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Suretyship--Reimbursement--Subrogation--Statute of Limitations

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In conclusion, it is suggested that this decision will not be greatly acclaimed by honest taxpayers who are actually paying taxes on their automobiles and on other personal property, well-knowing that other property owners are failing to submit a listing of personal property for tax purposes.

P. Joan Skaggs

SURETYSHIP—REIMBURSEMENT—SUBROGATION—STATUTE OF LIMITATIONS

A surety made payment in 1943 on a contractor's bond to a materialman without taking a written assignment of the creditor's claim against the contractor. Seven years later, the surety sought reimbursement by the contractor, or, as an alternative, subrogation to the rights of the materialman under the construction contract between the contractor and the City of Ashland. The contractor pleaded the five-year statute of limitations for implied contracts as a bar to the surety's action. The trial court sustained a demurrer to the contractor's plea and entered judgment for the surety. 

Held: Reversed. Where a surety pays a debt of the principal debtor and seven years later sues the principal debtor for reimbursement, the action based on the implied contract for reimbursement is barred by Kentucky Revised Statutes section 413.120, which provides that an action upon a contract not in writing, express or implied, must be commenced within five years from the time the action accrued. Nor can the surety recover through the application of the doctrine of subrogation, for subrogation is an "incident" to the right of reimbursement and is also barred by section 413.120. Payne v. Standard Acc. Ins. Co., 259 S.W. 2d 491 (Ky. 1953).

It is widely accepted that a surety may secure reimbursement by the principal debtor for any amount of money which he has paid against the debt. At early common law, the right of a surety to be reimbursed was denied in the absence of an express promise to indemnify, but it is now held that the principal debtor impliedly promises to reimburse the surety for that which he has

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1 Hanna, Cases and Materials on Security 357, note 1 (1952).
2 See Appleton v. Bascom, 3 Metc. 169 (Mass. 1841). See also, Simpson, Suretyship 225 (1950).
paid. The principal case follows the general rule that an action by a surety for reimbursement must be commenced within the period of limitations applicable to implied contracts. The less settled problem, however, arose when the surety contended that under the doctrine of subrogation he should be placed in the position of the creditor, and would be entitled to all the rights and remedies which the creditor might have by virtue of the written construction contract. That is, even though the right to reimbursement was barred by the five-year period of limitations for an action based on an implied contract, the surety contended that he could effectively bring an action within fifteen years for the money paid the materialman based upon his right to be subrogated to the rights of the creditor on the written contract.

Subrogation is generally defined as the right of a surety to be "substituted" in the place of the creditor upon payment of the debt. The right of the surety to subrogation exists as a consequence of an assignment by operation of law, and it does not depend upon an actual assignment made by the creditor. Where, as in the principal case, there is no written assignment of the rights of the creditor to the surety, there is a sharp conflict of authority as to whether or not the short-term period of limitations, which is applicable to an action on the implied promise of the principal debtor to reimburse the surety, will also be applicable

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5 50 Am. Jur. 1049 (1944) states: "Irrespective of the existence of an expressed contract of indemnity it is an established rule of law, based on equitable considerations, that where one person is in the situation of a mere surety for another, whether he became so by actual contract or by operation of law, and pays or is compelled to pay the debt which the other in equity and justice ought to have paid, or extinguishes it so that it is no longer a debt against the other, he is entitled to relief against the other, who was in fact the principal debtor, the law in such cases implying a promise on the part of the principal to reimburse the surety for the amount paid." See also, Illinois Surety Co. v. Mitchell, 177 Ky. 367, 197 S.W. 844 (1917).


83 C.J.S. 575 (1953) states: "Subrogation may be defined as the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt."

7 RESTATEMENT, SECURITY sec. 141, comment (a) (1941): "Equity, in effect, creates in the surety who has performed, rights similar to those of the creditor before the duty to him was discharged. This is sometimes called an assignment by operation of law. It does not depend upon an actual assignment, however, although where necessary to give the surety procedural or other advantages, the creditor can be required to make an assignment."
to the assignment by law on which the surety's right to subroga-
tion rests.\textsuperscript{7}

The Kentucky Court of Appeals in the \textit{Payne} case expressly
said that "the right of subrogation does not exist independently
of the right to reimbursement,"\textsuperscript{8} and that the right of subrogation
was barred by the five-year statute of limitations for actions on
implied contracts. The court further pointed out that the right of
subrogation was an "incident" of the primary right which the
surety had against the principal debtor for reimbursement.\textsuperscript{9} The
position of the Kentucky court, which is also followed by a sub-
stantial number of other jurisdictions,\textsuperscript{10} considers subrogation and
reimbursement as being one remedy. By definition, subrogation
and reimbursement are not the same—the right of subrogation
is based on an assignment made by law in order to place the surety
in the position of the creditor, and the right of reimbursement is
based on an implied promise of the principal debtor to indemnify
the surety. Writers support the view that subrogation and reim-
bursement are distinct remedies and should therefore be treated
separately.\textsuperscript{11} In some situations subrogation could not be treated
as "incidental" to reimbursement for nothing could be recovered
by an action for reimbursement, whereas on the theory of subro-
gation the surety could be indemnified, viz., where at the time
of suit by the surety the principal debtor is insolvent, but where
the creditor had a valid claim against a third party possessing
property previously transferred by the principal debtor.\textsuperscript{12}

\textsuperscript{7} Compare the following two cases: Junker v. Rush, 136 Ill. 179, 26 N.E. 499
(1891) and Leiter v. Carpenter, 26 Del. Ch. 95, 22 A. 2d 393 (1941).

\textsuperscript{8} \textit{Supra} note 4, at 494.

\textsuperscript{9} \textit{Id.} at 493: "... it has been held that the right to subrogation is an incident
of the main right which a surety may have against his principal, and if the im-
plied obligation of the principal is no longer effective because barred by the statute
of limitations, the right to subrogation is likewise extinguished."

\textsuperscript{10} Farmers' Loan and Trust Co. v. Wilcox County, Ga., 288 F. 773 (D.C. Ga.
1924); Junker v. Rush, 136 Ill. 179, 26 N.E. 499 (1891); Blitz v. Metzger, 120
Kan. 555, 245 Pac. 161 (1926); Darrow v. Summerhill, 93 Tex. 92, 53 S.W. 680
(1899).

\textsuperscript{11} \textit{6 Pomeroy, Eq. Jur. sec. 924, note 113 (Third ed. 1905); 13 Col. L. Rev.}
448 (1913). 50 Am. Jur. 1050 states: "The right of a surety to reimbursement
in an action at law on an implied promise for any money he may have been com-
pellcd to pay for the principal originally grew out of a rule of equity which ripened
later into a principle of law, so that courts of law and chancery entertain concur-
rent jurisdiction in giving remedy to the surety paying the debt. The action at law
for reimbursement is not based on the doctrine of subrogation, and hence the
principles applying to subrogation are not applicable."

\textsuperscript{12} See Martin v. National Surety Co., 85 F. 2d 135 (8th Cir. 1936).
In many jurisdictions the right of subrogation is not barred until the obligation to which the surety is subrogated is barred, and the period of limitation within which an action must be brought is that which was applicable to the creditor's claim on the debt.\textsuperscript{13} The theory underlying this rule is that, in the absence of superior equities, the surety is subrogated to all of the rights and remedies of the creditor. Because of equitable principles of justice and propriety, the principal debtor is not allowed to be unjustly enriched at the expense of the surety.\textsuperscript{14} A third rule considers subrogation as a right to proceed in an action against the creditor, and the right falls within the statute of limitations for "an action not otherwise provided for."\textsuperscript{15}

Language used by the court in the instant case indicates that if the surety upon payment had taken a written assignment of the creditor's claim against the principal debtor, the action against the principal would not have been barred by the period of limitation applicable to implied contracts.\textsuperscript{16} The question arises whether or not a written assignment would have changed the result of this case, since the court did apply the rule that the right to subrogation is an "incident" to the right of reimbursement. Seemingly, if the right of subrogation is incidental to reimbursement in a strict sense, the right will be extinguished by the bar of the right to reimbursement although there is a written instrument evidencing the assignment. However, it has been held in Kentucky that, where an assignment is made in writing, the right to recover from the principal through subrogation is not

\textsuperscript{13} Automobile Ins. Co. of Hartford v. Union Oil Co., 85 Calif. App. 2d 630, 193 Pac. 2d 48 (1948); Leiter v. Carpenter, 26 Del. Ch. 85, 22 A. 2d 393 (1941); City of Barnsdall v. Barnsdall Nat. Bank, 164 Okla. 167, 23 Pac. 2d 373 (1933); Smith v. Davis, 71 W. Va. 316, 76 S.E. 670 (1912).

\textsuperscript{14} It is significant to note that the Kentucky court in the Payne case, supra note 4 at pp. 493, 494, took the position that equities should exist in the surety's favor in order for him to recover through the use of subrogation. The right of subrogation is usually said to exist unless the equities of the case are against the surety, without giving the surety the burden to show the equities were in his favor. For a general discussion of the position contra to the Payne case, see Leiter v. Carpenter, supra note 11.

\textsuperscript{15} The right of subrogation "... is a right in action only; that is, it must be established by a judicial proceeding. ... It does not fall within any specific limitations prescribed by our statutes, and must be governed by the general provisions of section 4985, Rev. St., which provides that all actions for 'relief not hereinbefore provided for shall be brought within ten years after the cause of action accrued.'" Zaellig v. Hemerlie, 60 Ohio St. 27, 53 N.E. 447, 449 and 450 (1899).

\textsuperscript{16} Supra note 4, at pp. 493, 494.
limited to an action to be brought within the five year period applicable to the implied promise to reimburse. The written assignment gives the surety the right to bring an action on the debt at any time within the period of limitations applicable to the creditor’s claim against the principal on the debt.\textsuperscript{17}

The rule which the Kentucky Court of Appeals will follow in a case involving the question of the time within which the surety must bring an action for reimbursement or subrogation is settled by the principal case, but the scope of the rule is not clearly indicated. The court stated that where the proper equitable factors exist a surety could “acquire a superior right of subrogation which would \textit{transcend} the bar raised by the limitations on enforcement of the implied contract.”\textsuperscript{18} Neither the principal case nor any other case has been found which applies this principle or explains how such a “superior right of subrogation” may be acquired. Nevertheless, the point is significant and deserves attention in this type of case involving subrogation of the surety to the creditor’s claims against the principal debtor.

\textbf{J. Arna Gregory, Jr.}

\textbf{PROPERTY RIGHTS IN PROFESSIONAL SERVICE CONTRACTS}

In 1941 the plaintiff entered into an oral contract with the defendant, a mining engineer, whereby the latter agreed to do certain engineering work and to provide the plaintiff with certain engineering data and information. This arrangement lasted until April, 1951. During this period the defendant furnished the plaintiff with all information, maps and engineering data as was needed or requested by the plaintiff with the exception of the field books, traverse sheets, and base maps that defendant had made in performing the required services. In 1951 the plaintiff terminated the agreement when it decided to hire a full time engineer. The defendant refused to surrender possession of the field books, traverse sheets, and base maps.

\textsuperscript{17} Fidelity & Deposit Co. of Md. v. Sousley, 151 Ky. 39, 151 S.W. 353 (1912) (the court used the term reimbursement, but there was a written assignment of the creditor’s claim, and therefore the court is really speaking of subrogation). See also, Letton’s Adm’r. v. Rafferty, 154 Ky. 278, 157 S.W. 35 (1913); Joyce v. Joyce, 64 Ky. 474 (1867).

\textsuperscript{18} \textit{Supra} note 4, at 494.