogation in a case where the surety demanded a security to which he was not entitled.

As outlined above, a surety is entitled to the benefit of the creditor's security even though he did not know of its

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[56] The leading case is Orem v. Wrightson, 51 Md. 34, 34 A. R. 286 (1878).
[57] 97 Md. 598, 606, 55 A. 395, 99 A. S. R. 466 (1903).
[58] Neptune Ins. Co. v. Dorsey, 3 Md. Ch. 334 (1850); Swan v. Patterson, 7 Md. 164 (1854); Parrott v. Chestertown Bank, 88 Md. 515, 41 A. 1067 (1893); Grove v. Brien, 1 Md. 438 (1852); Hollingsworth v. Floyd, 2 H. & G. 87 (1827).
[59] Dinsmore v. Sachs, 133 Md. 437, 105 A. 524 (1918).
[60] 156 Md. 200, 144 A. 249, 62 A. L. R. 546 (1928).

existence, or even if it was taken after the date of the suretyship contract.[61]

Generally, in discussing the right of subrogation at law, attention should be directed to the case of *Martindale v. Brock*,[62] in which the proper way for a surety to assert his right at law was decided by the Maryland Court of Appeals.[63]

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[61] Freeny v. Yingling, 37 Md. 491 (1872).

[62] 41 Md. 571 (1874).

[63] The following are decisions dealing generally with cases of suretyship and the right of a surety to be subrogated to the creditor's rights. None of them calls for any particular comment. Snook v. Munday, 96 Md. 514, 54 A. 77 (1903); Fuhrman v. Fuhrman, 115 Md. 436, 80 A. 1082 (1911); Wallace v. Jones, 110 Md. 143, 72 A. 769 (1909); Ghiselin v. Fergusson, 4 H. & J. 522 (1811); Hollingsworth v. Floyd, 2 H. & G. 87 (1827); Sotheren's Lessee v. Reed, 4 H. & J. 307 (1811); Norwood v. Norwood, 2 H. & J. 525 (1804); Wilson v. Ridgely, 46 Md. 235 (1877); Peacock v. Pembroke, 8 Md. 348 (1855); Grove v. Brien, 1 Md. 438 (1852). Additional decisions will be found in the 2nd Vol. of Brantly's 1st Maryland Digest under "Principal and Surety", pp. 1110, 1111.