

biles. He not only knew of people desiring to purchase cars, but prospective purchasers sought him. He was in a far more advantageous position to sell the car than the surety would be. Though it may be a burden for the creditor to re-sell the automobile, this works much less hardship than requiring the surety to attempt to dispose of it. The creditor should sell the car, at a forced sale if necessary, and then recover the difference between the sale price and the contract price from the surety. If the surety objects to this result he may pay the creditor the contract price and receive the chattel in return. Otherwise the chattel is disposed of within a reasonable time and the entire transaction reduced to an element of damages. If the article is held for a period of time (in the main case it was six years), the article may greatly depreciate or even become practically worthless. If the creditor sells the chattel soon after the repudiation by the infant he eliminates the loss without any injury to himself, by recovery from the surety of the difference, if any. The burdens of the complicated situation are apportioned and a result most equitable to all parties is reached. Cf. 4 Ind. L. Jour. 206 (1928).

CARL S. POMERANCE

Suretyship—Pro Tanto Subrogation—[Indiana].—Intervenor as surety for X bank, a public depository, gave bond for \$10,000 which provided that if, on the principal bank's default, the amount paid by the surety did not equal the full amount of the principal's obligation to the obligee, then the surety should not participate in dividends out of the assets of the principal bank until the balance of the obligee's claim was fully satisfied out of such dividends. The X bank became insolvent. The plaintiff township board had \$11,481.26 on deposit. Intervenor paid its full bonded liability to the plaintiff who assigned in writing to intervenor the plaintiff's claim against the bank to the extent of \$10,000. The plaintiff filed a claim in the X bank receivership for \$1,481.26, and the surety filed an intervening petition in said receivership asserting a right to share proportionately with other creditors in the distributive dividends to the extent of its claim. The trial court upheld the claim of intervenor. *Held*, on appeal, reversed. *Washington Township Board of Finance v. American Surety Company of New York et al.*, 183 N.E. 492 (Ind. App. 1932).

The overwhelming weight of authority states as a general proposition that a surety has no right of subrogation until the claim upon which he is surety has been paid in full or the creditor is completely satisfied. 2 Williston, Contracts (1920), 2306, § 1269; 9 A.L.R. 1596-1607; 25 R.C.L. 1318, § 6; 37 Cyc., Subrogation, 408-409; 60 C.J., Subrogation, 719-721, §§ 28, 29; Sheldon, Subrogation (1893) 190, § 127; Arant, Suretyship (1931), 359, § 79; see also 29 Mich. L. Rev. 753-757 (1931); 37 Harv. L. Rev. 392-393 (1924).

Except for the written assignment following the payment by the surety on its bond, the present case is similar to many other applications of the general rule. *Board of Health v. Teutonia Bank and Trust Company et al.*, 137 La. 422, 68 So. 748 (1915), Ann. Cas. 1916B, 1251; *Banking Commissioners v. Chelsea Savings Bank*, 161 Mich. 691, 125 N.W. 424 (1910), affirmed on rehearing, 161 Mich. 704, 127 N.W. 351 (1910); *Knauff v. Knoxville Banking and Trust Company*, 133 Tenn. 655, 182 S.W. 232 (1915), Ann. Cas. 1917C, 1181, see also note on 1183; *Blair v. Board of Education of Prairie Township*, 38 Ohio App. 303, 176 N.E. 99 (1930).

The intervenor in the present case insists that these well established principles do not apply since the plaintiff upon receipt of payment of surety bond, executed the following agreement: ". . . and does hereby assign, transfer, and set over . . . and does hereby subrogate the said American Surety Company of New York in and to all the rights, claims, choses in action and remedies thereunder of the Washington Township Board of Finance against the State Bank of Westfield to the extent of Ten Thousand Dollars (\$10,000.00)." In this respect the present case seems to have gone a step farther than any of the above mentioned authorities. However, the Indiana court seems correctly to have held (in spite of the intervenor's contention that such agreement entitled them to "conventional subrogation"), that such part payment of the total claim of the creditor against the bank did not entitle the intervener to a *pro tanto* subrogation to the rights of the creditor. The court reasoned that the agreement did not clearly show a contract for *pro tanto* subrogation, but that the assignment was to operate only in accordance with the terms of the surety bond. To allow *pro tanto* subrogation in the present case would certainly be highly prejudicial to the creditor whose claim is not fully satisfied, and this would not be justifiable unless the right to *pro tanto* subrogation is clearly expressed in the subsequent agreement, in view of the contrary terms of the surety bond. The rule stated in Sheldon, Subrogation (1893), § 248 at page 373 is, "No claim by subrogation, whether conventional or by operation of law, to the securities held or the remedies enjoyed by the creditor for the collection of his demand, can be enforced, until the whole demand of the creditor has been satisfied. Until then there can be no interference with the creditor's rights or securities which might, even by possibility, prejudice or in any way embarrass him in the collection of the residue of the demand." See also *Board of Health v. Teutonia Bank and Trust Company*, *supra*; *Gannett v. Blodgett*, 39 N.H. 150 (1859); *Magee v. Leggett*, 48 Miss. 139 (1873); *Loeb v. Fleming*, 15 Ill. App. 503 (1884); *Fidelity and Deposit Company v. Wilkinson County*, 109 Miss. 879, 69 So. 865 (1915); *United States Fidelity and Guaranty Company v. City of Pensacola*, 68 Fla. 357, 67 So. 87 (1914), Ann. Cas. 1916B, 1236; 37 Cyc., Subrogation, 408-409; 25 R.C.L. 1318, § 6, note 4.

The ruling against giving effect to the assignment in the present case is strengthened by the very essence of the right of subrogation, the existence of which depends not upon a contract but upon the equities of the case involved. 2 Williston, Contracts (1920), 2302, § 1265; Arant, Suretyship (1931), 358, § 79.

FRED O. STEADRY

Torts—Libel—Due Care in Publication of Matter Secured from News Services—[Florida].—Plaintiff sued the defendant newspaper for publication of libellous matter received from the Associated Press and Universal News Service. There was no allegation that defendant was negligent in selecting these agencies or in the publication. *Held*, that the demurrer was properly sustained. *Layne v. Tribune Co.*, 146 So. 234 (Fla. 1933).

The test for libel *per se* is vilifying a man, bringing him into hatred, ridicule, or contempt. *Thorley v. Kerry*, 4 Taunt. 355 (1812); 1 Cooley, Torts (4th ed. 1932), 472, §§ 140, 491, § 145. It is no defense that the defendant merely repeated what had been told him by another whose name he gives, or copies into his newspaper a charge origi-