NON-CONSENSUAL SURETYSHIP

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THE mass of cases of consensual suretyship commanding the attention of courts and lawyers tends to obscure the possibility and the value of the non-consensual relation. Whenever two persons are under obligation or under property liability to a third, who is legally or equitably entitled to but one performance, it is necessary to fix the relation between the first two and thus determine the ultimate incidence of loss. Consensual suretyship exists when there is an understanding between the two persons, expressed or implied in fact, that one shall bear the loss in the end. If there is no such mutual understanding, a relation must be established in accordance with the requirements of equity and good conscience, and special economic and social interests involved, if any, so that the final imposition of loss will not be left to depend on accidental, capricious, collusive or corrupt action on the part of the third person. If the loss should be borne by one alone, the relation may be fittingly described as non-consensual suretyship; if by both, as non-consensual coprincipalship.

The value of the relation of non-consensual suretyship lies chiefly in the surety's incidental rights of recourse. These rights comprise subrogation and commensurate exoneration.¹ On account of possible injustice to the principal, the relational right of reimbursement, which normally accompanies consensual suretyship, is here excluded, except where the principal has consented to the suretyship risk.

Cases of non-consensual suretyship naturally fall into four classes: (1) when the surety alone consents to his incurring risk for the principal's performance; (2) when only the principal consents to this suretyship risk; (3) when both principal and surety consent; and (4) when neither consents.

I

SURETY ALONE CONSENTING TO HIS UNDERTAKING SURETYSHIP RISK

The fact that the principal gives no consent does not prevent the rise of the relation with incidental rights of subrogation and co-extensive exoneration. Typical cases of such non-consensual suretyship are as follows:

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1. Moreover, the surety, as a non-officious payor, has a quasi-contractual right against the principal for the amount of the debt, this being the fair value of the benefit conferred on the principal. *Wright v. Garlinghouse*, 27 Barb. 474, 478 (N. Y. 1853). *Contra*: *McPherson v. Meek*, 30 Mo. 345, 348 (1860) (alternative decision); *Ricketson v. Giles*, 91 Ill. 154 (1878) (dictum); *Teberg v. Swenson*, 32 Kan. 224, 4 Pac. 83 (1884) (dictum).

(1) The surety undertakes obligation by procurement of the creditor (or other obligee), and without the consent or, it seems, even against the will of the principal.² Thus, if one assigns a chose in action, guaranteeing its payment without assent by the obligor, the relation between them is non-consensual suretyship, and if the guarantor pays the assignee his only relational right of recourse is subrogation, which is obviously valueless if action on the chose is barred by the Statute of Limitations.³

(2) The surety assumes obligation by procurement of one who is neither creditor nor principal and without the consent of the principal; for example, if, at the request of *X* and for a consideration given by him, *S* promises *X* in writing that *P*, the principal, shall pay his debt to *C*, the creditor, *S*, is bound to *C*, since the latter is a donee-beneficiary, and the situation is one of non-consensual suretyship.

(3) A Surety, *S*₂, undertakes obligation for the performance of the obligation of another person, *S*₁, who is surety for *P* to *C*, and he so undertakes at the request of *S*₁, *C*, or *X*, and without the consent of *P*. The result is that *S*₂ is surety for *P* as well as for *S*₁. Since *P* and *S*₂ are both under risk to *C* and *C* may require but one performance, *some* relation must be legally established to prevent creditor's caprice and collusion; and the relation between *S*₂ and *P*, respectively, must be that of surety and principal.⁴ Any other relation, such as that of principal and surety, or coprincipalship, might result in improper indirect attack on *S*₁ (for example, if *P* should pay *C*, *P* would fall upon *S*₂ and thus throw *S*₂ upon *S*₁), and in circuity of action (for *S*₁ would next strike *P*). Really, the situation is one of subsuretyship, *P* being principal, *S*₁ surety for *P*, and *S*₂ surety for both.⁵

(4) The surety undertakes obligation at the request of one of two coprincipals and without the consent of the other. Thus, if *P*₁ and *P*₂

2. *Davis v. Schlemmer*, 150 Ind. 472, 50 N. E. 373 (1898); *Mathews v. Aikin*, 1 N. Y. 595 (1848); and see *Bishop v. Rowe*, 71 Me. 263 (1880); *Carter v. Jones*, 5 Ired. Eq. 196 (N. C. 1848); L. R. A. 1918F 709.

3. *Marsh v. Hayford*, 80 Me. 97, 13 Atl. 271 (1888). In the case of indorsement of a negotiable instrument, at least if it be payable to order, consent in advance is imported by the character of the instrument. *Godfrey v. Rice*, 59 Me. 308, 313 (1871); cf. *NEGOTIABLE INSTRUMENTS LAW* § 121.

4. *Leake v. Ferguson*, 2 Gratt. 419 (Va. 1846); *Goddard v. Whyte*, 2 Giff. 449 (Ch. 1860). The possibility of collusion between *C* and *P* appears from the fact that *P* might induce *C* to sue *S*₂ first, with the thought that *S*₁ might become insolvent before *S*₂ could recover from him or that *P* himself might become execution-proof before judgment could be recovered against him by *S*₁.

5. Most situations of subsuretyship have been excluded from this article. Reference may be made to the writer's article on *Nonconsensual Subsurretyship* (1935) 83 U. OF PA. L. REV. 326, 442.

undertake a joint or joint and several obligation to *C*, and *S* at the request of *P*₁ engages that they will perform, or more generally that the obligation will be performed,⁶ *S* is not only consensual surety for *P*₁ but also non-consensual surety for *P*₂,⁷ because this result accords with the understanding of *S* as manifested by the form of his promise to *C* and is in keeping with the expectation of *P*₂,⁸ unless of course there is an agreement between *S* and *P*₂ to the contrary, or *S* rejects such a relation.⁹ So also, even though *S* merely promises that *P*₁ will perform the obligation, it seems that *S* will be surety for *P*₂ as well as for *P*₁, for the one performance for which they all become responsible is as much the proper performance of *P*₂ as it is of *P*₁, especially when both have received the equivalent therefor.¹⁰

(5) A surety, *S*, undertakes obligation for and at the request of *A*,

6. *Agren v. Staker*, 46 Idaho 36, 267 Pac. 460 (1928); *CAMPBELL'S CASES ON SURETYSHIP* (1931) 129; *Taul v. Epperson*, 38 Tex. 492, 496 (1873) (supersedeas bond given by *P*₁ with *S* as surety; it did not appear whether *P*₁ and *P*₂ were co-principals or surety and principal, respectively, but the reasoning of the court indicates that *S* would be surety for *P*₂ in either case).

Professor Stephen I. Langmaid, in his able article, in (1934) 47 HARV. L. REV. 976, takes the position that *S* is not a surety for *P*₂. He reasons in effect that, if *P*₁ and *P*₂ are jointly or jointly and severally bound to *C* in the sum of \$1,000, as between them each is principal for \$500 of the obligation and surety for the remaining \$500; and hence that it is only as to the latter half that *S* is surety for *P*₁ and hence for *P*₂. The writer is unable to agree with either the conclusion or the reasoning. Are not the obligation and hence the risk of *P*₁ and *P*₂ integral rather than divided? The situation is different from one in which *P*₁ and *P*₂ have each executed a note for \$500 with the other as surety thereon. See *Pace v. Pace's Adm'r.*, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459 (1898). Furthermore, if the risk were divisible, what would be the relation of *S* and *P*₂ as to the half for which *P*₁ is principally responsible? At least co-suretyship, it seems; and probably *P*₂ should be accounted an interposed surety in view of the fact that he participated in the fruits of the transaction and *S* did not.

7. *Hecker v. Mahler*, 64 Ohio St. 398, 60 N. E. 555 (1901).

8. Cf. *Keith v. Goodwin*, 31 Vt. 268 (1858); *Craythorne v. Swinburne*, 14 Ves. 160 (Ch. 1807); 2 WILLISTON ON CONTRACTS (1920) § 1282.

9. Thus, in *Hill v. Wright, Williams & Co.*, 23 Ark. 530, 532 (1861), *C* had a claim against *P*₁ and *P*₂, owners of a steamboat, and to prevent *C* from seizing the vessel *P*₁ gave a bond with *S*₁ as surety, and *P*₂ one with *S*₂ as surety. Judgment having been rendered against *P*₁ and *P*₂, the sureties each paid one half thereof; *P*₂ reimbursed *S*₂, but *P*₁ failed to reimburse *S*₁. It was held that *S*₁ was not entitled to compensation from *P*₂. The court seemingly recognized that ordinarily *S*₁ would have been so entitled, but relied on the fact that *S*₁ expressly refused to undertake responsibility for *P*₂, but required that *P*₂ obtain a surety for himself. The results were that *S*₁ was surety only for *P*₁ and hence was limited to subrogation to the latter's right for contributive exoneration against *P*₂ (which right had been satisfied by the payment made by *P*₂ to *S*₂), and *S*₁, had he paid all, would have had no right of contribution against *S*₂.

10. *Robinson v. Sherman*, 2 Gratt. 178 (Va. 1845) (forthcoming bond given by *P*₁ with *S* as surety; *P*₁ and *P*₂ were co-principals). The only criticism which can be made of *Taul v. Epperson*, 38 Tex. 492 (1873), and *Robinson v. Sherman*, *supra*, is that in both there was variation of the risk of *P*₁ and hence *S* might well have been related to *P*₂ as *P*₁ was.

who with *B* is surety for *P*; *S* should be surety for both the co-sureties, and not merely surety for one and co-surety with the other. The performance for which *S* is responsible is due as much from *B* as from *A*.¹¹ Here again relations of subsuretyship are present, that is, between *P*, *A* and *S*, and between *P*, *B* and *S*.

(6) All the situations thus far considered may be varied by making the surety's risk relate to his property rather than consist in obligation. Thus *S* might mortgage real or personal property to secure the debt of *P* to *C*, at the instance of *C* or *X*, though without the consent of *P*, and so become a real surety for *P* with relational rights of subrogation and commensurate exoneration. Moreover, *S* might mortgage property to secure the obligation of *A*, who along with *B* is surety for *P*, though without the consent of *B*, and thus become the real surety for *B* as well as for *A* and *P*.¹² Furthermore, one can conceive of a situation in which *C*, having received a note and a mortgage on Whiteacre from *P*, surrenders the note but retains the mortgage title or lien¹³ and thereafter without the consent of *P* takes a mortgage on Blackacre from *S* to secure the same payment; *S* is real surety for *P*, a real principal, for, while neither is under obligation, the property of each is exposed to the risk of non-payment of the stated sum of money and as between the two, in equity and good conscience, *P*'s property should be sold to produce the money. The results are that if *C* realizes on Whiteacre, *P* will have no recourse against Blackacre, but that if *C* realizes on Blackacre *S* will be subrogated to the mortgage on Whiteacre; furthermore, *S* would even be entitled to exoneration, that is, to have Whiteacre sold first in ease of Blackacre, at least if he adequately indemnifies *C* against loss resulting therefrom.¹⁴

11. Distinguish a case in which the risk of *S* arises from becoming bound on a stay bond for one surety and so varying the risk of the other. *Crow v. Murphy*, 12 B. Mon. 444 (Ky. 1851).

12. A different situation was involved in *Furnold v. Bank of Missouri*, 44 Mo. 336 (1869). *C* obtained a judgment against *S*₁ and *S*₂, which was a lien on land of each; hence each was contributively subrogated to the lien on the land of the other; *S*₁ conveyed his land to *A*, receiving the full purchase price; *S*₂ later conveyed his land to *B*; *A* paid the judgment to *C*. It was held that *A* was contributively subrogated to the judgment lien of *C* on the land of *B*. The case is sound; it is true that *A* was real surety for *S*₁, but only because the land acquired by him was already subject to the judgment lien; hence, while he succeeded to the rights of *S*₁, as the case decided, he could stand in no higher position than *S*₁, because he took his land subject to the lien of the judgment in which *S*₂ (and later *B*) had a like equity of contributive subrogation.

13. Whether or not the mortgage survives the surrender of the note depends on the intention of mortgagee and mortgagor. If intended to survive, the mortgage will secure the act of payment. *Hemenway v. Bassett*, 13 Gray 378 (Mass. 1859); *Donnelly v. Simonton*, 13 Minn. 301 (1868); *PINGREY ON MORTGAGES* (1893) § 1228.

14. Cf. *West Huntsville Cotton Mills Co. v. Alter*, 164 Ala. 305, 51 So. 338 (1910); *Henry v. Compton*, 2 Head 549 (Tenn. 1859); *Neal v. Buffington*, 42 W. Va. 327, 331, 26 S. E. 172, 174 (1896); see *CAMPBELL'S CASES ON SURETYSHIP* (1931) 121-123.

II

WHEN ONLY THE PRINCIPAL CONSENTS TO THE SURETYSHIP RISK

Here again the relation of principal and surety arises although it is non-consensual. Indeed, the surety's rights of recourse are more extensive than in the situations last discussed. The following illustrations are taken from the field of negotiable instruments:

(1) If the payee of a negotiable bill or note, by whom it has been stolen or to whom it has been delivered for safekeeping or other restricted purpose, wrongfully negotiates it by indorsement to a holder in due course, the latter acquires an enforceable right against the drawer or maker, as well as against the indorser. It is quite clear that as between these persons the loss should ultimately fall on the wrongdoer; hence a non-consensual relation of principal and surety is created between the payee and the drawer (or maker), respectively.¹⁵ Again, if the payee had transferred property as consideration for the instrument but induced the transaction through fraudulent representation made to the drawer (or maker), the latter, on taking steps appropriate to rescission as against the indorsing payee, would become a surety for him to a holder in due course.¹⁶ If the fraudulent payee had retained the instrument, the rescinding drawer or maker would have had a defence; in view of the negotiation to a holder in due course, the drawer or maker must be denied any defence, but he will be given the next best protection possible, that is, the position of surety in respect to the payee, although he originally contemplated sole or principal liability.¹⁷ So also, if there had been failure of consideration or breach of warranty, instead of fraud, and effective rescission therefor, the drawer or maker would become a surety instead of a sole or principal obligor, as he originally intended.¹⁸

(2) In like manner, if one acquires possession of a valid negotiable note from the owner by theft or for safekeeping or other limited purpose and wrongfully negotiates it with or without indorsement to a holder in due course¹⁹ as security for his own debt, the wrongdoer and the owner

15. *McBride v. Potter-Lovell Co.*, 169 Mass. 7, 47 N. E. 242 (1897) (holding that M_1 and M_2 were co-sureties for P); *Cummins v. Line*, 43 Okla. 575, 143 Pac. 672 (1914) (same).

16. *Vian v. Hilberg*, 111 Neb. 232, 248, 196 N. W. 153, 160 (1923) (holding M_1 and M_2 co-sureties for P).

17. Compare the analogous situation in which a principal gives judicial bond with surety, thereby causing variation of risk of the original surety; while the original surety is not discharged, the variation of his risk requires that he stand in the relation of surety for the surety on the judicial bond. See the writer's article, *supra* Note 5, at 445.

18. *Baker v. Brem*, 103 N. C. 72, 80, 9 S. E. 629, 631 (1889) (breach of warranty, and chattel tendered by maker and received by payee in consequence thereof).

19. The words "negotiation" and "holder in due course" presuppose that the latter falls within the tenor of the instrument (NEGOTIABLE INSTRUMENTS LAW §§ 30, 191, 52), as he does if the instrument is payable to bearer or indorsed to bearer or in blank by the payee or a special indorsee.

stand in the non-consensual relation of principal and real surety, respectively, a relation arising with the consent of the principal but without that of the surety.²⁰ A similar situation would be present if the transferor had obtained a valid instrument from the owner for a consideration but through fraudulent representation, or if there had been failure of consideration or breach of warranty, followed by effective rescission therefor.

In the cases considered under this topic, either the injured person can maintain an action of tort against the wrongdoer²¹ or, in case of failure of consideration or breach of warranty, an action of contract; and in many instances an action of quasi contract would be a concurrent remedy. But these would not be the only remedies one would have and sometimes not the best. Being a real or personal surety, as the case may be, he

20. Consequently, if the wrongdoer transfers negotiable notes or other negotiable securities, owned by two or more persons, to secure the same debt, such persons become, non-consensually, real sureties for the wrongdoer and hence co-sureties, with appropriate relative rights of contributory reimbursement, subrogation and exoneration. *Duncan v. Johnston & Co.*, 3 F. (2d) 422, 424 (C. C. A. 6th, 1925), cert. denied, 267 U. S. 600 (1925); *Sexton v. American Trust Co.*, 45 F. (2d) 372 (C. C. A. 8th, 1930); *In re J. C. Wilson & Co.*, 252 Fed. 631 (S. D. N. Y. 1917); *Gould v. Central Trust Co.*, 6 Abb. N. C. 381 (N. Y. 1879); *Asylum of St. Vincent v. McGuire*, 239 N. Y. 375, 146 N. E. 632 (1925). *Contra*: *Leonard v. Hunt*, 36 F. (2d) 13 (C. C. A. 1st, 1929), reversing 29 id. 593 (D. Mass. 1928). Authorities are collected in Notes (1919) 1 A. L. R. 664; (1923) 24 id. 479; (1925) 38 id. 1219; (1927) 48 id. 803; (1932) 76 id. 794. See CAMPBELL'S CASES ON SURETYSHIP, 172-177, 176, n. 2.

21. Authorities are collected in (1895) 27 L. R. A. 519; (1914) 52 L. R. A. (N. S.) 945; BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (5th ed., Beutel, 1932) 372, 373, 540, 541. According to many authorities, the drawer (or maker) may recover full damages from the payee although the former has paid nothing to the holder in due course notwithstanding that the payee is still obligated to the holder. *Decker v. Matthews*, 12 N. Y. 313 (1885) (judgment previously recovered by holder against maker); *Metropolitan Elevated Ry. Co. v. Kneeland*, 120 N. Y. 134, 24 N. E. 381. (1890) (action not yet begun by holder against maker); *Hoffman v. Toft*, 70 Ore. 488, 142 Pac. 365 (1914) (same); Notes (1895) 27 L. R. A. 519; (1914) 52 L. R. A. (N. S.) 945. But see *Freeman v. Venner*, 120 Mass. 424 (1876). The writer disagrees with the first mentioned authorities because, theoretically, it is non-relief from sole liability which constitutes damage, and, practically, the defendant is left exposed to recovery by the holder and to the risk of the plaintiff's intervening insolvency. Had the existence of the suretyship relation and the advantages of a bill in equity for exoneration been perceived, judgment for substantial damages would probably have been refused or at least qualified. That exoneration may be had is shown by *Perry v. Engel*, 296 Ill. 549, 557, 130 N. E. 340, 344 (1921): the maker having rescinded the transaction as against the payee for breach of fiduciary duty, in a suit in equity brought by the former against the latter it was decreed that the payee either pay the complainant or pay the note to the holder at maturity. In *Baker v. Brem*, 103 N. C. 72, 80, 9 S. E. 629, 632 (1889), it was recognized that a judgment rendered in favor of the maker against the payee should provide that execution should not be issued until the latter should be relieved from his liability as indorser, presumably by the plaintiff's paying the holder, the court saying that equity would have granted an injunction to that effect under the former procedure; the objection to such a judgment is that the plaintiff would have to suffer loss before having effective redress against the defendant; it would be much more to his interest to obtain exoneration, as in the Illinois case.

would certainly have relational rights of subrogation, including an immediate equitable interest in any security received by the obligee from the principal; also, it is submitted, a relational right of reimbursement, because, in view of the principal's consent to the surety's risk, it is as just to require reimbursement here as in cases of consensual suretyship; and, lastly, a right of exoneration commensurate with the other two relational rights, or either of them.

III

WHEN BOTH PRINCIPAL AND SURETY CONSENT TO THE SURETYSHIP RISK

It is conceivable that the obligee, at the instance of the principal or merely with his consent, might procure from the surety a binding promise that the principal would pay his debt to the obligee; in such a case the relation is non-consensual because, without more appearing, there is no pertinent understanding, expressed or implied in fact, between principal and surety.²²

In cases falling within this topic the surety would seem to have a relational right of reimbursement, as well as of subrogation, with a commensurate right of exoneration; for here again the principal consented to the rise of the suretyship risk, and hence it would seem to be proper to subject him to the three kinds of recourse, just as in the case of consensual suretyship.

IV

NEITHER SURETY NOR PRINCIPAL CONSENTING TO THE SURETYSHIP RISK

This topic includes the most difficult cases of non-consensual suretyship and merits extended treatment. It will be observed that in situations considered under several of the following subtopics, while the surety willingly undertook risk and a principal liability later developed, still the surety might have become responsible without any liability attaching to another person, and hence it cannot be said that the surety willingly undertook *suretyship* risk; instances will be found in the relation of surety and principal created between an insurer and a tortfeasor who is in fault, or not in fault, in the like relation between an insurer of a shipper and the carrier of goods (or the latter's indemnitor), and in the relation sometimes arising between the indemnitor of a tortfeasor and a co-tortfeasor. Moreover, in cases treated under certain other subtopics, neither surety nor principal contracted for risk, let alone suretyship risk;

22. One might also imagine a situation in which a stranger, with the consent of the principal, had procured a binding promise from the surety that the principal would pay his debt to the obligee; in such a case the surety would be bound to the creditor, the latter being a donee-beneficiary, and a relation of principal and surety would exist, although it would be non-consensual.

for instance, when two persons incurred tort liability, one because of fault and the other without fault, or when two tortfeasors were in fault but one of them in equity and good conscience or for other reasons should bear the ultimate burden of reparation.

A. Relation between Insurer and Tortfeasor Who is in Fault

An insurer and a tortfeasor whose wilful, reckless or negligent conduct causes loss to a third person, for which loss the insurer is bound to indemnify²³ the latter, are in the relation of surety and principal,²⁴ although it is obviously not consensual.²⁵ The reasons are (1) that the insurer and the tortfeasor are bound, the one by contract and the other because of his tort, to indemnify the insured for the loss; (2) that, in equity and good conscience, the insured should but once receive full compensation in his own behalf; and (3) as between the insured and a tortfeasor who is in fault, the latter should bear the ultimate burden of making compensation for the loss resulting therefrom. The consequences of this relation of surety and principal are, first, that the insurer is subrogated in equity to the rights of the insured against the tortfeasor, even in the absence of the usual provision in the policy to that effect,²⁶ or if, having paid the insured, he prefers to proceed at law he may maintain a quasi-contractual action against the tortfeasor;²⁷ secondly, a release executed by insured to tortfeasor before payment made by the insurer discharges the insurer;²⁸ and, thirdly, settlement made by the tortfeasor or his indemnitor with the insured in the knowledge that the latter has already received compensation for the loss from the insurer does not discharge the effective equitable right of subrogation of the insurer against the

23. Hence this doctrine is applicable to fire and marine insurance, and not to life and accident insurance. In the *latter* kinds of insurance the insured may, in his own behalf, enforce payment of the policy and also obtain reparation from the tortfeasor; hence one of the essentials of suretyship is absent. RICHARDS ON INSURANCE (4th ed. 1932) § 52; VANCE ON INSURANCE (2d ed. 1930) §§ 175-177, p. 679.

24. *Chicago & Alton Rr. Co. v. Glenny*, 175 Ill. 238, 51 N. E. 896 (1898); JOYCE ON INSURANCE (2d ed. 1918) § 3574; MAY ON INSURANCE (4th ed. 1900) § 454.

25. Even the insurer merely contemplates that loss *may* result from the fault of another.

26. JOYCE ON INSURANCE § 3574; RICHARDS ON INSURANCE § 52; VANCE ON INSURANCE §§ 175-177, p. 676. Accordingly, an indemnitor against liability is subrogated, with or without agreement, to the rights of the indemnitee against a tortfeasor, who imposed liability on the indemnitee by negligently injuring his servant. *Travelers' Ins. Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426 (C. C. A. 6th, 1911).

27. It is to be observed that the tortfeasor is not under tort liability to the insurer, the latter's damage being regarded as too remote; if he were, a tortfeasor would be responsible to an insurer of life or against accident; but the cases hold the contrary. *Connecticut Mutual Life Ins. Co. v. New York, New Haven & Hartford Rr. Co.*, 25 Conn. 265 (1856); JOYCE ON INSURANCE § 3579; RICHARDS ON INSURANCE § 52; VANCE ON INSURANCE §§ 175-177, p. 679.

28. JOYCE ON INSURANCE § 3541; RICHARDS ON INSURANCE § 57; VANCE ON INSURANCE §§ 175-177, p. 675; Note (1911) 29 L. R. A. (N. S.) 698; and see Note (1928) 55 A. L. R. 926.

tortfeasor or his indemnitor, even though the settlement was accompanied by a release.²⁹

B. Relation between Insurer and Tortfeasor under Absolute Liability

The insurer is generally subrogated to the cause of action of the insured against one who is under tort liability for loss of or damage to the insured property even though the tortfeasor is without fault. Instances of such absolute liability are: (1) statutory liability imposed on a railroad company for causing fire through the operation of its locomotives or otherwise; (2) the common law liability of a carrier for loss of or damage to goods; (3) the liability of a principal for the tort of his agent, and especially of a master for that of his servant, resting on the doctrine of respondeat superior; and (4) liability under the principle of *Rylands v. Fletcher*.³⁰

The fundamental proposition in all these cases is that the insurer is surety and the person under absolute tort liability is principal, with the same legal consequences as those set forth under the last subtopic. The reasons for the establishment of this relation, rather than the reverse relation or coprincipalship, are sufficient, although not so compelling as in the case of liability for fault. They will be developed in connection with the treatment of the first and second classes of absolute liability, that is, the statutory liability of a railroad company for causing fires and the liability of carrier to shipper.

1. Relation between Insurer and Railroad Company Causing Fire without Fault.

For the railroad company it may be argued that it should be surety for the insurer on the ground that the latter has deliberately and specifically undertaken the risk of loss by fire without regard to its origin, whereas the absolute liability of the railroad company arises merely as a statutory consequence of the operation of the railroad; also, that the insurer is engaged in the business of underwriting such risks, the premiums for which might be raised sufficiently to compensate for a denial of subrogation. On the other hand, the insurer may argue more cogently: (1) that the railroad company is carrying on a dangerous business from which loss actually ensues in the particular case, and in which the rates for service may be so adjusted as to counterbalance denial of recourse

29. JOYCE ON INSURANCE § 3544; RICHARDS ON INSURANCE § 57; VANCE ON INSURANCE §§ 175-177, p. 676; Note (1911) 29 L. R. A. (N. S.) 698. For conceivable remedies, sounding in tort or quasi contract, which the indemnifying insurer has against the insured, who executes a release of his cause of action to the tortfeasor or his indemnitor, see Notes (1925) 36 A. L. R. 1267; (1934) 47 HARV. L. REV. 830 [commenting on *American Automobile Fire Ins. Co. v. Spieker*, 97 Ind. App. 533, 187 N. E. 355 (1933)].

30. L. R. 3 H. L. 330 (1868).

against the insurer; (2) that to advance insurance premiums on adjacent property would be unjust to a part of the community not seeking the services of the carrier, whereas to raise the rates of carriage is merely to place the ultimate cost thereof on users of the utility which causes the loss; (3) the railroad company is in control of the instrumentality; (4) the loss commonly results from faulty construction, maintenance or operation, faults difficult to prove. Accordingly, the insurer is generally placed in the position of surety for the railroad company, regardless of the latter's fault, and is given subrogation.³¹

In a few states, however, e.g., in Massachusetts, Maine, New Hampshire and Colorado, an amendment to the statute has reversed the relation,³² by providing in effect that the railroad company shall have an insurable interest in exposed property and be entitled to the benefit of any insurance thereon, and if the insured shall have received payment of the insurance that the amount thereof shall be deducted from the damages recoverable for the tort, or if not so paid that the policy upon settlement of the damage shall be assigned to the railroad company. The amendment is generally held to apply to negligent as well as non-negligent fires occurring after the enactment of the amendment; and to be constitutional, although the policy contains an agreement for subrogation to, and assignment of any claim for damages.³³ It has been properly decided,³⁴ however, that the amendment does not change the

31. *Crissey Lumber Co. v. Denver & Rio Grande Rr. Co.*, 17 Colo. App. 275, 299, 68 Pac. 670, 677 (1902); *Hart v. Western Rr. Corp.*, 13 Metc. 99 (Mass. 1847).

32. *New England Box Co. v. New York Central & Hudson River Rr. Co.*, 210 Mass. 465, 468, 97 N. E. 140, 141 (1912).

33. *Leavitt v. Canadian Pacific Ry. Co.*, 90 Me. 153, 37 Atl. 886 (1897) (policy issued before the amendment and non-negligent fire occurring afterwards; insured allowed to recover from the railroad company only the difference between loss and insurance); *Lyons v. Boston & Lowell Rr. Co.*, 181 Mass. 551, 64 N. E. 404 (1902) (same); *New England Box Co. v. N. Y. C. & H. Rr. Co.*, 210 Mass. 465, 97 N. E. 140 (1912) (policy issued and negligent fire occurring after the amendment; insurance companies denied subrogation); *Boston Ice Co. v. B. & M. Rr. Co.*, 77 N. H. 6, 86 Atl. 356 (1913) (same); *Farren v. Maine Cent. Rr. Co.*, 112 Me. 81, 90 Atl. 497 (1914) (same) [overruling *Dyer v. Maine Cent. Rr. Co.*, 99 Me. 195, 58 Atl. 994 (1904)]. But in *British America Assur. Co. v. Colo. & So. Rr. Co.*, 52 Colo. 589, 125 Pa. 508, 1135, (1912), where the policy was issued before, and the fire occurred after, the enactment of an amendment which denied subrogation to the insurer, but saved rights accruing before its enactment, it was held that the case fell within the saving clause (aside from any question of unconstitutionality for impairing the obligation of contracts), and that the insurer was entitled to subrogation. The writer disagrees with this interpretation of the amendment. In its absence, the insurer would have no right of subrogation until the loss occurred; for subrogation is essentially a right of recourse against a principal and one is not a principal until he comes under liability; furthermore, an agreement for subrogation, or for assignment on payment, between insured and insurer, gives the latter no effective right against the railroad company, because the very act of payment works an equitable extinguishment of the claim of the insured against the railroad company. Authorities are collected in 41 L. R. A. (N. S.) 1202 (constitutionality discussed); 52 L. R. A. (N. S.) 203.

34. *Wild v. Boston & Maine Rr. Co.*, 171 Mass. 245, 50 N. E. 533 (1898).

relation between insurer and railroad company in respect to liability for a fire occurring before its enactment.

2. *Relation between Insurer of Shipper and Carrier of Goods*

a. In General

Another instance of absolute liability is that of the common carrier of goods. Here also, in the absence of controlling stipulation, as soon as the loss of or damage to the goods occurs, the insurer and the carrier come into the relation of surety and principal, respectively, so that the insurer is subrogated to the rights of the shipper against the carrier.³⁵ The reasons are similar to those governing the relation between insurer and railroad company under statutory absolute liability for setting or causing fires, that is, the onus of compensation should ultimately rest on all shippers through increased rates rather than on insured shippers through increased premiums. Moreover, the carrier is in control of the goods, the loss is usually the result of negligence or other fault on the part of him or of his agent or servant, and such fault is difficult of proof. Furthermore, it is all the clearer that the insurer becomes surety for the carrier if the loss or damage results from the fault of the carrier or his agent or servant.³⁶

There is added reason for such subrogation if the insurance contract stipulates therefor.³⁷ It is not that the stipulation operates as an assign-

35. JOYCE ON INSURANCE § 3549; RICHARDS ON INSURANCE § 52; VANCE ON INSURANCE §§ 175-177, p. 677.

36. *Relation between Insurer of Shipper and Indemnitor of Carrier.* If the facts are such that the insurer is surety for the carrier and hence subrogated to rights of the shipper against the carrier, the insurer is also subrogated to such rights as the shipper has against an indemnitor of the carrier, e.g., rights resting on statute or the form of the undertaking of indemnity. *Sorenson v. Boston Ins. Co.*, 20 F. (2d) 640 (C. C. A. 4th, 1927) (liability insurance taken out by tortfeasor).

37. *Stipulation for Subrogation in Policy of Insurance and Release of Prospective Liability of a Tortfeasor or Carrier.* If the contract of insurance contains a stipulation for subrogation to any cause of action in tort which the insured may have and the insured has already effectively released or later so releases another person from all prospective liability, it is properly held that the insurer is discharged from responsibility for the tort of that person, since the action of the insured makes or has made subrogation impossible. *Downs Warehouse Association v. Pioneer Ins. Ass'n.*, 41 Wash. 372, 83 Pac. 423 (1906) (fire insurance with stipulation for subrogation; later spur track agreement, in which insured released railroad company from all liability for fire); *Fire Association v. La Grange Compress Co.*, 50 Tex. Civ. App. 172, 109 S. W. 1134 (1908) (dictum that insurer is discharged where lessee has by lease released railroad company from all liability and insurance is later issued with stipulation for subrogation; decision that insurer was bound because of waiver through agent's knowledge of release). But see *Pelzer Manufacturing Co. v. Sun Fire Office*, 36 S. C. 213, 267, 268, 15 S. E. 562, 582 (1891) (like facts; question of intentional concealment of material fact left to jury, which answered it in negative; judgment affirmed). Discharge is obvious if the policy is expressly avoided because of the release. *Kennedy Brothers v. Iowa Ins. Co.*, 119 Iowa 29, 91 N. W. 831 (1902); *Bloomington v. Columbia Ins. Co.*, 84 N. Y.

ment of an enforceable claim of the shipper against the carrier, because, once the shipper accepts satisfaction of the loss from either person liable, in equity and good conscience he is not entitled in his own behalf to further compensation from the other, and therefore has nothing which he can assign; the reason is rather that the stipulation in effect manifests an understanding between insurer and insured that the former shall be surety and the carrier principal, and the creation of that relation fulfills the will of the insurer without violating any manifested intention of the carrier.³⁸

In an effort to reverse that result, carriers adopted the practice of stipulating in the bill of lading for the benefit of any insurance effected by the shipper. The first situation to be considered is where the insurer has not stipulated for subrogation. He is not discharged, unless there be fraudulent misrepresentation; without more, there seems to be no fraudulent concealment of material fact by the shipper.³⁹ Nor is the insurer placed in the position of a surety, but rather in that of a non-consensual principal, in respect to the carrier, so that instead of the insurer being subrogated to the tort claim against the carrier, the latter is subrogated to the insurance even though the loss resulted from his negligence or other fault.⁴⁰ This is a just result, notwithstanding fault on the part of the carrier, since it accords with the will of the carrier as expressed to the shipper without running counter to any manifested understanding between insurer and shipper. Nor is there any principle of insurance law which defeats the carrier's stipulation for the benefit of the insurance; he has an insurable interest in the goods and hence may insure himself against liability, even for his own negligence in respect thereto, either directly or through a provision that he be entitled to the insurance of another.⁴¹

Supp. 572 (Sup. Ct. 1903) (release of common law liability contained in bill of lading). If, however, liability for fault is excepted from the operation of the release, the insurer would seem not to be discharged, inasmuch as the insured may still have a claim of substantial content to which the insurer may be subrogated. Cf. Brett, M.R., in *Tate v. Hyslop*, 15 Q. B. D. 368, 375 (1885). And see the form of bill of lading prescribed by the Interstate Commerce Commission, which limits the carrier's liability to negligence in certain respects. 64 I. C. C. 347, 356, 357, 364A (1921).

38. Cf. *Craythorne v. Swinburne*, 14 Ves. 160 (Ch. 1807); CAMPBELL'S CASES ON SURETYSHIP 189 (subsuretyship).

39. *Jackson Co. v. Boylston Ins. Co.*, 139 Mass. 508, 2 N. E. 103 (1885) (bill of lading given before insurance effected).

40. *Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U. S. 312 (1886) (shipment and insurance substantially simultaneous; carrier negligent); *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 173 (1859) (bill of lading given before insurance effected); *Platt v. Richmond Rr. Co.*, 108 N. Y. 358, 15 N. E. 393 (1888); Note (1925) 39 A. L. R. 1116.

41. *Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U. S. 312, 325 (1886); *Wager v. Providence Ins. Co.*, 150 U. S. 99 (1893); and see *Luckenbach v. McCahan Sugar Co.*, 248 U. S. 139, 146 (1918); Note (1925) 39 A. L. R. 1116, 1118.

b. Contradictory Stipulations in Contracts of Insurance and Carriage

Where the insurer in his policy or contract has merely stipulated for subrogation to any tort claim of the insured, that is, without requiring a warranty or clause of avoidance, and the carrier in the bill of lading or other shipping document has stipulated for the benefit of any insurance, difficult questions are presented.

(1) Is the carrier discharged from liability for loss of or damage to the goods because of the inconsistent stipulation in the contract of insurance? In the first place, the usual provision, which is to the effect that any carrier *who is liable* shall have the benefit of any insurance, imports not excuse from liability but continuation of liability.⁴² Moreover, the usual provision merely entitles the carrier to "any insurance"; it does not call for any particular form of policy and hence not for one which is free of opposing stipulations of subrogation, warranty or avoidance. Lastly, at least as far as liability for negligence or other fault goes, a provision would be void under the law of carriers which would purport to exempt the carrier from such liability, or from such liability provided that the shipper could insure against it,⁴³ or which, for the protection of the carrier against such liability, requires that the shipper have or get insurance,⁴⁴ or that it be of any particular form, as, for example, free from such opposing stipulations, or that he pay over the proceeds thereof to his prejudice.⁴⁵ Consequently, such a provision does not give to the carrier relief from such liability to the shipper or a counter right of action against him.⁴⁶ All that the carrier may properly insist on is a provision in the contract of carriage which gives to him merely the benefit of whatever insurance the shipper may have or may obtain; such a stipulation is not without legal effect.

(2) Is the insurer discharged in such a situation and, if not, what is the relation between him and the carrier? If the insurance is issued after or simultaneously with the shipping document and the insurer knows of the provision therein, he should be firmly bound to the insured, for he is not misled, and he should be ranked as principal in respect of the carrier, since otherwise he would be knowingly defeating the latter's expectations; and, even if he does not know of the provision, the insurer

42. *Inman v. South Carolina Ry. Co.*, 129 U. S. 128 (1889).

43. *The Hadji*, 20 Fed. 875 (C. C. S. D. N. Y. 1884).

44. *Inman v. South Carolina Ry. Co.*, 129 U. S. 128, 139 (1889) (dictum); *Bradley v. Lehigh Valley Rr. Co.*, 153 Fed. 350, 354 (C. C. A. 2d, 1907) (dictum); *The Hadji*, 20 Fed. 875, 877 (C. C. S. D. N. Y. 1884) (dictum).

45. *The Turret Crown*, 264 U. S. 591 (1924); *Bradley v. Lehigh Valley Rr. Co.*, 153 Fed. 350, 354 (C. C. A. 2d, 1907) (dictum).

46. *Inman v. South Carolina Ry. Co.*, 129 U. S. 128, 140 (1889); *Southard v. Minneapolis Ry. Co.*, 60 Minn. 382, 392, 62 N. W. 442, 619 (1895).

should not be discharged because, as is later shown, there is no concealment of material fact; on the contrary he should be held, but ranked as surety for the carrier for reasons about to be stated. When, however, as usually happens, the insurance arises before carriage, for example, upon an open or floating policy, it has been held that the insurer is discharged, the reason given being that the agreed right of subrogation has become impossible of fulfillment through action of the insured.⁴⁷ The writer questions the soundness of reason and result. In his opinion, the insurer may be held and still have subrogation as agreed. Since the two stipulations for subrogation are contradictory, neither should be recognized as a controlling manifestation of will, and the relation should be determined as if both had been omitted from the documents. In that case, as appears from the preceding subtopic, insurer and carrier would be placed in the relation of surety and principal, respectively. Thus the insurer may and should be firmly bound, but entitled to subrogation, exactly as the policy provides. Moreover, the provision in the bill of lading is thus seen to be an immaterial fact, so that concealment of its presence, or even fraudulent representation of its absence, would not relieve the insurer.

This reasoning is largely inapplicable wherever the contract of insurance contains a warranty against, or a stipulation for avoidance or discharge on, the insertion of a provision for the benefit of insurance in the bill of lading. In either case the insurer may at his election avoid his obligation under the policy.⁴⁸ It is to be observed that the warranty, or the stipulation for avoidance or discharge, goes to the mere presence of the provision in the bill of lading, and is not dependent on its being legally effective. Thus, the situation is reduced to one in which the carrier is under undefeated tort liability to the shipper, and the insurer

47. *Carstairs v. Mechanics' Ins. Co.*, 18 Fed. 473 (C. C. D. Md. 1883) (judgment for insurer in action brought by insured); *Missouri Pacific Ry. Co. v. International Ins. Co.*, 84 Tex. 149, 19 S. W. 459 (1892) (paying insurer held discharged and denied subrogation); Note (1925) 39 A. L. R. 1116.

48. *Fayerweather v. Phenix Insurance Co.*, 118 N. Y. 324, 23 N. E. 192 (1890) (avoidance); *Insurance Co. of North America v. Easton*, 73 Tex. 167, 11 S. W. 180, 3 L. R. A. 424 (1889) (warranty); *Southard v. Minneapolis Ry. Co.*, 60 Minn. 382, 391, 62 N. W. 444, 444 (1895) (dictum). But, if the carrier is not liable to the shipper for the particular loss, e.g., because of a provision in the bill of lading exempting it from absolute liability, a stipulation for discharge is interpreted as not discharging the insurer as to such loss, and the carrier who advances funds to the shipper on the security of the assignment of the insurance may recover from the insurer. *Pennsylvania Rr. Co. v. Manheim Ins. Co.*, 56 Fed. 301 (S. D. N. Y. 1893). Of course, the policy may be so strictly worded that the insurer is discharged by force of its very terms. *Maxwell Textile Co., Inc. v. Globe & Rutgers Fire Insurance Co.*, 225 App. Div. 279, 232 N. Y. Supp. 586 (1st Dep't, 1929) (policy provided for discharge in case of agreement between insured and carrier whereby any right of recovery was impaired which would have accrued to the insurer but for such agreement; insured undervalued goods and thus, under the bill of lading, limited right of recovery against carrier).

is under no substantial obligation to the shipper at the time of the commission of the tort. Two consequences ensue: First, if the carrier compensates the shipper, he has no effective right of subrogation, because the shipper has not an enforceable right against the insurer to which he can be subrogated.⁴⁹ Secondly, the insurer has never become surety for the carrier and cannot be entitled to subrogation as such. To keep the good will of this and other shippers, however, the insurer frequently prefers to put the insured in funds and himself take over the prosecution of the cause of action in tort against the carrier. Will a simple payment in satisfaction of the loss suffice? The general rule is that an insurer may disregard discharge or power of avoidance, arising from breach of warranty or condition, without being held officious, and by compensating the insured for the loss obtain subrogation in equity to the right of the latter against a carrier or other tortfeasor,⁵⁰ or, it seems, quasi-contractual recovery at law. Nor should the provision giving to the carrier the benefit of insurance take the case out of the general rule.⁵¹ That provision does not entitle the carrier to the money, previously paid by insurer to shipper, as being proceeds of the insurance; for that payment did not proximately result from the contract of insurance but from the desire of the insurer to preserve good will. The situation is analogous to that in which a surety, discharged by the Statute of Limitations, by the Statute of Frauds, or in bankruptcy, pays the creditor in disregard of the defence; he is denied recovery on the relational rights of subrogation and reimbursement because the payment is not the proximate consequence of his suretyship undertaking, but is nevertheless given subrogation in equity, or quasi-contractual recovery at law, against the principal, simply because of his non-officious payment of the debt of another.

Nevertheless, insurers have hesitated to make simple payment, but have resorted to other devices which have been generally held to be effective: The insurer may lend the amount of the loss to the insured on the understanding that the proceeds of his cause of action against the carrier should be applied in repayment, with or without an assignment thereof as security, and with or without giving to the insurer control of

49. *Insurance Co. of North America v. Easton*, 73 Tex. 167, 11 S. W. 180 (1889). Note (1925) 39 A. L. R. 1116.

50. *The Insurance Co. v. The "C. D., Jr."*, 1 Wood 72 (C. C. D. La., 1870); *St. Louis Ry. Co. v. Fire Association*, 60 Ark. 325, 331, 30 S. W. 350, 352 (1895) (alternative decision); *Fireman's Fund Ins. Co. v. Rowland Lumber Co.*, 186 N. C. 269, 119 S. E. 362 (1923) (alternative decision); MAY ON INSURANCE § 454; VANCE ON INSURANCE §§ 175-177, p. 673. *Contra: Missouri Pacific Ry. Co. v. International Ins. Co.*, 84 Tex. 149, 19 S. W. 459 (1892); and see *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534, 549 (1888) (dictum); *Gadsden v. Brown*, Speers Eq. 37, 41 (S. C. 1843) (dictum).

51. *Bradley v. Lehigh Valley Rr. Co.*, 153 Fed. 350, 353 (C. C. A. 2d, 1907) (alternative decision).

the prosecution of the action.⁵² Another method is to advance the amount of the loss to the shipper as a loan, or in the guise of a loan, without interest, but with a provision that it shall be repayable *only to the extent of recovery* in the action against the carrier, with or without an assignment of the cause of action as security, and with or without a provision for prosecution of the action.⁵³ Under either arrangement, the insurer may justly claim from the shipper the amount of the proceeds of the action against the carrier, and the carrier will not be entitled to the money previously received by the shipper from the insurer, because it was only a loan. Thus, the final results are much the same as if the shipper had recovered from the carrier in the first instance.

Moreover, the position of a negligent carrier is not helped by the presence in the bill of lading of a further provision that he shall be entitled to any payments made by the insurer "whether under the guise of advances, loans or otherwise"; for to give effect thereto would be to give the carrier relief from the consequences of negligent action at the expense of the insured.⁵⁴

In the state of the authorities above referred to, the carrier has obviously nothing to gain, and the insured much to lose, by inserting in the shipping contract a stipulation that the carrier shall have the benefit of insurance when such stipulation would defeat the contract of insurance. Hence a qualification of the stipulation has now become usual, that is, "so far as this [stipulation] shall not avoid the policies or contracts of insurance."⁵⁵ It seems that the insurer is not discharged from liability for the loss of or damage to goods shipped under such a bill of lading.

52. *Southard v. Minneapolis Ry. Co.*, 60 Minn. 382, 62 N. W. 442 (1895); *Kalle & Co., Inc. v. Morton*, 156 App. Div. 522, 523, 141 N. Y. Supp. 374, 375 (1st Dep't, 1913), 216 N. Y. 655, 110 N. E. 1043 (1915).

53. *Luckenbach v. McCahan Sugar Co.*, 248 U. S. 139, 1 A. L. R. 1522 (1918); *Bradley v. Lehigh Valley Rr. Co.*, 153 Fed. 350, 352 (C. C. A. 2d, 1907). In the Supreme Court case *Brandeis, J.*, approved this device, saying that it was "consonant both with the needs of commerce and the demands of justice." Moreover, the arrangement, if regarded as one of disguised payment, imports an agreement for subrogation and has been supported as an instance of conventional subrogation. *Southard v. Minneapolis Ry. Co.*, 60 Minn. 382, 392, 62 N. W. 442, 444 (1895). Authorities are collected in, Note (1919) 1 A. L. R. 1528. The device has been employed at times when simple payment would certainly have done as well, e.g., in *Sorenson v. Boston Ins. Co.*, 20 F. (2d) 640 (C. C. A. 4th, 1927); *Dejean v. Louisiana Western Rr. Co.*, 167 La. 111, 118 So. 822 (1928) (insurer not discharged from liability to the insured).

54. *The Turret Crown*, 297 Fed. 766, 777 (C. C. A. 2d, 1924), 264 U. S. 591 (1924); Note (1924) 38 HARV. L. REV. 117.

55. Indeed, the forms of bills of lading prescribed by the Interstate Commerce Commission, for export and for interstate transportation, contain the following provision: "Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: *Provided*, That the carrier reimburse the claimant for the premium paid thereon." 64 I. C. C. 347, 356, 357, 364A (1921).

The apparent circularity of expression may be resolved by interpreting the provision in the bill of lading as entitling the carrier to the insurance if there is no opposing *stipulation* in the policy or contract of insurance, that is, no warranty or provision for avoidance; and not, if there is.⁵⁶ Consequently, the insured may recover from the insurer;⁵⁷ the insurer is effectively subrogated to his cause of action against the carrier;⁵⁸ and the carrier is not entitled to the insurance.⁵⁹

C. Relation between Two Tortfeasors, One because of Fault and the Other without Fault

As between two persons under tort liability to a third, one having been in fault and the other not, the former should bear the ultimate burden of compensation; hence, he is principal and the other surety. The following are typical illustrations of this principle:

(1) A master or other employer, who is responsible for the torts of a servant or other agent by virtue of the doctrine of respondeat superior and who compensates the injured person, may in turn have compensation from the latter.⁶⁰ In most instances this result may be sustained on the ground of a right of reimbursement arising from an actual promise thereof, expressed or implied in fact. The result may also be rested on rights created by law as incidents of the relation of surety and principal. First, a right of subrogation to the cause of action of the injured person against the tortfeasor;⁶¹ and, secondly, perhaps, a right of reimbursement. As to the latter right, it must be admitted that the

56. *Adams v. Hartford Fire Ins. Co.*, 193 Iowa 1027, 188 N. W. 823, 24 A. L. R. 182 (1922). *Contra*: *Kalle & Co., Inc. v. Morton*, 156 App. Div. 522, 523, 141 N. Y. Supp. 374, 375 (1913) [dictum, without discussion; decision alone affirmed in 216 N. Y. 655, 110 N. E. 1043 (1915)].

57. *Adams v. Hartford Fire Ins. Co.*, 193 Iowa 1027, 188 N. W. 823 (1922); Note (1923) 24 A. L. R. 189.

58. *Hartford Fire Ins. Co. v. Payne*, 199 Iowa 1008, 203 N. W. 4 (1925); *Dejean v. Louisiana Western Rr. Co.*, 167 La. 111, 118 So. 822 (1928); Note (1925) 39 A. L. R. 1116.

59. *Graysonia Rr. Co. v. Newberger Cotton Co.*, 170 Ark. 1039, 1054, 282 S. W. 975, 981 (1926).

60. *Ohio Valley Bank v. Greenebaum Trust Co.*, 11 F. (2d) 87, 91 (C. C. A. 4th, 1926) (deceit by officer of bank; reasoning); *Bradley v. Rosenthal*, 154 Cal. 420, 427, 97 Pac. 875, 878 (1908); *Grand Trunk Ry. Co. v. Latham*, 63 Me. 177 (1874) (abuse of passenger by conductor); *Hill v. Murphy*, 212 Mass. 1, 3, 98 N. E. 781, 782 (1912) (libel committed by directors of employer corporation); *Fedden v. Brooklyn Terminal*, 204 App. Div. 741, 744, 199 N. Y. Supp. 9, 12 (1923) (servant impleaded by master under CIVIL PRACTICE ACT, § 193); *Gaffner v. Johnson*, 39 Wash. 437 (1905). Also, see authorities cited in Note (1912) 40 L. R. A. (N. S.) 1153, and in the able article of Professor Robert A. Leflar in (1932) 81 U. OF PA. L. REV. 130.

61. When compensation is given by employer to employee under workmen's compensation statutes, subrogation of the employer to the rights of the employee against the person in fault is now usually provided for, expressly or impliedly, by such statutes. Notes (1922) 19 A. L. R. 766, 782; (1923) 27 id. 493, 500; (1925) 37 id. 838, 844, 853; (1930) 67 id. 249, 266.

employer did not consent to the employee's tort or to the incurring of liability therefor, and hence the relation of surety and principal is necessarily non-consensual, notwithstanding a previous agreement of indemnity between them; nevertheless, even a non-consensual surety might reasonably be given a relational right of reimbursement against a principal whose wrongdoing was the cause of his coming under liability and so incurring suretyship risk.⁶² The authorities do not settle the question. If a right of reimbursement is denied, the employer on compensating the tortfeasor clearly acquires a quasi-contractual right against the wrongdoing employee, the benefit to the latter consisting in his relief from tort liability.⁶³ If reimbursement is given, however, there seems to be little justification for quasi-contractual redress. Indeed, there is authority for the proposition that a paying surety is denied a quasi-contractual right against the principal whenever the former already has a right of reimbursement which affords an effective and commensurate remedy.⁶⁴

The employer may compensate the injured person without having been first sued by him,⁶⁵ and have recovery over in the lesser of two sums, namely, the amount so paid and the damage suffered by the injured person. If, however, the injured person brings an action against the employer, judgment recovered therein without fraud or collusion is conclusive⁶⁶ on the agent, in a later action brought by the employer against the agent, as to the existence and amount of the employer's liability and all matters necessarily involved in such liability, provided that the agent had adequate opportunity to defend the former action by being a party thereto or by being called on by the employer to take over or participate in the defence thereof, whether he did so or not. In proceeding on any of the theories of reimbursement, as distinguished from quasi-contract and subrogation, the employer has the advantage of incidental reimbursement, that is, if he successfully resisted an action brought by the tortfeasor he may have reimbursement from the agent for costs, necessary attorneys' fees and other expenses incurred in defending the action, and so, even though the resistance proved unsuccessful, if he defended at the

62. It is conceivable that the employer's recovery may also be rested on a right of reimbursement incident to the relation of principal and agent; but the Restatement of Agency, § 438, seems to place the redress, at least in all ordinary cases, on an agreement expressed or implied in fact.

63. Cf. *Brown v. Hodgson*, 4 Taunt. 189 (C. P. 1811); *WOODWARD ON QUASI CONTRACTS* (1913) § 258, subsection 4. Quasi-contractual recovery is at law and rests on the legal discharge of the liability of the agent; subrogation is in equity and proceeds on the principle of saving the cause of action of the tortfeasor and passing it to the surety.

64. *Jackson v. McKeown*, 79 Colo. 447, 246 Pac. 277 (1926), *CAMPBELL'S CASES ON SURETYSHIP* 27; *Appleton v. Bascom*, 3 Metc. 169 (Mass. 1841).

65. *Smith v. Foran*, 43 Conn. 244 (1875).

66. *Fedden v. Brooklyn Terminal*, 204 App. Div. 741, 199 N. Y. Supp. 9 (2nd Dep't, 1923). But cf. *Costa v. Yochim*, 104 La. 170, 28 So. 992 (1900) (only prima facie effect).

request of the agent,⁶⁷ or if he acted reasonably and in good faith in undertaking and conducting the defence. These principles, being of general application to situations where one is "answerable over" to another,⁶⁸ govern other cases discussed in this subtopic.

(2) When an initial carrier, because of the contract of carriage or statute, is liable to the shipper for loss of or damage to goods resulting from the fault of a connecting carrier, or occurring while in the possession of the latter, the initial carrier on compensating the shipper may have compensation from the connecting carrier.⁶⁹ Likewise, a carrier, who came under liability by virtue of his absolute duty to transport and deliver goods safely, may have compensation from an agent or other person whose culpable act or omission caused the loss of or damage to the goods,⁷⁰ or against a wilful or profiting converter to whom the carrier misdelivered them by mistake;⁷¹ and a carrier who is liable for a deficiency in the quantity of goods under a bill of lading issued by him in reliance on an untrue representation of the consignor is entitled to compensation from the latter.⁷² These results may be rested on a right of subrogation and possibly of reimbursement, both incident to the relation of surety and principal or, if reimbursement be denied, on quasi-contractual grounds.

(3) If in any case an occupier of land⁷³ or the owner of an animal is under absolute liability for damage resulting from the culpable act or omission of another, the occupier or owner on making the injured person whole should have compensation from the other on grounds of subroga-

67. *Grand Trunk Ry. Co. v. Latham*, 63 Me. 177 (1874).

68. *SEDGWICK ON DAMAGES* (9th ed. 1912) §§ 236, 241, 803, 834, 982. The authorities are divided on the question whether notice or other opportunity to defend the former action is a prerequisite of incidental reimbursement. It is not in cases of consensual suretyship, *SEDGWICK, supra* § 805; no more should it be here, though failure to give such notice may well be considered a fact bearing on the reasonableness of plaintiff's defence. See *Ryerson v. Chapman*, 66 Me. 557 (1877) (warranty of realty; held that failure to give notice is not fatal to plaintiff's incidental recovery, but merely leaves the defendant unconcluded); *SEDGWICK ON DAMAGES* §§ 239, 241a. *Contra: Westfield v. Mayo*, 122 Mass. 100 (1877) (dictum); *Chase v. Bennett*, 59 N. H. 394 (1879); *Hubbard v. Gould*, 74 N. H. 25 (1906) (dictum); and see *Yokum v. Thomas*, 15 Iowa 67 (1863).

69. *Powhatan Steamboat Co. v. Appomattox Rr. Co.*, 24 How. 247 (U. S. 1860); *Chicago & North Western Ry. Co. v. Northern Line Packet Co.*, 70 Ill. 217, 223 (1873) (dictum). Such indemnification is expressly provided for in the Carmack Amendment of June 29, 1906, to the Interstate Commerce Act, 34 STAT. 593, 49 U. S. C. A. § 20 (1929). Notes (1911) 31 L. R. A. (N. S.) 1, 70; (1928) 53 A. L. R. 1004, 1016. Like indemnification may be had in the case of misrouting. *Texas & Pacific Ry. Co. v. Eastin & Knox*, 100 Tex. 556, 562, 102 S. W. 105, 107 (1907).

70. *Smith v. Foran*, 43 Conn. 244 (1875); *Georgia Ry. Co. v. Jessey*, 105 Ga. 271, 31 S. E. 179 (1898).

71. *Brown v. Hodgson*, 4 Taunt. 189 (C. P. 1811).

72. *Van Santen v. Standard Oil Co.*, 81 N. Y. 171 (1880).

73. *Rylands v. Fletcher*, L. R. 3 H. L. 330 (1868).

tion or perhaps of reimbursement incident to suretyship or, if reimbursement be refused, on the theory of quasi contract.⁷⁴

D. Relation between Two Persons under Tort Liability because of Fault, when One of Them in Equity and Good Conscience should Bear the Ultimate Burden of Compensation

The cases presenting this situation may be mostly classified as instances of command, creation of risk, control, and last clear chance.

(1) When one person innocently commits a tort by specific direction of another, the former on compensating the tortfeasee may have compensation from the latter. Thus, a servant or other agent who innocently commits a tortious act by specific direction of his master or other principal,⁷⁵ or a carrier who does so by order of the shipper,⁷⁶ or an independent contractor by order of his employer,⁷⁷ is entitled to compensation from the other person even though the latter be himself innocent.⁷⁸ And if, by direction of an attaching or execution creditor or foreclosing mortgagee, acting personally or by agent,⁷⁹ or by direction of any other person beneficially interested in the process,⁸⁰ or of his attorney,⁸¹ a sheriff, constable or other officer innocently commits a tort by seizing specifically designated goods of another person, the officer on compensating the tortfeasee may have compensation from the person so directing him. In all these instances it would seem that compensation may be rested on the subrogation due to a surety; or frequently on a right of reimbursement arising from a promise express or implied in fact; or possibly on a relational right of reimbursement which even a non-consensual surety may have against a principal who is responsible for his coming under liability and thereby incurring the suretyship risk,⁸² and

74. *Supra*, note 64.

75. *Howe v. Buffalo Rr. Co.*, 37 N. Y. 297, 298 (1867) (conductor ejecting passenger); *Hoggan v. Cahoon*, 26 Utah 444, 73 Pac. 512 (1903), *THURSTON'S CASES ON QUASI CONTRACTS* 513 (agent taking possession of chattels); *Ladd v. Town of Waterbury*, 34 Vt. 426, 427 (1861) (statutory); *Adamson v. Jarvis*, 4 Bing. 66 (C. P. 1827) (auctioneer selling goods); *Ann. Cas.* 1912D, 990.

76. *Betts v. Gibbins*, 2 A. & E. 57 (K. B. 1834) (alternative decision).

77. *Horrabin v. Des Moines*, 198 Iowa 549, 199 N. W. 988 (1924) (contractor trespassing on real estate).

78. *Culmer v. Wilson*, 13 Utah 129, 44 Pac. 833 (1896) (agent-trustee procuring ejectment of one in possession of realty by a court without jurisdiction).

79. *Henderson v. Eckern*, 115 Minn. 410, 132 N. W. 715, *Ann. Cas.* 1912D, 989 (1911).

80. *Gower v. Emery*, 18 Me. 79, 83 (1841).

81. *Higgins v. Russo*, 72 Conn. 238 (1899).

82. Thus in *Howe v. Buffalo Rr. Co.*, 37 N. Y. 297, 299 (1867), where indemnity was given in an action at law, Porter, J., said: "In respect to the right of the latter (conductor ejecting passenger) to indemnity, he stood to the defendant (directing railroad company) in the relation of a surety; and it is well settled that in such a case, the acceptance by the creditor (the tortfeasee) of the note of the surety, in satisfaction of the demand, is equivalent to actual payment."

sometimes on principles of quasi contract.⁸³ Either the promised or the relational right of reimbursement should be attended by a right of incidental reimbursement for costs, necessary attorneys' fees and other expenses incurred in reasonably and faithfully, though unsuccessfully, undertaking and conducting a defence to an action brought by the tortfeasor.⁸⁴

(2) When one person is under tort liability because he culpably created a dangerous situation and another is liable because he failed to discover and remove the danger, the latter person on compensating the tortfeasor will be given full redress against the former, not only in cases in which the latter is thought by the courts merely to have violated an affirmative duty to make conditions safe,⁸⁵ but even when he is recognized to have been negligent, and therefore at fault, in failing to discover and remove the danger.⁸⁶ Thus, a delinquent municipality may be allowed indemnity from an abutting owner,⁸⁷ a public service company,⁸⁸ or a contractor engaged in public or private work,⁸⁹ who negligently created the unsafe condition in a highway;⁹⁰ a delinquent owner of property or other contractee may have recovery from a contractor, who negligently brought about the dangerous situation;⁹¹ a master failing to provide his servant with a safe place for ingress and egress has been granted indemnity from one who negligently set up a defective passageway and impliedly invited the servant to use it;⁹² a neglectful public service company may have redress from another public service company which culpably created the dangerous condition in a street;⁹³ a delinquent owner of abutting premises may have recovery from a person who negligently created a dangerous condition in the premises which worked harm to travelers in the high-

In cases of agency a relational right of reimbursement may also be predicated, perhaps, on the consensual relation of agent and principal. But see the *RESTATEMENT, AGENCY* (1932) § 438.

83. It is evident that the elements of a quasi-contractual right are present, including benefit conferred on the defendant in his relief from tort liability. There is authority for the proposition, however, that a paying surety does not acquire a quasi-contractual right against the principal when an effective and commensurate right of reimbursement already exists. *Jackson v. McKeown*, 79 Colo. 447, 246 Pac. 277 (1926); *Appleton v. Bascom*, 3 Metc. 169 (Mass. 1841).

84. *SEDGWICK ON DAMAGES* §§ 236, 241; *supra*, note 68.

85. Note (1912) 40 L. R. A. (N. S.) 1147.

86. *Standard Oil Co. v. Robins Dry Dock Co.*, 32 F. (2d) 182, 183 (C. C. A. 2d, 1929); Notes (1912) 36 L. R. A. (N. S.) 583; (1912) 40 id. 1165, 1169.

87. Note (1908) 12 L. R. A. (N. S.) 949.

88. *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316 (1896).

89. Note (1925) 38 A. L. R. 566, 575.

90. Note (1912) 40 L. R. A. (N. S.) 1165; L. R. A. 1916F 86.

91. Note (1925) 38 A. L. R. 566.

92. *Standard Oil Co. v. Robins Dry Dock Co.*, 32 F. (2d) 182 (C. C. A. 2d, 1929).

93. *Southwestern Bell Tel. Co. v. East Texas Co.*, 48 F. (2d) 23 (C. C. A. 5th, 1931).

way;⁹⁴ and one who is liable to an employee, invitee, or second purchaser because of his negligent failure to discover dangerous defects in an appliance or commodity is entitled to indemnity from a person who negligently manufactured and furnished the same.⁹⁵

There are several theories of compensation in cases of this class, as well as in those discussed in paragraphs (3) and (4) of this subtopic. One theory is that the defendant committed an actionable tort on the plaintiff, although the plaintiff was himself negligent and his negligence resulted in his being liable to the tortfeasor; and that the damage proximately caused by the defendant's conduct includes not only the amount of compensation paid to the tortfeasor but also incidental expenditures for costs, necessary attorneys' fees and other expenses incurred by the plaintiff in the course of a defence undertaken and conducted reasonably and in good faith.⁹⁶ Another theory is that of quasi-contractual recovery at law for the benefit nonofficially conferred on the defendant at the plaintiff's expense by discharging the defendant's liability to the tortfeasor.⁹⁷ Again, the plaintiff has a right of subrogation and, it may be, of reimbursement, main⁹⁸ and incidental,⁹⁹ in consequence of the relation of surety and principal existing between himself and the person who is responsible for his incurring liability.

While the plaintiff claiming indemnification under the rules stated in this subtopic might have safely compensated the tortfeasor without having been first sued,¹⁰⁰ yet if he is so sued and judgment is recovered against him without fraud or collusion, that judgment will be conclusive in the later action for compensation as to the existence and amount of the plaintiff's liability, and matters necessarily involved in such liability,¹⁰¹

94. *Gray v. Boston Gas Light Co.*, 114 Mass. 149 (1873).

95. *Boston Woven Hose Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, (1901) (recovery on theory either of tort or of contract); *Wanamaker v. Otis Elevator Co.*, 228 N. Y. 192, 126 N. E. 718 (1920); *Ocean Accident & Guaranty Corp. v. Hooker Electrochemical Co.*, 240 N. Y. 37, 147 N. E. 351 (1925); Note (1912) 40 L. R. A. (N. S.) 1153, 1156. In *Mowbray v. Merryweather*, [1895] 1 Q. B. 857, recovery over by a stevedore against a ship owner, whose default may have been merely passive, was rested on the ground of the implied warranty of the fitness of appliances furnished.

96. SEDGWICK ON DAMAGES §§ 236, 241; *supra*, note 68.

97. But see note 83, *supra*.

98. Taking the view that the plaintiff is not limited to quasi-contractual recovery or subrogation, but has a right of reimbursement for caused loss, one may still agree with *Lowell v. Boston & Lowell Rr. Co.*, 23 Pick. 24, 35 (Mass. 1839), and *Lowell v. Short*, 4 Cush. 275 (Mass. 1849), in which cases a non-culpable municipality was limited to recovery of single damages from the person who was responsible for the unsafe condition of a highway, although by force of statute the municipality had had to pay double damages to the tortfeasor; for the additional damages were in the nature of a fine, which the policy underlying the statute forbade the municipality to recover from the wrongdoer.

99. SEDGWICK ON DAMAGES §§ 236, 241. 100. Note (1925) 38 A. L. R. 566, 589.

101. *City of Rochester v. Montgomery*, 72 N. Y. 65, 67 (1878) (judgment held conclusive as to the absence of contributory negligence on the part of the third person).

provided that the defendant had opportunity to defend the former action either as being already a party thereto or as having been expressly or impliedly called on to defend it.¹⁰²

(3) When two persons are each under liability for culpably failing to correct a dangerous condition, one being in control thereof, and the other not, the latter may have compensation from the former on making the tortfeasee whole.¹⁰³

(4) When one person is liable for negligently creating the dangerous situation, and another person is liable because he later had the "last clear chance" to avoid the injury (knowing of the danger or, perhaps, having reason to know of it) and yet acted culpably and thus contributed to the injury, the former is entitled to compensation from the latter, not only for damage to his own person or property, but also for damages paid by him to the third person.¹⁰⁴

E. The Position of an Indemnitor of a Tortfeasor In Respect to a Co-Tortfeasor

The indemnitor is rarely a surety. In the first place, if he undertakes merely to compensate the indemnitee for loss suffered by the latter because of liability to a tortfeasee, and if there is no statute vesting in the tortfeasee a substantive right of compensation against the indemnitor, the former has no right against the latter;¹⁰⁵ and, secondly, even though the indemnitor promises the indemnitee to relieve him from liability by

102. *Chicago v. Robbins*, 2 Black 418, 423 (U. S. 1862), 4 Wall. 657 (U. S. 1866); Note (1925) 38 A. L. R. 566, 576.

103. *Kinloch Tel. Co. v. St. Louis*, 268 Mo. 485, 188 S. W. 182 (1916) (probably; municipality against public service company); *Oceanic Steam Navigation Co. v. Compania Espanola*, 134 N. Y. 461, 31 N. E. 987 (1892), 144 N. Y. 663, 39 N. E. 360 (1895) (lessor against lessee); *Trustees of Canandaigua v. Foster*, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554 (1898) (city against abutting owner). And see *Chicago v. Robbins*, 2 Black 418, 423 (U. S. 1862), 4 Wall. 657 (U. S. 1866); *Geo. A. Fuller Co. v. Otis Elevator Co.*, 245 U. S. 489 (1918) (contractor who compensated injured employee of subcontractor given indemnity from an employer in control of negligently acting servant); cf. *Seward v. National Surety Co.*, 120 Ohio St. 47, 165 N. E. 537 (1929); CAMPBELL'S CASES ON SURETYSHIP 203.

In *Seaboard Air Line Ry. Co. v. American & Protective Co.*, 106 Fla. 330, 143 So. 316 (1932), the defendant had installed a fire-alarm system on plaintiff's property and negligently allowed a wire to sag with the result that an employee of plaintiff was injured. Plaintiff compensated the employee and was given indemnity against the defendant on the ground that the latter had contracted to maintain the system. In *Taylor v. J. A. Jones Construction Co.*, 195 N. C. 30, 141 S. E. 492 (1928), however, an employee of a sub-contractor, who was injured through failure to provide a safe working place, recovered judgment against the contractor as well as the sub-contractor, and it was held that the former would not be entitled to indemnity or contribution from the latter since both knew of the danger.

104. *Colorado & Southern Ry. Co. v. Western Light & Power Co.*, 73 Colo. 107, 122, 126, 214 Pac. 30, 36, 37 (1923); *Nashua Iron & Steel Co. v. Worcester & Nashua Co.*, 62 N. H. 159 (1882); Notes (1934) 81 U. OF PA. L. REV. 130, 153; (1912) 36 L. R. A. (N. S.) 583, 587.

105. Notes (1925) 25 Col. L. REV. 661 (1931); 44 HARV. L. REV. 470.

compensating the tortfeasee, so that the latter has the right of an obligee-beneficiary against him, or a statute gives the tortfeasee a substantive right of compensation against him,¹⁰⁶ still the relation between indemnitor and indemnitee is not that of surety and principal, but of principal and surety, respectively, for as a consequence of the enforceable contract between them, the ultimate loss should fall on the indemnitor rather than the indemnitee.¹⁰⁷

The tendency of the law is to place the indemnitor in a position similar to that of the indemnified tortfeasor in respect to the co-tortfeasor. In many states a negligent tortfeasor, and in most states a wilful tortfeasor, is denied the right of contribution against a co-tortfeasor.¹⁰⁸ Certain social and procedural reasons have been thought to require this result. The supposed social reason is that denial of contribution tends to prevent designful, reckless and even negligent action.¹⁰⁹ The supposed procedural reasons are found in a not unnatural repugnance of the courts to relieve a tortfeasor from the consequences of his tort in whole or part, especially when it involves turpitude, and the impropriety of spending time in distributing losses between wrongdoers while more deserving litigants await redress. It cannot be denied, however, that the rule against contribution contravenes the principle of effecting equality of burden among persons under like risk, and that it also gives to the tortfeasee the power of casting the ultimate burden on one or the other of the tortfeasors through fortuitous, capricious or collusive action.¹¹⁰

Courts which deny contribution to a tortfeasor usually deny it to his indemnitor.¹¹¹ It is evident that if the indemnitor reimburses the in-

106. See VANCE ON INSURANCE § 178; RICHARDS ON INSURANCE §§ 503-506.

107. Cf. the statement of Pitney, V. C., in *Beacon Lamp Co. v. Travellers Ins. Co.*, 61 N. J. Eq. 59, 66, 47 Atl. 579, 582 (1900).

108. Leflar, *Contribution and Indemnity between Tortfeasors* (1932) 81 U. OF PA. L. REV. 130, 139, 140 (an illuminating article); Ann. Cas. 1913B, 938.

109. In truth, it might well be thought that the rule of no contribution, if regarded by him at all, is more heartening than disheartening to a prospective tortfeasor; the element of chance would likely appeal to such a person.

110. The rule denying contribution between negligent tortfeasors is not a necessary consequence of the common law rule that contributory negligence precludes liability for negligence instead of leading to ratable liability. It is true that the policy of deterrence will be served not less effectively here than there. But, on the other hand, the rule of contributory negligence leads to no such anomaly as the power of capricious disposition of loss. Moreover, there would likely be less serious procedural difficulties here than there; for frequently the *quantum* of contribution would be determined here simply by dividing the amount of a judgment, already recovered and paid, by the number of tortfeasors.

111. *Adams v. White Bus Line*, 184 Cal. 710, 195 Pac. 389 (1921) [but cf. *Salter v. Lombardi*, 116 Cal. App. 602, 3 P. (2d) 38 (1931)]; *Smith v. Fall River School District*, 1 Cal. (2d) 331, 334, 34 P. (2d) 994, 996 (1934); *United States Casualty Co. v. Cincinnati, New Orleans, & Texas Pacific Ry. Co.*, 218 Ky. 455, 291 S. W. 709 (1927); *Fiorentino v. Adkins*, 9 N. J. Misc. 446, 154 Atl. 429 (1931); *Royal Indemnity Co. v. Becker*, 122 Ohio

demnitee he will fail of contribution in states denying it to the latter, inasmuch as he is equitably entitled only to such rights as the latter has. But if he exonerates the indemnitee by paying the tortfeasee, as he usually does because he is legally bound to do so or expediency so requires, he may cogently argue that being a nonofficial payor he is subrogated to the right of the tortfeasee against the co-tortfeasor. Whether he should be so subrogated in whole or part is essentially a question between himself and the co-tortfeasor, and depends on economic and social considerations as well as those of equity and good conscience.

Full subrogation is obviously improper, since this would allow a tortfeasor, *A*, by procuring indemnity, to throw the whole ultimate burden on any co-tortfeasor, *B*, in every instance; for, under a rule of full subrogation, if *C*, the tortfeasee, should recover from *A*, the latter would have recovery from the indemnitor, *I*, and *I* from *B*; whereas, if *C* (or *I*, as above indicated) should recover from *B*, the latter could have no redress against *A* either in whole or part.

Whether contributory subrogation should be given to *I*, the indemnitor, is a closer question. The courts have generally been inclined to place *I* in a vicarious position for *A*, since *I*'s intervention has lessened *A*'s urge to careful conduct. But the question should not be so summarily dismissed. It may be well argued for *I* that he has not been in fault, as *A* was, and that *C* should not have accidental, capricious or collusive control over the ultimate incidence of the burden. Moreover, most contracts of indemnity are made by casualty companies, which commonly, because of legal obligation or out of a desire to have the good will of the insuring public, pay the tortfeasee, either before or after judgment, without regard to the solvency of the indemnitee or the suffering of loss by him; hence in practice liability insurance is socially beneficial in that it affords to tortfeesees a safeguard against the tortfeasors' inability or unwillingness to pay. It may be answered that to refuse contribution has the merit of tending to induce the indemnitor to examine the risk and cancel the indemnity contract when the risk is too great; and, much more potently, that to allow contribution to an indemnitor while refusing it to a tortfeasor is to enable the latter, through the device of indemnity, to get an undue advantage over any co-tortfeasor who has been unwilling or unable to procure indemnity; for, if *C* should recover from *A*, the indemnitee, the latter would have full recovery from *I*, and *I* one half

St. 582, 173 N. E. 194 (1930); *Cain v. Quannah Light & Ice Co.*, 131 Okla. 25, 267 Pac. 641 (1928); Note (1931) 75 A. L. R. 1486.

A like result was reached in *Fidelity & Casualty Co. v. Christenson*, 183 Minn. 182, 236 N. W. 618 (1931), where the indemnitor of *A*, a tortfeasor who had knowingly acted in violation of a traffic regulation, was denied contribution from *B*, a merely negligent co-tortfeasor, on the ground that *A* would not have been so entitled, though he would have been if he had been merely negligent.

from *B*, whereas, if *C* should recover from *B*, the latter, because of his participation in the tort, would have no contribution from *A* or *I*; thus the risk of *A* (and his indemnitor) would range from nothing to one half, and that of *B* from one half to the whole. To this reasoning the indemnitor may reply, first, that in practice it is *I*, and not either *A* or *B*, who pays *C*, so that the undue advantage would be largely theoretical; and, secondly, that in view of this practice the brunt of compensation, as well as of litigation, falls on the casualty companies in the first instance and, if contribution is denied, comes to rest on the insuring public in ease of the non-insuring public. Hence, the case for contribution seems to be much stronger than it may at first appear.

It is also to be observed that the cause of the paying indemnitor is not advanced by his procuring an assignment of the claim or judgment against the co-tortfeasor to be made to himself or another.¹¹²

It not infrequently happens, however, that there is an indemnitor for each tort-feasor, for example, *I* for *A* and *J* for *B*. Whatever may be the just result in the situation last discussed, it is submitted that here, on paying *C*, *I* should have subrogational contribution from *B* or from *J*, for the following reasons: (1) *I* was not in fault. (2) *C*'s opportunity for collusive control over the ultimate loss will otherwise be much greater here, where there are two solvent indemnitors and *C* can play one against the other. (3) The spoils which tortfeasees might gather out of such collusive control would be had at the eventual expense of the insuring public. (4) Not only may *I* have contribution from *J*, but he may have to make contribution to him, so that *I*'s urge to supervision over *A* is not lessened. (5) *A* gets no advantage over *B* through indemnity, inasmuch as *B* also has availed himself of that device, so that, if *C* attacks *I* (directly or through *A*), *I* will have contribution by subrogation from *J* (immediately or through *B*), and if *C* recovers from *J* (directly or through *B*), *J* will have subrogational contribution from *I* (immediately or through *A*).¹¹³

At all events, if there are two indemnitors for a single tortfeasor, it seems clear that contribution should be had by either against the other,

112. *Adams v. White Bus Line*, 184 Cal. 710, 195 Pac. 389 (1921); *Smith v. Fall River School District*, 1 Cal. (2d) 331, 34 P. (2d) 994 (1934); *Fiorentino v. Adkins*, 9 N. J. Misc. 446, 154 Atl. 429 (1931); *Royal Indemnity Co. v. Becker*, 122 Ohio St. 582, 589, 173 N. E. 194, 196 (1930); Note (1931) 75 A. L. R. 1468, 1486, 1490. Otherwise, if the tortfeasee be compensated by a person who is not an indemnitor or otherwise legally obligated to the tortfeasor. *Salter v. Lombardi*, 116 Cal. App. 602, 3 P. (2d) 38 (1931); Note 75 A. L. R. 1468, 1470.

113. For these reasons the writer believes that Metropolitan Casualty Insurance Co. v. Union Indemnity Co., 141 Misc. 792, 253 N. Y. Supp. 324 (1st Dep't, 1929), 255 N. Y. 591, 175 N. E. 326 (1931), note 117, *infra*, to be erroneous, even aside from N. Y. CIVIL PRACTICE ACT (1928) § 211a.

whatever may be the conclusion reached on the question last discussed.¹¹⁴

In not a few states a merely negligent tortfeasor is given contribution from a co-tortfeasor.¹¹⁵ In such jurisdictions the indemnitor who reimburses a negligent indemnitee will be equitably entitled to his right of contribution against the co-tortfeasor. Likewise, the indemnitor who pays a tortfeasor will be subrogated to his right against the co-tortfeasor;¹¹⁶ but recovery will be limited to the contributive share of the latter, since any greater recovery would result in improper indirect attack upon the indemnitee and also in circuity of suit.¹¹⁷ The indemnitor and the co-tortfeasor are really nonconsensual coprincipals, with incidental rights of contributory subrogation.

Furthermore, there are exceptional situations in which, being liable to *C* as tortfeasors, *A* and *B* are in the relation of surety and principal, so that *A* is entitled to receive full compensation from *B* for any resulting loss. In such cases *I*, the indemnitor of *A*, if he reimburses *A* will be equitably entitled to the latter's rights against *B*; and, if he exonerates *A* by paying *C*, will be fully subrogated as surety to *C*'s rights against *B*,¹¹⁸ and against *J*, an indemnitor of *B*.¹¹⁹ The reasons which justify the relation of surety and principal between *A* and *B* support the like relation between *I* and *B* (or *J*), respectively. Examples of such cases are where *A* is liable to *C*, his employee, for damages resulting from the negligent construction of a building or installation of an appliance by *B*;¹²⁰ where *A* is liable to *C*, a business visitor, for harm resulting from

114. Compare the cases allowing contribution as between two employers liable under the doctrine of *respondent superior* for the conduct of one joint employee, and those denying contribution as between respective employers of different employees whose conduct concurrently causes injury. Leflar, *supra* note 108, at 142, 143.

115. Note 108, *supra*. But not when the plaintiff was a wilful or conscious wrongdoer, *Boyer v. Bolender*, 129 Pa. 324, 18 Atl. 127 (1889), or acted in violation of statute, *Fidelity & Casualty Co. v. Christenson*, 183 Minn. 182, 236 N. W. 618 (1931). For a recent decision interpreting the GEORGIA CIVIL CODE (1910) § 4588, see *Southern Ry. Co. v. City of Rome*, 179 Ga. 449, 176 S. E. 7 (1934), reversing 47 Ga. App. 489, 170 S. E. 695 (1933).

116. *Hadcock v. Wiggins*, 147 Misc. 252, 263 N. Y. Supp. 583 (Sup. Ct. 1933), being of merely procedural significance, does not militate against the substantive right of the indemnitor to have contribution from the co-tortfeasor.

117. Underwriters at *Lloyds v. Smith*, 166 Minn. 388, 203 N. W. 13 (1926). *Contra*: Metropolitan Casualty Ins. Co. v. Union Indemnity Co., 141 Misc. 792, 253 N. Y. Supp. 324 (Sup. Ct. 1929), 255 N. Y. 591, 175 N. E. 326 (1931); the decision in that case seems open to criticism on the ground that NEW YORK INSURANCE LAW, § 109, vested a cause of action in *C* against *I*, indemnitor of insolvent *B*, to which *I*, indemnitor of *A*, might well have been held contributorily subrogated, not only for the reason stated in the text *supra*, but also because N. Y. CIVIL PRACTICE ACT (1928) § 211a, [Note (1930) 16 CORN. L. Q. 246, 598], allowed contribution between co-tortfeasors subjected to a joint judgment.

118. *Ocean Accident & Guaranty Corp. v. Hooker Electrochemical Co.*, 254 N. Y. 37, 52, 147 N. E. 351, 355 (1925).

119. *United States Fidelity & Guaranty Co. v. Remond*, 221 Ala. 349, 351, 129 So. 15, 17 (1930).

120. *Lord & Taylor v. Yale & Towne Mfg. Co.*, 230 N. Y. 132, 135, 129 N. E. 346 (1920).

the negligent construction of an elevator or other appliance by *B*,¹²¹ or from a breach of warranty of operation of a safety device installed by *B*;¹²² where *A*, a dealer, is liable to *C*, a purchaser of chemicals, for damage caused by the negligent manufacture and sale thereof by *B*;¹²³ and where *A*, in possession of premises, is liable to *C*, a pedestrian on the sidewalk, for damage caused by negligent action on the part of *B*.¹²⁴

F. Rights of a Surety for a Tortfeasor to Receive Indemnity or Contribution from a Co-Tortfeasor

The position of a surety is quite different from that of an indemnitor. The surety should receive and not give indemnity. Accordingly, the general principle would seem to be that a surety who makes the tortfeasee whole is fully subrogated to the latter's right against the co-tortfeasor,¹²⁵ whether, under the facts of the case and the law of the particular jurisdiction, neither tortfeasor would be entitled to contribution from the other, or either would be entitled to contribution but only to that. The reason is that there is a nonconsensual relation of surety-principal between the surety and the co-tortfeasor: both are bound to the tortfeasee for the same performance, that is, compensation for the tort; the tortfeasee can equitably exact compensation but once; and as between the two the co-tortfeasor should bear the entire burden of compensation, at least when he was in fault, and, it seems, when merely in control.¹²⁶ It is to be observed that the surety is not exposed to any of the arguments which forbid or may seem to forbid full or contributive compensation to an indemnitor against the co-tortfeasor.¹²⁷ Indeed, to make the surety for one tortfeasor surety for the other as well, and thus give to him full subrogation against either, is merely to substitute the surety for the tortfeasee on payment; true, the surety may now recover from either of the tortfeasors and, where they were in such fault as to preclude contribution, may thus fix the ultimate loss capriciously or collusively, but the tortfeasee could have done the like. Furthermore, if the co-tortfeasor also has a surety, it would seem that the two sureties would be in the relation of co-suretyship, since they are each responsible

121. *Wanamaker v. Otis Elevator Co.*, 228 N. Y. 192, 126 N. E. 718 (1920).

122. *London Guarantee Co. v. Otis Elevator Co.*, 86 Ind. App. 150, 155 N. E. 182 (1927).

123. *Ocean Accident & Guaranty Corp. v. Hooker Electrochemical Co.*, 240 N. Y. 37, 147 N. E. 351 (1925).

124. *Employers' Liability Assurance Corp. v. International Milk Products Co.*, 192 App. Div. 88, 182 N. Y. Supp. 337 (1920).

125. *Agren v. Staker*, 46 Idaho 36, 267 Pac. 460 (1928). *CAMPBELL'S CASES ON SURETYSHIP*, 129.

126. Cf. *Seward v. National Surety Co.*, 120 Ohio St. 47, 165 N. E. 537 (1929).

127. No circuitry of action or improper indirect attack is involved; no lessening of the tortfeasor's urge to care; no possibility of one tortfeasor obtaining undue advantage over the other.

for the same performance and for the same principals, consensually for one and nonconsensually for the other.¹²⁸

If, however, a tortfeasor, *C*, has already obtained judgment against one tortfeasor, *A*, or both tortfeasors, *A* and *B*, and a surety, *S*, becomes bound for *A* on his bond merely to stay execution or on his appeal or *supersedeas* bond given for a like purpose in prosecuting an appeal or writ of error, a variation of risk is involved which usually results in placing *S* in the like position in respect to *B* as *A* is in. Thus, in a state which recognizes that *A* and *B* are co-principals, with rights of contribution *inter se*, *S* and *B* will be in like relation, with like rights.¹²⁹ *S* should have no right greater than contribution against *B*, since *B* may possibly have been damaged by the stay, and therefore his risk varied, to the extent of his right of contribution against *A*. *S* should have no less right, since *B* cannot have suffered greater damage.¹³⁰ For like reasons *B* should have a right of contribution against *S*, no greater and no less. On the other hand, in states which for real or alleged reasons of policy and procedure deny contribution between *A* and *B*, recovery should be refused between *S* and *B*.¹³¹ But for the stay, *C* might have recovered

128. The writer is, therefore, obliged to disagree with the opinion of the majority of the court in *National Surety Co. v. Massachusetts Bonding Co.*, 19 F. (2d) 448 (C. C. A. 2d, 1927), *CAMPBELL'S CASES ON SURETYSHIP*, 158. He submits that the dissenting opinion of Swan, J., is the better reasoned.

129. *Goldman v. Mitchell-Fletcher Co.*, 285 Pa. 116, 131 Atl. 665 (1926), 292 Pa. 354, 365, 141 Atl. 231, 235 (1928).

130. This reasoning is supported by two well-settled rules of suretyship: (1) that variation of risk by an extension of time given by the creditor to the principal discharges a surety, and (2) that such variation effected by the intervention of a new surety and without act of the creditor interposes the new surety between the principal and the old surety. It is to be observed that, while reversal of the judgment in the situation under discussion may benefit the old surety, it will not necessarily do so, as it will in the case of *successive* appeal bonds.

While the writer regards the two rules just referred to as unsound in principle, nevertheless he believes that consistency requires that they be carried over to the closely analogous situations of co-suretyship and coprincipalship, and hence ventures to make the statement in the text to which this footnote is appended. The cases mostly relate to the carrying over of the first rule. By the weight of authority, it and certain similar rules are extended to situations of co-suretyship. *WILLISTON ON CONTRACTS* § 1263; *CAMPBELL'S CASES ON SURETYSHIP*, 422, 423, n. 1, 449, n. 1. But most authorities refuse to extend it and similar rules to situations of coprincipalship. Thus, a creditor may covenant never to sue one principal, *WILLISTON ON CONTRACTS* § 338; or extend time to one principal, *Davenport v. King*, 63 Ind. 64 (1878); *Mullendore v. Wertz*, 75 Ind. 431, 435 (1881); *Parsons v. Harrold*, 46 W. Va. 122, 123, 32 S. E. 1102 (1899); *Neel v. Harding*, 2 Metc. 247, 250 (Ky. 1859) (dictum); *WILLISTON*, *supra* § 340; or, as it was held in *Parsons v. Harrold*, *supra*, surrender security to a principal, without discharging the coprincipal even ratably.

131. *Royal Indemnity Co. v. Becker*, 122 Ohio St. 582, 588, 173 N. E. 194, 196, 75 A. L. R. 1481 (1930) (alternative decision). *Contra*: *Kolb v. National Surety Co.*, 176 N. Y. 233, 68 N. E. 247 (1903) (subrogation to agreed amount less than contributive share; alternative decision rendered before enactment of *CIVIL PRACTICE ACT* (1928) § 211a, which gave contribution between tortfeasors bound by joint judgment); *Rosenthal v. New York Rys. Co.*,

from *A*, in which event *A* would have had no recourse against *B*. Because of and during the stay, *C* can attack only *B*, who cannot have redress against *A*, so that *B*'s risk has been varied seriously and *in toto*. Amends can best be made to *B* by placing *S* in a position like that of *A*; that is, if *C* recovers from *S*, the latter should not have contribution from *B*, any more than *A* would have had; justice to *B* requires so much; on the other hand, if *C* recovers from *B*, the latter should have no contribution from *S*, and thus indirectly from *A*; reasons of policy and procedure forbid *B* to have relief against *S* as much as against *A*. Thus, in cases of stay bonds, in states which would deny contribution between *A* and *B*, the law should recognize no relation and no rights of recourse between *S* and *B*, just as it recognizes none between *A* and *B*. Whatever may be thought of this reasoning, *S*, surety for *A* on the appeal bond, must be denied any redress against *B* in a case where he had originally indemnified *A* against liability; in such case, according to the authorities, had he paid the tortfeasor without appeal, he would have been denied any redress against *B*, the co-tortfeasor. To give him even contributory subrogation now would be to allow him to better his position merely by taking an appeal and becoming surety for *A* on the appeal bond.¹³²

It remains to be said that *B* cannot justly object to the variation of his risk by the extension of time if he consents thereto or if he previously or subsequently varies the risk of *A* by himself appealing and giving a *supersedeas* bond with *S*₂ as surety. In either event variation of risk should have no bearing on the present relation between *S* and *B*. Consequently, *S*, consensual surety for *A*, is nonconsensual surety for *B*,¹³³ and *S*₂, consensual surety for *B*, is likewise nonconsensual surety for *A*. Moreover, *S* and *S*₂ are co-sureties, since they are sureties for the same principals and the same performance.¹³⁴ It has been held, however, that *B* will not be adversely affected if he separately appeals without giving a bond.¹³⁵ It may be that because *B* himself appeals he should not object

109 Misc. 210, 179 N. Y. Supp. 593 (Sup. Ct. 1919) (full subrogation given); *Smith v. Fall River School District*, 1 Cal. (2d) 331, 334, 34 P. (2d) 994, 996 (1934) (dictum); and see *City of White Plains v. Ellis*, 113 Misc. 5, 9, 184 N. Y. Supp. 444 (Sup. Ct. 1920), *aff'd* 200 App. Div. 869, 192 N. Y. Supp. 920 (1922). It is difficult to harmonize these New York cases with the doctrine of *Hinckley v. Kreitz*, 58 N. Y. 583 (1874), *CAMPBELL'S CASES ON SURETYSHIP*, 199. Note (1932) 77 A. L. R. 452.

132. *Smith v. Fall River School District*, 1 Cal. (2d) 331, 338, 34 P. (2d) 994, 998 (1934) (replacing prior opinion in 26 P. (2d) 37 (1933)); *Royal Indemnity Co. v. Becker*, 122 Ohio St. 582, 173 N. E. 194, 75 A. L. R. 1481 (1930).

133. *Agren v. Staker*, 46 Idaho 36, 267 Pac. 460 (1928).

134. *id.*

135. *Smith v. Fall River School District*, 1 Cal. (2d) 331, 34 P. (2d) 994 (1934) (replacing prior opinion in 26 P. (2d) 37 (1933), holding that *S* was wholly denied subrogation to *C*'s right against *B*); *Goldman v. Mitchell-Fletcher Co.*, 285 Pa. 116, 131 Atl. 665 (1926), 292 Pa. 354, 365, 141 Atl. 231, 235 (1928) (holding that *S* was limited to contributory subrogation).

to his co-defendant prosecuting or having prosecuted a completely effective appeal, that is, an appeal with bond to stay process, but on the other hand, while *A* has varied *B*'s risk, the latter has done nothing to vary the risk of the former.

In those exceptional situations in which two tortfeasors, *A* and *B*, are respectively in the relation of surety and principal,¹³⁶ *S*₂, a surety on the appeal bond of *B*, because of variation of *A*'s risk, is interposed between *B* and *A*, so that *S*₂ will have no recourse against *A* and *A* will be fully subrogated to the rights of *C*, the tortfeasee, against *B* and *S*₂. And if *A* appeals and gives bond with *S*₁ as surety, *S*₁ will be so subrogated as against *B* and *S*₂ since they were already principals as to *A* and hence their risks have not been varied by the undertaking of *S*₁.¹³⁷ Furthermore, *S*₁, surety on the appeal bond of *A*, and also *I*, indemnitor of *A*, will be subrogated to such rights as *C* has against *J*, indemnitor of *B*,¹³⁸ since *J* is a principal in respect to *B*.¹³⁹

G. Relation between Insurers, Mortgagees and Mortgagors

The cases involving such situations generally fall within three classes:

(1) The mortgagee at his own expense may procure insurance on his interest in the mortgaged property. In such cases the insurer is in effect contingently responsible for the payment of the mortgage debt and is thus surety for the mortgagor, or subsequent owner, or both;¹⁴⁰ for if the mortgagor or owner does not pay the mortgagee, the insurer must do so, contingently on loss and within the limits of the loss and of the insurance. On the other hand, if the mortgagor or owner pays the debt before loss, the insurer is relieved of risk, and, if the mortgagor or owner pays the debt after loss, the insurer should be equally relieved of liability, at least in equity, since its contract was essentially one of indemnity and

136. See appropriate subtopics, *supra*.

137. *Commercial Casualty Ins. Co. v. Capital City Surety Co.*, 224 App. Div. 500, 231 N. Y. Supp. 169, (1st Dep't, 1928).

138. *United States Fidelity & Guaranty Co. v. Remond*, 221 Ala. 349, 351, 129 So. 15, 17 (1930).

139. In *City Trust Etc. Co. v. Haaslocher*, 101 App. Div. 415, 91 N. Y. Supp. 1022 (1st Dep't, 1905), a surety on the appeal bond of a sole tortfeasor was properly given full redress against the indemnitor of the tortfeasor.

140. It is to be observed that the mortgagee may recover from the insurer without having first realized on, and without making allowance for, any undestroyed portion of the mortgaged property, *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 354 (1873); or from the mortgagor by action on the debt or foreclosure of the mortgage without accounting for any proceeds of the insurance. Note (1908) 11 L. R. A. (N.S.) 143; *VANCE ON INSURANCE* §§ 170-171. But the mortgagee may not recover from both and retain for himself more than the amount of the debt; the statement to the contrary in *King v. State Mutual Ins. Co.*, 7 Cush. 1, 4 (Mass. 1851), confirmed in *Suffolk Ins. Co. v. Boyden*, 9 Allen 123 (Mass. 1864), is opposed by the many authorities giving subrogation to the insurer and is practically nullified by *MASS. GEN. LAWS* (1932) c. 175, § 99.

the accidental sequence of events should make no difference. Hence it is generally held that the insurer is subrogated to the debt and mortgage,¹⁴¹ even in the absence of stipulation in the policy to that effect,¹⁴² the right of subrogation becoming operative when the mortgagee receives full payment of the debt.¹⁴³ Accordingly, the mortgagor or owner is denied subrogation to the insurance.¹⁴⁴ It is true that the insurer has been compensated for its risk and hence the mortgagor or owner may contend that he should be subrogated to the insurance instead of the insurer being subrogated to the debt and mortgage. But the compensation did not proceed from the mortgagor or owner; moreover, the question remains what is the insurer's risk, its ultimate risk, for which compensation was made, and that depends in part on whether it is subrogated or not; and, lastly, legal recognition of the insurer's right of subrogation will normally be reflected in diminution of the particular premium or class of premiums or of premiums generally.

A like result has been reached in England in the case of vendor and purchaser of real estate: the insurer of the vendor on making him whole is held to be subrogated to the vendor's rights against the purchaser.¹⁴⁵

141. And also, it seems, to other security for the debt. *Sussex County Ins. Co. v. Woodruff*, 2 Dutcher 541, 550 (N. J. L. 1857) (arguendo).

142. *Leyden v. Lawrence*, 79 N. J. Eq. 113 (1911); *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 359 (1873) (arguendo); *Stuyvesant Ins. Co. v. Reid*, 171 N. C. 513, 88 S. E. 779 (1916) (conditional sale, likened to chattel mortgage); *Carpenter v. Providence Ins. Co.*, 16 Pet. 495, 501 (U. S. 1842) (dictum); *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 446 (1869) (dictum); Note (1906) 3 L. R. A. (N. S.) 79. *Contra*: *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen 123 (Mass. 1864) [now practically nullified by Mass. Gen. Laws (1932) c. 175 § 99].

143. See *Phoenix Ins. Co. v. First Nat. Bank*, 85 Va. 765, 767 (1889); Note (1920) 9 A. L. R. 1596, 1607.

144. *Lawrence v. Union Ins. Co.*, 80 N. J. L. 133, 76 Atl. 1053 (1910).

145. *Castellain v. Preston*, 11 Q. B. D. 380 (1883). The opposite view prevailing in many states of this country rests, not only on the doctrine that as between vendor and purchaser the latter is equitable owner and incurs the risk of loss, but also on the view that the purchaser is justly entitled to the benefit of insurance procured by the vendor on the property sold although there was no agreement between them to that effect. VANCE ON INSURANCE § 172. Notes (1925) 37 A. L. R. 1324; (1926) 40 id. 607; (1927) 51 id. 929; CHAFFEE AND SIMPSON'S CASES ON EQUITY (1934) 965-976. Thus, in *Automatic Sprinkler Corp. of America v. Robinson-Slagle Lumber Co., Inc.*, 147 So. 542 (La. App. 1933), the plaintiff had installed a sprinkler system for the defendant, title to remain in the plaintiff until purchase price should be paid and defendant to keep the same insured for the benefit of the plaintiff; defendant did not insure the system, but plaintiff did, the policy not providing for subrogation; loss having occurred, plaintiff received the amount thereof from the insurer under a "loan agreement"; in this action prosecuted in behalf of the insurer, it was held that the "insurance money" inured to the benefit of the defendant, and that the loan agreement did not help the plaintiff's case. But see *Cadillac Automobile Co. v. Fisher*, 172 Atl. 393 (R. I. 1934) (sale of motor car; policy against theft running to seller and buyer "as their interests may appear," but cancelled as to buyer; loss paid to seller under loan agreement; judgment given for seller against buyer).

(2) On the other hand, the mortgagor (or owner), or the mortgagee at the latter's expense, may procure insurance on the mortgagor's or owner's interest in the mortgaged property, it being originally or subsequently provided that the amount of the loss, if any, shall be payable to the mortgagee as his interest may appear. The result is that the mortgagee acquires by original designation or subsequent assignment, as the case may be, a security interest in the rights of the mortgagor or owner arising under the policy.¹⁴⁶ Consequently, if the mortgagor or owner pays the debt, he becomes solely entitled to the policy and its proceeds, just as any debtor on payment of his debt is entitled to his property securing the same; furthermore, if the insurer pays the amount of loss to the mortgagee, it is not surety for the mortgagor or owner and not subrogated to the debt or mortgage, since by the terms of the policy the insurer should bear the ultimate burden of the loss rather than the mortgagor or owner.¹⁴⁷

(3) It remains to consider a situation which is identical with the one last discussed, except that the policy contains a provision that in the event of specified action or neglect on the part of the mortgagor or owner, for example, vacancy, procurement of other insurance, or change in title, the policy shall be invalidated, but not as to the mortgagee. Such a policy, unlike that in cases of the second class, reasonably imports that the insurer undertakes to indemnify the mortgagee in respect to his interest as well as the mortgagor as to his interest, with the result that the interest of the mortgagee is insured, although the interest of the mortgagor or owner may cease to be so.¹⁴⁸ Hence, on the happening of a specified event, the case is virtually reduced to one of the first class. Although the mortgagor paid a premium to the insurer, he received the full agreed equivalent therefor, that is, a defeasible assumption of risk. Consequently, on paying the amount of the debt to the mortgagee,¹⁴⁹ the

146. *Grosvenor v. The Atlantic Fire Ins. Co.*, 17 N. Y. 391 (1858); and see *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y. 401 (1858) (subsequent assignment).

147. Note L. R. A. 1916A 559, 560. A like decision has been reached where the mortgagor procured insurance at his own expense but the policy named only the mortgagee as the person indemnified. *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442, 446 (1869). In the absence of a mutual mistake in expression the soundness of this decision may be doubted, inasmuch as it deprived the insurer of a justly expected right of subrogation. But where the mortgagee procures insurance naming only himself as indemnitee, subrogation is granted to the insurer and denied to the mortgagor, although under the terms of the mortgage the mortgagee might have procured insurance protecting *both* at the mortgagor's expense, *Lawrence v. Union Ins. Co.*, 80 N. J. L. 133, 76 Atl. 1053 (1910); and especially so if the policy provided for subrogation to the debt and mortgage, *Foster v. Van Reed*, 70 N. Y. 19, 26 (1877), in which case the mortgagee attempted to charge the premium to the mortgagor.

148. *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141, 148, 154 (1878); *Eddy v. London Assurance Corp.*, 143 N. Y. 311, 322, 38 N. E. 307, 309, 25 L. R. A. 686, 689 (1894).

149. *National Union Fire Ins. Co. v. Price*, 211 Ala. 155, 99 So. 848 (1924). Mortgage clauses usually provide in effect that subrogation shall not impair the right of the mortgagee

insurer, as surety, and independently of any provision to that effect in the policy, will be effectively subrogated, not only to the mortgagee's right on the bond or note, but also to his mortgage title or lien, as against the mortgagor or owner,¹⁵⁰ a second mortgagee or other junior incumbrancer,¹⁵¹ and a surety for the mortgagor or owner.¹⁵²

Even more clearly will the insurer be entitled to subrogation under such circumstances if, as is usually the case, the policy expressly so provides. Such a provision imports an agreement on the part of insurer, mortgagee, and mortgagor (or owner) that the insurer shall be surety for the mortgagor or owner and subrogated as such,¹⁵³ accordingly, the mort-

to recover the full amount of his claim. For the standard mortgage clause legally prescribed for use in New York, see RICHARDS ON INSURANCE, 934, 936, and MCKINNEY'S CONSOL. LAWS (1929) INSURANCE, § 121; in Massachusetts, MASS. GEN. LAWS (1932) c. 175, § 99. In *Clark v. Trainor*, 237 Ill. App. 269 (1925), the policy did not so provide but only that the insurer should be subrogated to the extent of the payment to the mortgagee's rights, and, the insurer having paid the amount of the policy but less than the mortgage debt, it was held that it should be ratably subrogated to the mortgage; this result may rest on a legitimate interpretation of the provision but it is certainly not in keeping with general principles of subrogation.

150. *First Nat. Bank v. Springfield Fire & Marine Ins. Co.*, 104 Kan. 278, 178 Pac. 413 (1919); *Aetna Life Ins. Co. v. National Fire Ins. Co.*, 98 Neb. 446, 153 N. W. 553, L. R. A. 1916A 784 (1915) (fraudulent representations made by mortgagor to insurer; no agreement for subrogation appeared); *Matter of Kip*, 4 Edw. Ch. 86, 95 (N. Y. 1842). *Contra*: *Graves v. Hampden Fire Ins. Co.*, 10 Allen 281 (Mass. 1865) [now substantially abrogated by MASS. GEN. LAWS (1932) c. 175, § 99]; *Milwaukee Mechanics' Ins. Co. v. Ramsey*, 76 Ore. 570, 149 Pac. 542 (1915); notes L. R. A. 1916A 559, 560; (1928) 52 A. L. R. 278, 282; (1929) 63 id. 1527.

Furthermore, if the mortgagor, instead of the insurer, should pay the mortgagee, the mortgagor would be denied subrogation to the rights of the mortgagee on the policy; there seems to be no escape from this conclusion; for, the policy being by its very terms invalidated as to the mortgagor, that is, as if never phrased for his protection, the mortgagor must be denied indirect as well as direct recovery thereon. This offers additional support for the proposition that the paying insurer will be subrogated to the debt and mortgage; otherwise, the insured would have the power of accidental, capricious, or collusive action. Moreover, the mortgagor cannot require the mortgagee to account for any payment received by him from the insurer. Note (1908) 11 L. R. A. (N. S.) 143, 144.

151. *Tarrant Land Co. v. Palmetto Fire Ins. Co.*, 220 Ala. 428, 125 So. 807 (1930). It is to be observed that subrogation as against a second mortgagee or other junior incumbrancer is sustainable only on the theory that the insurer has become a surety, and hence is something more than a mere nonofficial payor of the debt of another.

152. Thus, let it be supposed that the mortgagor took out the policy and assigned it with the consent of the insurer to an assuming grantee, whose act or neglect later invalidated the policy; it being invalidated only as against the mortgagee, the situation of the mortgagor-surety as well as the grantee is the same as if the policy had originally indemnified the mortgagee alone; and in that case the same reasoning that was advanced at the beginning of this sub-topic to support subrogation of the insurer against the owner would support subrogation against his surety. *Savings Bank of Ansonia v. Schancupp*, 108 Conn. 588, 144 Atl. 36 (1928) (stipulation for subrogation present but not stressed by the court).

153. *Allen v. Watertown Fire Ins. Co.*, 132 Mass. 480 (1882) (paying insurer held to be subrogated as against the mortgagor and a second mortgagee on the ground that the policy stipulated for an assignment to the insurer under such circumstances if he should elect to

gagor, grantee or junior incumbrancer who pays the mortgage debt will not be subrogated to the insurance,¹⁵⁴ and even though he procures an assignment thereof from the mortgagee will be denied recovery thereon because of circuitry of action.¹⁵⁵

Subrogation will not be granted to the insurer as against a second mortgagee, however, if the policy provides that the insurance shall not be invalidated as to his interest (as well as that of the first mortgagee) by the act or neglect of the mortgagor or owner. Thus, let it be supposed that *R* makes to *E* a note and a mortgage for \$5,000 and later conveys the mortgaged property to *G*, who assumes payment of the first mortgage debt and gives a second mortgage to *R* for \$5,000; that *G* procures from the *I* fire insurance company a policy for \$5,000, the policy providing that the loss shall be payable first to *E* and secondly to *R*, as their respective interests may appear, and that the insurance shall be invalidated in certain events as to *G* but not as to either mortgagee; that such an event happens; that the building burns with loss of \$5,000 leaving land now worth \$5,000; and that *I* pays \$5,000 to *E*. The insurer, *I*, will not be subrogated to *E*'s note against *R*, and will be subrogated to *E*'s mortgage on the land of *G* only in subordination to the mortgage of *R*;¹⁵⁶ otherwise, the loss would be finally cast on *R*, when it should rather be borne by *I*, since the policy in effect provides that both *E* and *R* should be in the same position as if the insurer had originally engaged solely for their successive indemnification; in other words, instead of *I* being surety for *R* and subrogated as such, *R* is surety for *I*, and as between them the

pay the mortgage debt); *Canton Co-operative Bank v. American Central Ins. Co.*, 219 Mass. 132, 106 N. E. 635 (1914) (insurer held to be discharged by mortgagee's foreclosing the mortgage within the reasonable time allowed to the insurer to make an election); *Eddy v. London Assurance Corp.*, 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686 (1894); *Gillespie v. Scottish Union Ins. Co.*, 61 W. Va. 169, 177, 56 S. E. 213, 216 (1906); L. R. A. 1916A 559, 562; *Note* (1928) 52 A. L. R. 278. The forms of standard fire policies now required in Massachusetts and New York contain a provision for subrogation of the insurer in such a situation. MASS. GEN. LAWS (1932) c. 175, § 99. RICHARDS ON INSURANCE, 934, 936.

Moreover, if the agreement for the continuance of the mortgagee's protection and the stipulation of the insurer for subrogation are separate from the policy, it is clear that on forfeiture the insurer becomes surety for the mortgagor. While it is true that subrogation is essentially a matter which concerns the insurer and mortgagor, and hence an effective contract for subrogation must be between those two persons, still the stipulation manifests the will of the insurer to be a surety and, there being no inconsistent expression of intention on the part of the mortgagor, equity relates them accordingly and gives the appropriate right of subrogation. *Hare v. Headley*, 54 N. J. Eq. 545, 35 Atl. 445 (1896) (subrogation granted to insurer as against second mortgagee); *Ulster County Saving Institute v. Leake*, 73 N. Y. 161 (1878).

154. *Walker v. Queen Ins. Co.*, 136 S. C. 144, 134 S. E. 263, 52 A. L. R. 258, 284 (1926).

155. *Lett v. Guardian Fire Ins. Co.*, 125 N. Y. 82, 25 N. E. 1088 (1890).

156. *Perretta v. St. Paul Fire & Marine Ins. Co.*, 106 Misc. 91, 183 App. Div. 983 (Sup. Ct. 1919).

insurance money paid to *E* discharged the first mortgage and the note secured thereby.¹⁵⁷

Nor will the insurer be subrogated as against the mortgagor or owner if the event is not within the class of those working a forfeiture of their protection,¹⁵⁸ or if conduct of the insurer relied on by the mortgagor or owner is such as to bar the former from asserting the forfeiture.¹⁵⁹

CONCLUSION

In most of the situations discussed in this article, certain common factors are present: two persons are under obligation or other risk to a third person, who, however, is entitled either legally or equitably to but one performance. To deprive this third person of the power of fixing the ultimate incidence of loss by accidental, capricious or collusive action, the law must fix some relation between the two persons under risk with appropriate rights of recourse of one against the other. Whether they shall be coprincipals or whether a certain one shall be surety for the other depends on one or more of many diverse factors, including agreement, command, fault, normal fault, control, the operation of a dangerous instrumentality or the creation of a dangerous situation, difficulty of proof, form of undertaking or other manifestation of understanding, variation of risk, and a proper imposition of the cost of insurance.

157. It will be observed that because of the agreement of assumption *R* was surety in respect to the first mortgage note and so inchoately subrogated to the first mortgage; consequently, he had two insurable interests in the land, both of which were protected by the policy, namely, his equity of subrogation in the first mortgage lien and his second mortgage lien.

158. *Fire Assn. v. Patton*, 15 N. M. 304, 107 Pac. 679, 27 L. R. A. (N. S.) 421 (1910).

159. *Scottish Union Ins. Co. v. Colvard*, 135 Ga. 188, 68 S. E. 1097 (1910).