Subrogation

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GENERAL PRINCIPLES

Meaning

The Louisiana Civil Code explains that subrogation is the substitution of one person to the rights of another. In the framework of performance of obligations, the normal effect of performance is to extinguish the obligation, but that result normally takes place only when performance is rendered by the obligor himself. If performance is rendered by a person other than the original or ultimate obligor, such as a third person who is a stranger to the obligation, or if performance is rendered in full by one who only owes a part, such as a co-obligor, the obligee may no longer demand that the obligor perform. That amounts to saying that one who receives performance from someone other than his obligor is no longer the obligee of that obligor, although the latter may not be thereby liberated. Indeed, whenever the third person who performs has a recourse against the obligor who owed that performance, that obligor merely undergoes a change of obligee, as he is now bound to reimburse the one who performed in his stead. Only in the rare case where the third person rendered performance out of a spirit of liberality and for the sole purpose either of helping an obligor who lacked the means to perform, or of making to him a gift—a donation—of the amount or value of the performance, would the obligor be entirely free from his obligation either to the obligee or to the third person.

The rendering of a performance for the account of another gives to the person who renders it a special action arising either from mandate or from the management of the affairs of another—gestion d'affaires—depending on whether the third person rendered the performance at the obligor's request or on his own initiative, perhaps for the purpose of sheltering the obligor from action threatened by the obligee.

The case may also be that without rendering performance to the obligee directly the third person makes available to the obligor the means necessary to render performance, which amounts to a contract of loan between the third person and the obligor, out of which an action for reimbursement arises for the person who rendered performance. Nevertheless, whether arising from mandate, gestion d'affaires, or loan, the action against the obligor is personal to the third person who has

performed, in the sense that it arises directly in his patrimony. More often than not, the credit for which that action may be brought neither enjoys a privilege nor is assured by a particular security, which clearly means that the third person's recourse against the obligor is exposed to the risk of insolvency. For that reason, it is evident that the third person has an interest in acquiring, besides the action of his own, the action that belongs to the obligee to whom he has rendered performance, which satisfies that obligee's interest. Such a transfer to a third person of the right and action of an obligee is effected through subrogation. Once subrogated to the right of the obligee, the third person is entitled to bring against the obligor the same action that existed against the obligor since the inception of the obligation and to avail himself of all the features of that action, such as its executory nature. Through that action the third person may enforce the right correlative of the obligor's duty with all the features that accompany that right, as when the obligor owes interest in addition to the principal amount. The third person is also entitled to ensure that enforcement by availing himself of the securities accessory to the right of the original obligee, such as a mortgage, a pledge, or an action in dissolution.

Usefulness

Thus, subrogation gives an advantage to the third person, by assuring him of reimbursement in a way considerably more effective than the personal action that arises from just his act of performing. When the third person is an investor, as when he chooses to substitute himself for the obligee because he finds the obligation potentially profitable, subrogation allows him to invest his resources in a secure manner. The obligee also benefits from subrogation, since in the vast majority of instances it is because of the knowledge that he can substitute himself to the rights of the obligee that a third person may decide to render performance at a moment when the obligor may lack the means to do so, thereby fulfilling the expectations of the obligee, who might be otherwise disappointed.

Subrogation allows an advantage also to an obligor who lacks the means or is otherwise unable to render the performance he owes at the time that is due. As a result of the change of the obligee that subrogation facilitates, the obligor may avoid the danger of imminent action against

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6. In French law such a credit is called *chirographaire*. In La. Civ. Code art. 3397(3), the word "chirographie" is used to designate a credit arising of a merely personal or unsecured obligation.
7. See 7 M. Planiol et G. Ripert, supra note 3, at 626.
8. Id. See also La. Civ. Code art. 1826.
9. See 7 M. Planiol et G. Ripert, supra note 3, at 626.
him and even obtain an extension of time within which he can perform.\textsuperscript{10}

\textit{Effects, Nature, Fiction, Transfer}

The basic mechanism that has just been discussed to explain the meaning of subrogation is summarized in an article of the Louisiana Civil Code which states that when subrogation results from a person’s performance of the obligation of another, that obligation subsists in favor of the person who performed it, who may avail himself of the action and security of the original obligee against the obligor, but is extinguished for the original obligee.\textsuperscript{11}

The contradiction between extinction of the obligation and its survival has given rise to a question concerning the nature of subrogation. Answering that question, traditional doctrine asserts that subrogation is a fiction admitted or established by law in certain cases exclusively, by virtue of which an obligation which is extinguished with regard to the original creditor by payment he has received from a third person foreign to the debt, or from the debtor himself but made with funds a third person furnished, is regarded as subsisting in favor of the third person, who is entitled to exercise the rights and actions of the original creditor.\textsuperscript{12}

Modern doctrine, however, rejects the idea of a legal fiction and asserts that it is unnecessary to resort to such an artificial notion to explain solutions actually based on practical needs.\textsuperscript{13} It is more realistic, it is said, to regard the nature of subrogation as resulting from an examination of its effects. Then it becomes clear that subrogation is a mode of effecting a transfer of the active side of an obligation.\textsuperscript{14} That view explains that through subrogation the obligation subsists for the original obligor, but is extinguished for the original obligee. Following that approach, the Louisiana Civil Code regulates subrogation in a chapter devoted to the transfer of obligations, displacing that regulation from its earlier location, where it was treated as a special effect of an act of payment.\textsuperscript{15} The new location is a better reflection of reality, since the substitution of a person to the rights of another, which by definition is effected through subrogation, may result not only from an act of performance, or payment, but also from other juridical acts such as a contract of sale.\textsuperscript{16}

\begin{footnotes}
10. Id. See also A. Weill et F. Terré, supra note 3, at 1072-73.
14. Id. at 644-46.
\end{footnotes}
Original Obligee Paid Only in Part

A third person may render only a part of the performance owed by an obligor. When such is the case, the original obligee who has been paid only in part may exercise his right for the balance of the debt in preference to the new obligee. In other words, the original obligee retains the right to the balance still owed by the obligor, and that right takes precedence over the third person's right to recover from the obligor the portion the third person paid.

It might be thought, at first blush, that the original obligee's right to the balance still owed to him and the third person's right to recover from the obligor are of the same rank, if not fractions of the same right, since both are correlative of the same duty to perform of the original obligor. It may seem that in case of insolvency of the obligor or insufficiency of the security, both the original obligee and the third person should be on equal footing in their endeavor to recover from whatever resources may be found in the obligor's patrimony. The law, however, clearly provides a different solution. Predicated on an interpretation of the obligee's intent, the law gives preference to the original obligee. According to a traditional adage, no one should be presumed to act against his own interest when subrogating another to his rights—nemo contra se subrogasse censetur.

An early French authority, whose work greatly influenced the Code Napoleon, stated that a creditor who is paid with resources of a person other than his debtor is bound to subrogate that person to his right only to the extent that such subrogation does not impair the creditor's interest. As a consequence, a creditor who subrogates to his right a third person from whom he received a partial performance should be presumed to have reserved for himself a preference for the balance still owed to him.

The Louisiana jurisprudence has frequently recognized that preference. Thus, for the balance owed to him, an obligee has against the principal obligor a right preferential to the one of a surety who paid only part of the debt he secured. Likewise, for the balance still owed to him, the victim of an accident has against the party at fault a right preferential to an uninsured motorist insurance carrier which subrogated

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itself to the rights of the victim at the time of making partial payment of the damages that the victim sustained. 22

Since the law that establishes the preference is not one for the preservation of the public order, private parties may depart from the provision in their agreement. 23 Thus, a third person who renders partial performance to the original obligee may obtain that obligee's consent to share the rank of his right to the balance with the third person's right to recover from the obligor the part performance he rendered, or may even obtain the original obligee's agreement to make his right to the balance still owed subordinate in rank to the right of the third person. 24 For that purpose, the bargaining position of the third person is stronger when he acts spontaneously in tendering partial performance to the obligee than when he is, for example, a buyer of property subject to a mortgage who uses the purchase money to make partial payment of the debt owed to the mortgagee, or a surety who makes partial payment to the original obligee. 25

Be that as it may, as a peculiar effect of subrogation, the original obligee's preference in case of partial performance by a third person cannot take place when partial performance is not possible, as in the case of an indivisible obligation or a cause of action that may not be divided. 26

Historical Perspective

Subrogation, as a means of effecting a transfer of an obligation at the time the obligee receives payment from a person other than his principal or original obligor, can be traced back to two Roman law institutions. The first was the cession or assignment of actions, whereby whenever a creditor demanded payment from an accessory obligor, such as a surety, the latter by way of defense could demand an assignment in his favor of the creditor's actions against the principal debtor as a condition for payment by the surety. The defense of assignment of actions was later extended to a solidary obligor from whom the creditor demanded full performance, as well as to a third person in possession

of mortgage-burdened property on which the mortgage was about to foreclose. 27

The second Roman law institution was the *successio in locum creditoris*—the substitution or succession of another person in the creditor’s place—which allowed a third person to succeed to the rank of a mortgagee to whom he had made payment on the secured debt. 28 That advantage could be claimed by a mortgagee who had paid another mortgagee of superior rank, by a person who had loaned the funds necessary to make payment to the mortgagee, or by a purchaser of property burdened with a mortgage who used the purchase money to make payment to the mortgagee. 29 Unlike the cession or assignment of actions, which gave to the third person all the advantages the creditor had, the *successio in locum creditoris* allowed the third person only the benefit of a particular mortgage rank.

A blending of those two Roman institutions took place under the French *ancien droit*, in that the *cessio in locum creditoris* was in a way absorbed by the cession or assignment of actions. 30 In 1609, an edict of Henry IV sanctioned the binding force of conventional subrogation effected by the obligor, and in the course of the eighteenth century recognition was given also to the binding force of conventional subrogation effected by the obligee. 31

**At Common Law**

At common law, subrogation is not a matter of strict law, but a purely equitable doctrine, so that granting a remedy based thereon lies within the discretion of the court. 32

In an early English case where a surety had paid a bond signed by himself and the principal debtor, the Chancery Court held that the surety was entitled to a suit in equity to compel assignment of the bond to himself. 33 Viewing subrogation as a remedy granted in equity rather than law began in that way.

American states have preserved that approach. In another case, where a person other than the debtor had paid to a state a debt secured by

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28. Id. at 479.
31. A. Weill et F. Terré, supra note 3, at 1074.
32. 10 S. Williston, A Treatise on the Law of Contracts 843 et seq. (3d ed. 1967);
a mortgage on property of a railroad company on which the state was about to foreclose, the court allowed that person to subrogate himself to the rights of the creditor-state against the railroad company. The court asserted, however, that subrogation does not originate in contract but in equity, and that it is to be recognized only in the interest of substantial justice.34

On the other hand, in a case where a surety for a railroad company, who had paid a creditor a debt for land the railroad company had appropriated, attempted to enjoin the use of the company's rails by the trustee in bankruptcy of the company, the court denied the injunction, asserting that, because of its equitable nature, subrogation could not benefit the surety in such circumstances.35 Likewise, where priority status was claimed by a creditor who had been forced to pay a tax debt for his debtor, the court held there was no priority since there had been no assignment, and that because of the equitable nature of subrogation the court did not feel inclined to grant that remedy to the creditor.36

In sum, as clearly expressed by an American court recently, it is precisely because of its equitable nature that there is no generally accepted test for the application of the doctrine of equitable subrogation, and, therefore the use of it in the common-law states depends on the facts and circumstances of each case.37

**Real Subrogation**

There is also "real" subrogation. As may be expected, "real" subrogation, as opposed to personal subrogation, or subrogation pure and simple, is the substitution of a *thing* for another in a universality of assets and liabilities.38 When a person has a single patrimony, anything acquired in exchange or as a counter-performance for the alienation of an element of that patrimony enters into the mass by operation of law. Traditional civilian doctrine regarded real subrogation as a legal fiction. Modern French doctrine, however, has departed from the idea of fictitious substitution of assets and merely maintains that a newly-acquired asset serves the same purpose as the asset it has replaced. Consequently, real subrogation takes place when the destination of a thing or of a

mass of things intended for a special purpose is to be preserved, or when there is a need to secure the restitution of a thing.39

Neither the Code Napoleon nor the Louisiana Civil Code address real subrogation as a general principle, but both codes contain provisions that assume the existence of the principle and regulate its specific application to certain situations.40 Thus, in Louisiana real subrogation takes place by operation of law in certain areas such as usufruct and, primarily, matrimonial regimes where the principle is used to determine whether property acquired by a spouse during the existence of a community property regime enters into the community or remains the separate property of that spouse.41 In its section devoted to subrogation per se, however, the Louisiana Civil Code deals only with personal subrogation, that is, the substitution of a person to the rights of another, and not with real subrogation, which is the substitution of a thing for another.

Conventional or Legal Subrogation

Subrogation may be conventional or legal.42 It may result either from the agreement of the obligor or the obligee or both with a third person, or directly from the operation of law for the protection of persons who perform certain acts.

Conventional Subrogation by the Obligee

Obligee and Third Person

An obligee who receives performance from a third person may subrogate that person to his, the obligee's, rights even without the obligor's consent.43 As a result, the third person, or conventional subrogee, is substituted to all the rights of the original obligee.44 Indeed, the third person, or subrogee, is now entitled to recover from the obligor the full amount of the debt the original obligor was bound to pay to his initial creditor regardless of the amount he actually paid to the obligee.45

Cf. 3 M. Planiol et G. Ripert, Traité de Droit Civil Francais 32 (2d ed. 1952); H. Capitant, Essai sur la subrogation reelle, 18 Revue trimestrielle de droit civil 385 (1919).
See also 2 A. Yiannopoulos, supra note 38, at 341-46.
40. See 2 A. Yiannopoulos, supra note 38, at 341-46.
44. See La. Civ. Code art. 1827 comment (d).
45. Id. See also 1180 infra.
When timeliness of performance is essential, the obligee, by subrogating a third person to his rights, may obtain the advantage of receiving a timely performance when the original obligor may have difficulty or may have delayed rendering that performance. Unless the obligation is strictly personal on his part, the obligor suffers no damage from the substitution of the new obligee, since he is not placed in a worse position than he was when he initially obligated himself. For that reason the obligor's consent is not required for subrogation to be validly effected by the obligee. Since an obligor should not be exposed to claims by multiple persons as a result of an act of the obligee, however, a question whether an obligor's consent is required may arise when the obligation is divisible and the obligee receives only partial performance from the third person. All the same, the obligor's consent is not required even when the obligee only partially subrogates his rights to a third person from whom he has received less than full performance. That is so because, in the first place, the pertinent provision of the Louisiana Civil Code makes no distinction between full and partial subrogation. In the second place, permitting or preventing a division of the debt by the obligee is a matter decided on the basis of policies subject to change in the wake of changing business practices. In the third place, where partial performance is concerned, there is no valid reason to distinguish between conventional and legal subrogation so as to require the obligor's consent to the former when it is not required to the latter. In sum, no interest of the obligor justifies his having the right to prevent a conventional subrogation effected by the obligee. As explained in connection with the general principles that govern subrogation, when the obligee subrogates to his right a third person who has rendered only partial performance, the third person yields in ranking to the original obligee should the obligor's assets be insufficient to afford full recovery to both.

**Intention to Subrogate**

Although the obligor's consent is not required for an effective subrogation by the obligee, it is quite obvious that the obligee's assent is essential for the validity of each conventional subrogation. Indeed, although an obligee may not refuse to accept performance tendered to
him by a third person unless the obligation is strictly personal to the obligor, the obligee cannot be forced to subrogate such a person to his rights, except when subrogation results directly from the operation of law. Therefore, the obligee’s intention to subrogate another person to his rights must be clearly indicated. Of course, there is no problem when that intention is expressly stated in the agreement the obligee concludes with the third person or when the obligee expressly states he is subrogating the third person in the receipt he gives to that person for the performance received.

Unlike the Code Napoleon, the Louisiana Civil Code does not require that subrogation by the obligee be express. Nevertheless, it is not easy to conceive of a situation where the obligee’s intention to transfer his right to another would not be made express, since that subrogation is subject to the rules governing the assignment of rights, which require that notice of the transfer be given to the obligor in most cases. On the other hand, the conclusion should be avoided that because it is not required to be made express, the obligee’s intention to subrogate another to his right can be presumed. Quite the contrary, if disputed, such intention must be shown by clear proof of acts of the obligee that unquestionably imply it, as when the obligee has agreed to subrogate the third person in negotiations that took place prior to the rendering of performance by that person, or when the obligee has given the obligor notice that the third person is now the new obligee. It should be noticed that such acts of the obligee practically amount to making his intention to subrogate express, although without using the word “subrogation,” a use that is not even required in French law.

**Need Not be Made in Writing**

The Louisiana Civil Code does not prescribe any particular formality for an act of conventional subrogation by the obligee. Thus, such an act can be valid even if made orally, subject, of course, to the ability to overcome the difficulties of proof by the party in interest. One line of Louisiana decisions asserts that a writing is required for a valid subrogation to be effected by an obligee, although no provision of law

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52. See La. Civ. Code art. 1855. See also 1164 infra.
57. See 7 M. Planiol et G. Ripert, supra note 3, at 627.
58. Id. at 629.
is cited in support of that conclusion. Fortunately, another line of decisions asserts that an agreement of subrogation by an obligee may be proved by parol evidence. Thus, where insurance companies have claimed to have been conventionally subrogated to the rights of their insureds against the parties through whose fault the insureds had sustained damage without introducing a writing for that purpose, Louisiana courts have concluded that an insured's testimony concerning his having received payment from his insurer and that he subrogated the insurer at that moment to his rights, sufficed to prove a conventional subrogation by the obligee had taken place. The correct rule is the one stated in the latter line of decisions.

When conventional subrogation by the obligee results from an act gratuitous in nature, the act amounts to a gratuitous assignment of a right or the donation of an incorporeal, which requires an authentic act for its validity, as when a obligee gives to a third person because of affection or mere liberality the right to collect the debt owed by the obligor and to keep that amount. Absent such proof, however, the obligor may refuse to perform in favor of the third person, or alleged subrogee, since the latter lacks the power to enforce a right he does not have, unless the obligee confirms the substitution to his rights to the third person, the donee, in the prescribed form.

Finally, a conventional subrogation effected by the obligee is subject to the general rules that govern the proof of obligations.

Before or at the Time of Performance

Performance is one of the ways in which obligations are extinguished. Although the pertinent rule states that performance by the obligor extinguishes the obligation, what that rule means is that the obligation is extinguished for the obligor when he himself renders performance. As already explained in the general discussion of the general principles of subrogation, the obligation may not be extinguished for the obligor when performance is rendered to the obligee by a third person. On the other hand, performance, whatever its source, always

64. See 7 M. Planiol et G. Ripert, supra note 3, at 629.
66. See 1147 supra.
extinguishes the obligation for the obligee. That is the case because the obligee may no longer demand anything from the obligor once his interest is satisfied, so the legal bond between them comes to an end. Thus, after receiving performance by either the obligor or a third person, the obligee no longer has a right to which he may subrogate another. Therefore, the last time at which the obligee still has a right that he may transfer is when he is about to receive performance. At the time the performance is rendered, the obligee may subrogate to his right a third person from whom he receives it. But once he has been paid, without any mention or discussion of subrogation, the creditor no longer has a right to which he may subrogate another, even when that other is the person who paid him.

The third person may, however, render performance to the obligee in several acts or in installments. In that case the obligee may still subrogate the third person after one or more acts of performance have taken place, provided that he does so before completion of those acts, since he has a right that he may transfer only for as long as he has not received full performance. Likewise, when upon or even after completion of the performance the obligee must deliver to the third person an instrument that evidences the obligation or an instrument of title subrogation may still be effected at the time the obligee delivers the instrument to the third person.

Although the obligee may no longer subrogate another to his right after the obligation has been extinguished by performance, he may effect a subrogation before receiving performance, since for as long as the obligation is not extinguished he has a right to which he may subrogate another person. The Louisiana jurisprudence asserts without hesitation that it is not necessary that subrogation be effected at the same time as payment and that an agreement granting subrogation to another person may be entered by an obligee before he receives performance from that person. Thus, in a case where an obligee and a third person agreed that the latter would be subrogated to the former's right when he paid the obligor's debt at a future time, the Louisiana court found that a valid conventional subrogation took place when the third person sent a check to the obligee in payment of the debt, several months after the agreement, without saying anything more about subrogation. The court made it clear that although subrogation may not be effected after

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68. See Bank of Bienville v. Fidelity & Deposit Co. of Maryland, 172 La. 687, 135 So. 26 (1931); Cooper v. Jennings Refining Co., 118 La. 181, 42 So. 766 (1907).
70. Cooper v. Jennings Refining Co., 118 La. 181, 42 So. 766 (1907).
performance has been rendered, it can be validly effected, however, when the obligee and the third person have agreed before rendering performance that subrogation will take place in the future. The same conclusion can be derived from another decision asserting that the time at which he receives performance from a third person is the latest time at which an obligee may subrogate that person to his right, which confirms by implication that subrogation may be validly effected at an earlier time. Even in modern French doctrine, in spite of language in the Code Napoleon to the effect that subrogation must be effected at the time the obligee receives payment, it is not disputed that it may take place before that time, in which case it is valid as a promise of subrogation rather than an already perfect subrogation.

SUBROGATION BY OBLIGEE AND ASSIGNMENT OF RIGHTS

The Louisiana Civil Code

Unlike the Code Napoleon, the Louisiana Civil Code provides that conventional subrogation by the obligee is subject to the rules governing the assignment of rights.

Because traditional formulations as stated in the French Civil Code and earlier Louisiana law merely enumerate situations in which subrogation takes place but do not define all its effects, Louisiana courts have often regarded subrogation and assignment of rights as equivalent. In one case the court stated that subrogation is in effect a sale. In another, it was held that the assignment of a judgment made by a bank to one of several debtors who had paid that judgment, constituted a legal subrogation of the debt, entitling that co-debtor to exercise the rights of the bank against the other solidary debtors. In still another case, a Louisiana court held that a creditor who held a second mortgage on certain property and bought the notes that were secured by the first mortgage was legally subrogated to the rights of the first mortgagee. At the time they were rendered, the foundation of those practically-oriented decisions was not strictly correct under then-prevailing law, which as traditionally formulated gave rise to relevant differences between subrogation and assignment of rights.

72. See A. Weill et F. Terré, supra note 3, at 1075.
76. See Steele v. Hough, 174 La. 441, 141 So. 22 (1932).
Traditional Differences

In traditional law, subrogation and assignment of rights differ in at least three ways.

In the first place, although neither an obligee who subrogates another person to his right nor one who assigns his right to another warrants the solvency of the obligor, an assignment of rights carries an implied warranty of the existence of the debt. No such warranty exists in the case of subrogation. If the debt does not exist, however, the would-be subrogee may have an action for unjust enrichment against the alleged obligee from whom the subrogation was obtained.

In the second place, subrogation is effective against third persons, including the obligor, from the time it takes place, which is expressed by saying it produces effects erga omnes. An assignment of rights, on the other hand, requires notice to the debtor or his express acceptance in order to be effective against third persons.

In the third place, an assignee may recover from the debtor the full amount of the assigned claim, regardless of the price he actually paid for the assignment. On the other hand, according to traditional doctrine that explained subrogation principles, and the jurisprudence that has applied traditional law, a subrogee may recover only the amount that he actually paid to the obligee.

Because of those differences, it was possible under traditional law for an obligee to gain an advantage by alleging his rights had been acquired by subrogation rather than by assignment in order to circumvent, for example, the requirement that he give notice of the assignment to the obligor.

Similarities

Besides those differences, the rights acquired by an assignee and a subrogee are essentially the same. In addition to the principal right to demand performance by an obligor, both acquire accessory rights that include not only suretyship, as recognized by traditional law, but also

the right of preference arising from mortgage, pledge or privilege. In the case of assignment of a credit-right, the wide range of accessory rights acquired by the assignee is clearly stated in an article of the Louisiana Civil Code. In the case of subrogation, the Louisiana Civil Code states that a person who subrogates himself to the right of an obligee may avail himself of that obligee's action and security, though traditional law contains no similar provision. The Louisiana jurisprudence has asserted without hesitation that conventional or legal subrogation effects a transfer of the rights, privileges and mortgages of the obligee.

Consequences of Identity of Regime

The main consequence of subjecting subrogation by the obligee to the rules that govern assignment of rights is that, regardless of the amount he actually paid to the obligee, the third person, or subrogee, may recover from the obligor the full amount originally owed by the obligor to the obligee. As shown before, traditional law provided a different solution, which only allowed the third person to recover the amount he actually paid to the obligee. The reason for the rule stemmed from provisions of the civil codes that contemplate assignment of rights as an onerous transaction from which the third person intends to derive a profit by purchasing the obligee's credit, no doubt for less than its face value. Subrogation by the obligee, on the other hand, has traditionally been regarded as resulting from an act of kindness on the part of the third person, or subrogee, who gratuitously or benevolently, helps the debtor by paying his debt, but not for the purpose of speculating or making a profit.

Although such a distinction is theoretically sound, it is hard to make in the vast majority of practical situations. When a person pays the debt of another and obtains subrogation from the obligee, the onerous or gratuitous nature of the act depends on that person's intention, which is seldom disclosed. Louisiana courts were forced to make artificial distinctions under traditional law because of the difficulties of ascertaining whether performance rendered by a person other than the obligor

82. See C. civ. art. 1252; La. Civ. Code art. 2162 (1870); La. Civ. Code art. 1826 and comment (d) thereto.
85. See Ferrari v. Durac and Sheriff, 25 La. Ann. 80 (1873); King v. Dwight, 3 Rob. 2 (La. 1842).
86. See La. Civ. Code art. 1827 comment (d).
87. See 1158 supra.
88. See 7 M. Planiol et G. Ripert, supra note 3, at 653-55.
was a purchase of the obligee's credit-right or was prompted by a generous intent to help the obligor.\textsuperscript{89}

The identity of regime for both subrogation by the obligee and assignment of rights eliminates that difficulty. Under the single regime the third person may recover the full amount owed by the obligor, regardless of the amount paid to the obligee at the time the subrogation was effected. If that person, or subrogee, rendered performance to the obligee out of a spirit of generosity towards the obligor, he is perfectly free to limit his recovery from the obligor to the amount actually paid.

Another consequence of the identity of regime is that conventional subrogation by the obligee is effective against third persons, including the obligor, only when notice is given to the latter, though it is valid between the parties without more.\textsuperscript{90}

An important exception to the rule that provides for an identity of regime takes place when the obligee paid only in part, since, in that case, the subrogee's right yields in rank to the original obligee's right to the balance owed when the obligor's assets are insufficient to satisfy both.\textsuperscript{91}

**CONVENTIONAL SUBROGATION BY THE OBLIGOR**

**Obligor and Third Person**

The Louisiana Civil Code provides that an obligor who pays a debt with money or other fungible things borrowed for that purpose may subrogate the lender to the rights of the obligee, even without the obligee's consent.\textsuperscript{92}

Allowing an obligor such discretion is strange, to say the least. Under that provision, the obligor can dispose of a credit-right that is actually in the obligee's patrimony and transfer it to another, namely the lender. An eminent French authority calls such an act abnormal because no reasonable theoretical explanation can be found for it and asserts that it can be understood only in light of the practical needs such discretion is designed to satisfy.\textsuperscript{93} Indeed, that rule allows an obligor to free himself from the debt he owes to the obligee using resources he might have obtained at lower interest or for a longer term than the one agreed to with the original obligee. A lender may be amenable to


\textsuperscript{90} See La. Civ. Code art. 1827 comment (c). See also 1158 supra.

\textsuperscript{91} La. Civ. Code art. 1826.

\textsuperscript{92} La. Civ. Code art. 1828.

\textsuperscript{93} 7 M. Planiol et G. Ripert, supra note 3, at 630. See also A. Weill et F. Terré, supra note 3, at 1076-77.
giving such advantage in return for the benefit of subrogation offered by the obligor, without having to fear any opposition from the obligee. 

In that context, the resources that the obligor obtains from a lender may consist of fungible things other than money. Although in the vast majority of instances the obligor will borrow money, a merchant might obtain a loan of a certain quantity of goods from another in the same trade, which the borrower intends to use as the object of a performance he owes to an obligee.94 The Louisiana Civil Code is not the only one that contemplates such a situation and provides a rule the scope of which is not limited to money.95

As effected by the obligor, the subrogation just described causes no harm to the lender whom the obligor subrogates to the rights of the obligee, nor to the obligee himself. The lender suffers no harm since, out of his free will, he enters with the obligor into a contract of loan, either because of the advantage he expects to derive or more rarely, because he wants to help the obligor. Nor does the obligee suffer any injury because his expectation of receiving the performance owed to him materializes through the subrogation. Nevertheless, the peculiar situation of an obligee confronted with subrogation effected by his obligor deserves further comment.

**No Need for the Obligee's Consent**

The obligor may subrogate the person who lends him the means to pay the obligee without the obligee's consent.96 Properly understood, that rule means not only that the consent of the obligee is not needed for validation but also that subrogation may be effected by the obligor even against the will of the obligee.97 The origin of the rule can be found in a reaction against unfair practices that ancient French feudal law allowed to creditors who could then refuse payment tendered by a debtor who had borrowed money from a lender whom the debtor intended to subrogate to the rights of the creditor.98 A creditor could thus prevent an alleviation of the burden of the debtor who had a chance to obtain resources on terms less onerous than those to which he had originally agreed with the creditor. In a manner consistent with the principle that favors the liberation of obligors, a rule was fashioned that deprives creditors of the power to oppose such payment and subrogation by the obligor.

95. See Codice civile [C.c.] art. 1202 (Ital.).
98. For the origin of the rule in an edict by Henry IV, King of France, in 1609, see A. Weill et F. Terré, supra note 3, at 1077.
When the practices that motivated the enactment of that rule are contrasted with modern ones, it is easy to understand that advantageous opportunities for subrogation effected by the obligor in favor of a lender seldom present themselves in the world of contemporary transactions, which diminishes the usefulness of that manner of subrogation and tempers the rigor of the rule permitting subrogation without the obligee's consent.

For example, loans of money at interest but for no fixed term might have been a frequent practice in earlier times. In that case, if the creditor were allowed to oppose subrogation by the debtor in favor of another person who was willing to lend the debtor the same amount of money at a lower interest, a good chance to alleviate his burden would be lost for the debtor, which justified the rule depriving creditors of such power. Now, however, a loan at interest without a fixed or determinable term would be a rare occurrence. When there is a term during which interest accrues for the creditor, the term is for the benefit of the obligee, who cannot be forced to take performance rendered before arrival of the term, either by the obligor or by a third person.99 On the other hand, upon arrival of the term the creditor probably would be more than happy to receive performance even if the debtor paid with money borrowed from another, in which case the creditor would lack interest in opposing a subrogation to his rights effected by the debtor in favor of the person from whom he borrowed the money used to pay the debt. The creditor then suffers no harm from the deprivation of the power to oppose subrogation.

In sum, although an obligor who borrows the resources needed to perform an obligation may subrogate the lender to the rights of the obligee even against the obligee's will, that subrogation presupposes the obligor actually rendered performance to the obligee with those resources, and that performance cannot be forced upon an obligee to the detriment of his valid interest. Nevertheless, in the rare cases where that kind of subrogation may be useful to an obligor, he may overcome resistance by the obligee who refuses the performance the obligor wants to render with means borrowed from a lender whom he intends to subrogate to the obligee's rights by resorting to tender and deposit proceedings.100

Writing Required

In the context of subrogation effected by the obligor, the Louisiana Civil Code provides that the subrogation agreement must be in writing and express that the purpose of the loan is to pay the debt.101 Unlike its French ancestor, and in a manner more consistent with contemporary

practices, the Civil Code of Louisiana does not require authentic form for such an agreement. Thus, a writing under private signature rather than a notarial act suffices. The writing need not contain the word "subrogation," but the borrower's purpose of using the borrowed resources to perform his obligation must be express. The name of the obligee for whom the performance is intended and other circumstances of the debt, such as the amount and place of payment, should be clearly indicated in order to identify the obligation to be performed with the borrowed resources.

The subrogation, however, is not effected by the writing itself, since it cannot actually take place until the obligee receives performance. The lender, therefore, should see to it that performance is actually rendered to the obligee, which can be readily accomplished if the obligee is present at the time the loan is made and the writing is executed. Otherwise, for as long as the obligee is not paid, the agreement between the obligor and the lender amounts to just a promise to subrogate made by the former to the latter, a promise on which the lender may not feel very inclined to rely. If the obligee is present when the agreement is made, however, the difference between subrogation effected by the obligor and subrogation effected by the obligee becomes blurred, which is another indication of the limited usefulness of subrogation effected by the obligor.

For the reason just stated, the French Civil Code in a traditional approach requires not only that the agreement between the obligor and the lender be in authentic form, but also that a receipt be extended by the obligee clearly stating that the obligor has rendered performance with the borrowed resources. In the opinion of French doctrine, if an obligee refuses to extend such a receipt, he may be forced to do so, since he cannot oppose subrogation effected by the obligor in the manner here described. Earlier Louisiana law prescribed the same requirements. The Louisiana Civil Code has now departed from that traditional approach in order to make the rules more consistent with contemporary practices.

SUBROGATION BY OPERATION OF LAW

Underlying Policy

In the vast majority of instances, a person who performs the obligation of another does not need to obtain a conventional subrogation

102. See C. civ. art. 1250.
104. See C. civ. art. 1250.
105. See 7 M. Planiol et G. Ripert, supra note 3, at 632.
by the obligee or the obligor because the law by its direct operation
subrogates that person to the right and action of the obligee. The
instances of legal subrogation, however, are exclusively enumerated in
the law since that kind of subrogation derogates from the well-established
principle that no one may acquire the right of another without the
concurrence of both the will of the person who acquires the right and
that of the one who transfers it.\textsuperscript{107}

Sometimes, a person who performs for another is himself bound to
perform or does so for the protection of an important interest of his
own or of the obligor. The law provides for subrogation through its
own operation in order to encourage performance by a third person
when such are the circumstances. In so doing, it has been said, the law
introduces a sort of implied or constructive conventional
subrogation.\textsuperscript{108}

The language of some Louisiana decisions suggests a liberal approach
to subrogation by operation of law. At one time a court stated that
the right to legal subrogation is to be recognized in every case where
a person pays a debt which he has an interest in discharging.\textsuperscript{109} At other
times, however, Louisiana courts concluded that, under well-known meth-
ods of statutory interpretation, the exceptions to the rule that payment
extinguishes the obligation and no subrogation takes place should be
strictly construed.\textsuperscript{110} The latter approach is the correct one because of
the exceptional nature of subrogation by operation of law.

\textit{Obligee Who Pays Another Obligee}

Subrogation takes place by operation of law in favor of an obligee
who pays another whose right is preferred to his because of a privilege,
pledge, mortgage, or security interest.\textsuperscript{111}

Two requirements must be met for such legal subrogation to take
place. The first is that the person who pays the creditor of another
must be himself a creditor of the other. If he is not, the person who
pays can always obtain a conventional subrogation from the obligee or
from the obligor, but may not avail himself of legal subrogation. Thus,
Louisiana courts have denied legal subrogation to subcontractors who
paid wages of laborers who did not qualify as creditors of the owner
of the work at the time their wages were paid by the subcontractor

\textsuperscript{107.} See 7 M. Planiol et G. Ripert, supra note 3, at 632-33.
\textsuperscript{108.} Id.
\textsuperscript{109.} R.F. Mestayer Lumber Co. v. Cusack, 141 So. 2d 166 (La. App. 4th Cir. 1962).
See also Duchamp v. Dantilly, 9 La. Ann. 247 (1854).
\textsuperscript{110.} Pringle-Associated Mortgage Corp. v. Eanes, 254 La. 705, 226 So. 2d 502 (1969);
Succession of Andrews, 153 So. 2d 470 (La. App. 4th Cir. 1963), cert. denied, 244 La.
1005, 156 So. 2d 57 (1963).
\textsuperscript{111.} La. Civ. Code art. 1829.
because of the lack of timely recordation of their rights. Likewise, a finance company which paid the debt owed to a creditor holding a first mortgage on certain property was held not to be legally subrogated to the right of the first mortgagee because the company was not a creditor of the mortgagor at the time it made payment to the mortgagee.

The second requirement is that the right of the creditor being paid must be preferred to the right of the creditor who makes the payment. The preference may be based on a privilege, pledge, mortgage, or security interest held by the creditor being paid, while the creditor who pays has no security or has one inferior in rank to the security of the creditor to whom he pays the debt of the mutual obligor. The conclusion of the Louisiana jurisprudence is that legal subrogation avails all creditors that are "inferior," either because they are unsecured, or because, though preferred, their security is of a lower rank than the one retained by other creditors. Thus, a third mortgagee who pays a first mortgagee is legally subrogated to the right of the latter. The same conclusion prevails for the same reason when a creditor who holds a second mortgage pays another who maintains a first mortgage on the same property. Likewise, legal subrogation avails an unsecured creditor who pays another creditor who holds a mortgage on property of their mutual debtor. It also avails a junior creditor who pays a seizing one. By the same token, a materialman or subcontractor who pays the wages of laborers is subrogated by operation of law to the laborers' privilege on the owner's property.

The corresponding article of the French Civil Code allows legal subrogation only when the creditor who is paid is preferred to the one making the payment because of a privilege or mortgage. French doctrine bemoans the fact that French jurisprudence invoking that restricted language as a justification has refused subrogation to creditors who paid other creditors secured by other devices. Such a restrictive approach could not be justified in Louisiana where the pertinent article of the Civil Code, after listing privilege, mortgage and pledge as sources of

119. C. civ. art. 1251.
120. See 7 M. Planiol et G. Ripert, supra note 3, at 639.
the requisite preference, also lists a "security interest" in general. For instance, since a seller's right to dissolve the sale and recover the property when the buyer fails to pay the price is a security interest, another creditor of the buyer could pay the price and subrogate himself to the seller's right to dissolve, provided the other creditor's right is unsecured or his credit is protected only by a weaker security and that other rights of the seller are not thereby impaired, a solution which finds support in French doctrine.

When a creditor is preferred because of his right of mortgage on certain property of the debtor, it has been held that legal subrogation does not take place in favor of an inferior creditor who pays the mortgagee if the mortgage is erased from the records. If understood in an unrestricted manner, that conclusion would allow either a debtor or a superior creditor to defeat the interest of the inferior creditor and potential subrogee by simply causing the mortgage to be erased from the records. As between inferior and superior creditors, or as between an inferior creditor and the debtor, erasure of the mortgage should not prevent subrogation for the same reasons that did not preclude it in a situation where mortgage notes had been marked "cancelled" and returned to the debtor. On the other hand, if a mortgage has been erased from the records, legal subrogation should not take place in favor of an inferior creditor who pays the mortgagee once a third person has relied on the erasure or absence of recordation of an interest adverse to his.

A question has been raised in modern French doctrine about the reasons why subrogation that the law through its own operation allows to an inferior creditor who pays a preferred one, is not allowed also to a preferred creditor who pays another creditor of a lower rank. Indeed, situations can arise where a creditor whose security primes that of another creditor has an interest in paying the latter and being subrogated to the right of the lower-ranked creditor, as when a second mortgagee wants to foreclose on the mortgaged property and the first mortgagee wants to delay foreclosure because he expects market conditions to improve and he might secure a better price by selling the

122. In this context see Sliman v. McBee, 311 So. 2d 248 (La. 1975); La. Civ. Code arts. 2561 and 2562; see 7 M. Planiol et G. Ripert, supra note 3, at 639.
126. See A. Weill et F. Terré, supra note 3, at 1082.
property later. When such is the case, the first mortgagee might want to pay the second in rank if he were protected by legal subrogation. The language of the law clearly states, however that such subrogation only benefits an inferior creditor, not the preferred one. A preferred creditor in such a situation, on the other hand, can always negotiate for a conventional subrogation from the second mortgagee or the debtor.127

The question arose whether the legal subrogation here discussed avails a creditor who pays a preferred one when the paying creditor also is an obligor of the one to whom he has paid. The Louisiana jurisprudence has given a negative answer on the grounds that the person making payment should be a third person *vis-a-vis* the obligee of the debt he is seeking to prime through that payment.128 For example, a contractor and his laborers are both obligees of the owner of the construction—the contractor by virtue of the contract in which the owner agrees to pay for the job and the laborers by virtue of the privilege that the law allows them on the land and improvements on which their work or labor was performed.129 Because of that privilege the laborers' rank primes the contractor's as obligees of the owner. When the contractor pays the laborers their wages, he might be regarded as an obligee who pays other obligees whose rights are preferred to his because of a privilege and might therefore be deemed entitled to subrogate himself to the secured rights of the superior obligees. On the other hand, he is also the primary obligor of the obligation to pay wages to the laborers since he is the one who hired them. For the laborers this means the contractor is not a third person who voluntarily pays them, but is one who is bound to them by a legal relationship and who simply discharges his own obligation by making payment. That kind of separate relationship between the inferior creditor and the preferred one prompted Louisiana courts to conclude that legal subrogation does not take place in favor of the inferior creditor in such situations.130 That conclusion is questionable, however, as it is predicated on the premise that for this type of subrogation to take place payment must be made to a preferred creditor by another creditor *for the benefit of the debtor*.131 Such a peculiar requirement can be found neither in the theoretical foundation of this type of subrogation nor in the way that it has been discussed in the classical and modern doctrine. On the contrary, since its origins in Roman law, and also through its reception in the *Siete Partidas*, the subrogation discussed here is based on the assumption that payment is

127. See 1152 supra.
131. Id. at 515.
made to the preferred creditor for the benefit of the inferior one who makes the payment. Nor does it seem practically necessary for the paying creditor to be a stranger to the relationship between the preferred creditor and the debtor. Moreover, the most important decision in which that conclusion was reached can perhaps be justified on different grounds, such as doubts concerning the preferred creditor status of the laborers paid by the contractor and the fact that the contractor did not qualify to benefit from legal subrogation under any other provision. Nevertheless, that conclusion lies at the root of the marked divergence of subsequent decisions concerning the legal subrogation of subcontractors to the preferred position of the laborers whose wages they have paid as obligees of the owner of the work in which they labored.

More recently, in a decision not involving laborers and contractors, the Louisiana jurisprudence seems to depart from the assumption that a third person who pays must be a stranger to the relationship between the preferred creditor and the debtor for subrogation to take place in favor of the person who pays.

**Purchaser of Property Who Uses Price to Pay Creditors**

Subrogation takes place by operation of law in favor of a purchaser of a movable or immovable property who uses the purchase money to pay creditors holding any privilege, pledge, mortgage, or security interest on the property.

Thus, a buyer of property subject to a mortgage who uses the money to pay the mortgagee rather than paying the price to the vendor becomes substituted to the right of the mortgagee through the subrogation by law and will be protected against the vendor's action for the price. A distinguished French authority even asserts that such a buyer actually liberates himself from the duty he owes the vendor for the purchase.

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132. See P. Girard, Manuel Élémentaire de Droit Romain 784-786 (5th ed. 1911); Las siete partidas 5. 13. 34. See also 1 C. Aubry et C. Rau, supra note 12, at 187, 203, where an assertion was made that the court seems to have interpreted as favoring such a requirement though that is not what the French writers say; id.

133. See Pringle-Associated Mortgage Corp. v. Eanes, 226 So. 2d 502 (La. 1969). See also 1170 infra.


135. Great Southwest Fire Ins. Co. v. CNA Ins. Co., 557 So. 2d 966 (La. 1990), where it was held that an excess insurance policy carrier who pays to a tort victim an amount over and above the policy limits of the primary insurer need not be a third party disinterested in the obligation in order for it to be conventionally and legally subrogated to the rights of the insured against the primary insurer, when the latter, because of its bad faith, has caused its insured to suffer damages in excess of the coverage provided by the primary insurance policy.

price by extinguishing an obligation of the vendor. If the amount of the debt secured by the mortgage is less than the amount of the price, the buyer clearly owes the difference to the vendor. On the other hand, if the amount of the debt secured by the mortgage exceeds the price of the property, the buyer's credit against the vendor for the difference will be unsecured, unless the mortgage held by the creditor and paid by the buyer also covered other property of the vendor.

Such a buyer is likewise protected if the property is subject to more than one mortgage and is auctioned as a result of an action brought by a mortgagee of a rank inferior to that of the creditor paid by the buyer. In such a case, the buyer, though he loses the property, stands a good chance to recover the purchase money he used to pay the superior creditor because of the superior rank of that creditor to whose right he subrogated himself.

Departing from traditional law, the Louisiana Civil Code allows the benefit of such legal subrogation not only to the buyer of immovable, but also to the buyer of movable property, and not only for the payment of mortgage creditors with the purchase money, but also for the payment of creditors holding other kinds of security interests such as a pledge or a privilege. Thus, legal subrogation should operate in favor of a buyer who uses the purchase money to pay laborers or materialmen who have properly recorded their privileges.

Such a buyer benefits from legal subrogation even when he has borrowed the purchase money he uses to pay a creditor holding a security interest on the purchased property. And that subrogation takes place whether payment is made by the buyer himself or by his mandatary.

It is noteworthy that the legal subrogation here discussed operates not only with respect to the property, the price of which is used by the buyer to pay a creditor who holds a security interest thereon, but also with respect to other property of the vendor subject to the interest of the creditor paid by the buyer. For example, a Louisiana court asserted in one case that a buyer who paid a debt secured by a mortgage on both the property he bought and additional acreage became subrogated by operation of law to the mortgage on the entire tract.

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137. See 7 M. Planiol et G. Ripert, supra note 3, at 635.
138. Id.
141. See Bierhorst v. Fruthaler, 231 La. 176, 91 So. 2d 1 (1956).
142. Id.
143. See 7 M. Planiol et G. Ripert, supra note 3, at 636-37.
A buyer who makes such a disposition of the purchase price benefits from legal subrogation even when he buys at a judicial sale.\textsuperscript{145} When that is the case, however, it must be clear that payment to the creditor is made by the buyer himself or his mandatary. Thus, a Louisiana decision held that a buyer at a judicial sale did not benefit from legal subrogation because his payment to the creditor secured by a mortgage on the property sold had been made by the sheriff acting as agent of the vendor.\textsuperscript{146}

If a mortgage to which a buyer is subrogated is cancelled by error, it may be reinscribed through proceedings held contradictorily between the buyer and the recorder of mortgages.\textsuperscript{147}

The legal subrogation here discussed does not operate in favor of the acquirer of property by gratuitous act, such as a donee.\textsuperscript{148}

\textbf{Obligor Bound with Others or for Others}

Subrogation takes place by operation of law in favor of an obligor who pays a debt with others or for others and who has recourse against those others as a result of the payment.\textsuperscript{149} That rule contemplates an instance of legal subrogation that occurs in a wide variety of situations, unlike the rules governing the other instances heretofore discussed, which are considerably more limited.

A distinction is made between obligors bound \textit{with} others and obligors bound \textit{for} others. The former are principal obligors, as in the case of persons solidarily bound, while the latter are subsidiary obligors, at least insofar as the relationship among them is concerned, as in the case of sureties.\textsuperscript{150} The distinction is sufficiently important as to merit the separate treatment of each category. Here, it suffices to say that an obligee bound \textit{with} others is entitled to recover from those others the amount he paid to the obligee, but with deduction of his own portion of the debt. An obligor bound \textit{for} others, however, is entitled to recover from those others as much as he paid to the obligee, which in certain instances includes interest and attorney's fees.\textsuperscript{151}

Nevertheless, for legal subrogation to operate the obligor must have a recourse against the other obligors \textit{with} whom or \textit{for} whom he is bound. That requirement of the Louisiana Civil Code is clearer than

\textsuperscript{145} Barilleaux v. Toft, 5 La. App. 756 (1st Cir. 1927).
\textsuperscript{146} Id.
\textsuperscript{148} Cf. 1 C. Aubry et C. Rau, supra note 12, at 201.
\textsuperscript{149} La. Civ. Code art. 1829(3).
\textsuperscript{150} See 7 M. Planiol et G. Ripert, supra note 3, at 633.
\textsuperscript{151} See La. Civ. Code arts. 1804, 3048, 3052.
the one found in traditional law, according to which an obligor benefits from legal subrogation if he pays a debt he had an interest in discharging. Perhaps that is so because he would sustain a loss if the debt is not paid, since it can be said that only a volunteer or an intermeddler would pay a debt he has no interest in discharging.\textsuperscript{152}

In sum, the legal subrogation here discussed benefits one who is already an obligor, though not the only one, at the time he renders performance to the obligee and who is bound in such a way that the law gives him recourse against other obligors once he has rendered that performance.

**Obligor Bound with Others**

Clearly, an obligor is bound with others when the obligation is solidary.\textsuperscript{153} An obligee is also bound with others when the obligation is indivisible.\textsuperscript{154} Furthermore, each of multiple sureties for the same debt is bound with others, at least in his relation to the other sureties, since if he pays the whole debt he renders not only his share of the performance owed to the obligee, but also the shares of the others.\textsuperscript{155}

According to the Louisiana jurisprudence, a co-owner of immovable property who pays the whole cost of pavements required by a city is subrogated by operation of law to the rights of the creditor who did the pavement job against the other co-owners.\textsuperscript{156} Likewise, legal subrogation to the rights of the creditor operates in favor of a co-obligor of taxes who has paid the whole debt, for shares of the debt that would have been due from the other co-obligors.\textsuperscript{157} It also benefits a mandatary who pays a promissory note on which he bound himself together with his principal.\textsuperscript{158} Likewise, a divorced wife solidarily bound with her former husband is legally subrogated to the right against her former husband of the mortgagee to whom she paid a debt.\textsuperscript{159} By the same token, the endorser of a promissory note who pays a judgment rendered

\textsuperscript{152} See C. civ. art. 1251; La. Civ. Code art. 2161(3) (1870). See also Hutchinson v. Rice, 105 La. 474, 29 So. 898 (1901); Maryland Casualty Co. v. Marquette Casualty Co., 143 So. 2d 249 (La. App. 4th Cir. 1962). See also American Law Institute, Restatement of the Law of Restitution § 162, at 653 (1937); McClintock, Handbook of the Principles of Equity 332 (2d ed. 1948) and Note, Subrogation and the Volunteer Rule, 24 Va. L. Rev. 771 (1938) for a discussion of the problems at common law the approach of which seems to permeate some early Louisiana decisions.


\textsuperscript{156} Succession of Whitehead, 3 La. Ann. 396 (1848).

\textsuperscript{157} Carpenter v. Cox, 186 So. 863 (La. App. 2d Cir. 1938).

\textsuperscript{158} Hart v. Polizzotto, 168 La. 356, 122 So. 64 (1929).

\textsuperscript{159} Hilgenfeld v. Hilgenfeld, 180 So. 2d 236 (La. App. 2d Cir. 1965).
against himself and the maker subrogates himself to the rights of the judgment-creditor against the maker.\textsuperscript{160}

The legal subrogation here discussed takes place regardless of whether the obligation is contractual or delictual in origin and regardless of whether the obligation derives from the same or different sources for each of the obligors bound with others or for others.\textsuperscript{161} Thus, once it is adjudged that two persons who through their fault have caused damage to another are solidarily liable to the victim, the one who pays the whole benefits from legal subrogation for the contribution he is entitled to recover from the other.\textsuperscript{162}

A question arose whether an insurer who indemnifies the victim of a quasi-delict enjoys legal subrogation to the rights of the victim against the wrongdoer. As a matter of practice, many insurance policies provide for the conventional subrogation of the insurer to the rights of the insured upon payment of indemnification for a risk. Even when a policy does not contain such a provision, an insurance carrier will obtain such a conventional subrogation at the time of making payment and securing the customary release in most instances. The question then, is whether an insurer is subrogated by operation of law to the rights of the insured or victim in the absence of any conventional subrogation. For a long time the Louisiana jurisprudence gave a negative answer.\textsuperscript{163} More recently, however, Louisiana courts have answered the question affirmatively, at least where property insurance is concerned.\textsuperscript{164} Thus, in a case involving an insurance carrier that had paid the insured for damage caused by fire, the court clearly asserted that the insurer was subrogated by operation of law to the rights of the owner for the damaged property, even though conventional subrogation had been outrightly denied to the insurer by the owner at the time the payment for the loss was made.\textsuperscript{165} The affirmative answer is no doubt the correct one, as both insurer and wrongdoer are bound one with the other towards the victim, the obligee, to whom a duty of reparation is owed for his loss, thereby meeting the requirement that governs the instance of legal subrogation here discussed, even though the insurer is bound by a contract while the wrongdoer is bound by law. The same conclusion should prevail where an insurer of civil liability for personal injury is involved, as the same requirement

\textsuperscript{160} Succession of Dorsey, 7 La. Ann. 34 (1852).
\textsuperscript{161} See La. Civ. Code art. 1797.
\textsuperscript{162} See Spanja v. Thibodaux Boiler Works, 33 So. 2d 146 (La. App. Orl. 1948).
\textsuperscript{165} Sentry Indem. Co. v. Rester, 430 So. 2d 1159 (La. App. 1st Cir. 1983).
is met concerning the legal bond that binds insurer and wrongdoer to the victim. The legal subrogation here discussed clearly does not benefit joint or several obligors.

**Obligor Bound for Others**

The clearest example of an obligor bound for others is a surety, who by definition is one who binds himself to perform the obligation of another in case the latter fails to perform. The Louisiana Civil Code clearly provides that the surety who pays the principal obligation is subrogated by operation of law to the rights of the creditor. Thus, when a person pays the rent owed by a lessee because of an agreement to do so, legal subrogation to the right and privilege of the lessor takes place in favor of the person who paid. When there are multiple sureties for the same obligation of the same obligor, the one who pays the creditor benefits from legal subrogation to the latter's right in order to recover from the others the share of the principal obligation that each is to bear. If he so wishes, however, the surety may proceed directly against the principal obligor.

Sureties are not the only example of obligors for others. A person who grants a mortgage on his property to secure the debt of another also is such an obligor, so that if he pays the secured debt he benefits from legal subrogation to the right of the creditor against the principal obligor. If the mortgage is a first one and other mortgages were later granted on the same property, the mortgagor who pays the first mortgagee thereby subrogates himself to the right of the first, which would prevent the other mortgages from advancing in rank, thereby protecting his interest on his own property.

He who binds himself to pay the stipulated damages for which another obligor may be held liable or who secures with his own property payment of such damages by a principal obligor is also bound for another. Likewise, when the liability of an excess insurer is triggered

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by the bad faith failure to perform of the primary insurer, the latter
is considered the principal obligor and the former may be subrogated
to the right of the insured for the full amount of the excess paid.\textsuperscript{174}

\textit{Heir Who Pays Debts of the Succession}

Subrogation takes place by operation of law in favor of an heir
with benefit of inventory who pays debts of the estate with his own
funds.\textsuperscript{175}

The benefit of inventory is the privilege which the heir obtains of
being liable for the charges and debts of the succession only to the
extent of the value of the effects of the succession, by causing an
inventory of those effects to be made in the manner prescribed by law.\textsuperscript{176}
All successors by universal title, which excludes particular legatees, also
may avail themselves of that privilege.\textsuperscript{177}

For this kind of legal subrogation to take place, the debt paid
by the successor must be one of the estate, but it is often immaterial
whether or not the debt was incurred by the deceased. Thus, legal
subrogation benefits a successor who pays legal and funeral expenses
chargeable to the estate.\textsuperscript{178} The successor who pays such a debt, however,
must do so with his own funds in order to subrogate himself to the
right of the creditor.

Some Louisiana decisions have liberally interpreted the rule and
allowed legal subrogation to take place in favor of persons connected
to a succession, such as close relatives or administrators who are not
themselves successors, on the grounds that such persons should be en-
couraged not to delay payment of debts of the estate by the assurance
that they will enjoy a privilege for the amounts they expend.\textsuperscript{179} As
persuasive as the rationale may be, the fact is that such a liberal
interpretation exceeds the scope of the rule.

Once subrogated to the rights of the creditor, the successor who
paid the debt of the estate enjoys the security and privilege of the
creditor for the contribution the successor may recover from other
successors in proportion to the share each has in the succession.\textsuperscript{180}

It is noteworthy that special statute provides that every successor is
presumed and deemed to have accepted a succession under benefit of

\textsuperscript{175} La. Civ. Code art. 1829(4).
\textsuperscript{176} La. Civ. Code art. 1032.
\textsuperscript{177} See La. Civ. Code arts. 876, 1424, 1430.
\textsuperscript{178} See Legendre v. Rodrigue, 358 So. 2d 665 (La. App. 1st Cir. 1978), writ denied,
359 So. 2d 1293 (La. 1978).
\textsuperscript{179} See Succession of Holstun, 141 So. 793 (La. App. 2d Cir. 1932).
\textsuperscript{180} La. Civ. Code art. 1427.
inventory even though the acceptance is unconditional, where an inventory or descriptive list has been executed, in which case every heir or legatee, whether particular or under a universal title, is not in any manner personally liable for any debt or obligation of the decedent or his estate, except to the amount of his inheritance, although any such heir or legatee may obligate himself personally for such debts if he so wishes.  

Other Cases Provided by Law

Subrogation by operation of law takes place in other cases provided in legislation other than the civil code.  

For example, a state-supported charity hospital is legally subrogated to the rights of a patient against an alleged tortfeasor to the extent of reasonable charges for services rendered to the patient. It has been decided that such subrogation of the charity hospital against the wrongdoer does not imply that the injured patient himself is unable to seek recovery from the one who caused his injuries.  

An employer who pays the claim of an injured employee is subrogated to the right of that employee against whoever is liable for reparation for the injuries that gave rise to the employee's claim. The amount recoverable is limited to any amount the employer paid or became liable to pay as compensation to the injured employee or his dependents, which excludes any excess of the amount for which the employer is legally liable. An employer who pays medical expenses for the employee in excess of that which the law prescribes may obtain conventional subrogation from the employee, however, thereby securing the right to seek recovery of the full amount from the third person ultimately liable.  

An employer's insurer who pays the claim of its insured's employee is subrogated to all rights and actions that the insured employer has against a third person. Though that solution is provided by special statute, it clearly would prevail even in the absence of a statute since insurer and employer are bound the one with the other, which, as discussed above, gives rise to subrogation by operation of law in favor of the insurer who pays the employee.

186. See Chase v. Dunbar, 185 So. 2d 563 (La. 1st Cir. 1966).
188. See 1172 supra.
Any person, other than the one in whose name property has been assessed, who pays taxes on that property is subrogated to all rights and privileges of the taxing authority.\textsuperscript{189} That instance of legal subrogation has peculiar aspects of its own, as the tax collector must issue to the paying person a certificate of subrogation and in certain circumstances the consent of the original tax debtor is required.\textsuperscript{190}

The above are only some examples of subrogation that takes place by operation of special law.

\textbf{Effects}

The Louisiana Civil Code clearly provides that when subrogation takes place by operation of law, the new obligee may recover from the obligor only to the extent of the performance rendered to the obligee.\textsuperscript{191} The same solution prevails in French law where it has been asserted by doctrine and jurisprudence, since it is not expressed in the Code Napoleon.\textsuperscript{192}

Thus, although subrogation effects a transfer of the active side of the obligation from an original obligee to a new one, the natural effects of subrogation are subject to a twofold limitation when the subrogation is legal.

In the first place, the subrogee's recovery is limited to the amount of the performance he actually rendered. That result is quite clear when the subrogee has made only partial payment, since the original obligee preserves his right to the balance and the obligor's burden may not be increased by the subrogation of another person to the right of the obligee.\textsuperscript{193} The subrogee's recovery is likewise limited even when he completely extinguishes the obligation for the obligee through the payment of an amount less than the one actually owed, as when he obtains a remission of the balance from the obligee or makes with him a transaction or compromise. That is so, because when subrogation takes place by operation of law, the parties' consent is less relevant, if at all, and the new obligee should not be placed in a better position than the original one for whom the obligation has been extinguished. In an early Louisiana decision, that limitation was regarded as similar to the restriction imposed upon the right to recover of a \textit{negotiorum gestor} and is also rooted in principles of equity.\textsuperscript{194} That kind of theoretical spec-

\textsuperscript{190} Id. See also Atkins v. Simpson, 28 So. 2d 769 (La. App. 1st Cir. 1947).
\textsuperscript{191} La. Civ. Code art. 1830.
\textsuperscript{192} See 7 M. Planiol et G. Ripert, supra note 3, at 646.
\textsuperscript{193} See La. Civ. Code art. 1826. See also 1148 supra.
ulation, perhaps unavoidably prompted by the inherently ambiguous nature of subrogation, can now be spared in light of the clear provision of the Louisiana Civil Code.

In a manner consistent with the general rule, a special one belonging to the law of suretyship provides that a surety may not recover from the principal obligor more than he paid to secure a discharge. The same solution prevails when one solidary obligor who pays the obligee less than the amount owed to him obtains a full release of all solidary obligors.

Because of that limitation, it is relevant that the effect of legal subrogation differs importantly from the effect of conventional subrogation by the obligee, which, as shown earlier, amounts to an assignment of the obligee's right that entitles the subrogee to recover the full extent of the obligation from the obligor regardless of what the subrogee paid to the obligee. That traditional solution is founded on the reasonable policy of avoiding multiplicity of suits.

Similarly, when subrogation takes place by operation of law in favor of one bound with others, as is the case with solidary obligors, the one who pays the obligee does not receive from the latter the right to demand the whole from any of the other solidary obligors, but must divide the obligation among them and may seek to recover only the share of each. That traditional solution is founded on the reasonable policy of avoiding multiplicity of suits.

The Louisiana Civil Code further provides that the new obligee under a legal subrogation may not recover more by invoking conventional subrogation. Thus, a person who subrogates himself to the right of another by operation of law may not claim a greater advantage by availing himself of conventional subrogation. If that were not so, the limitation the law imposes upon the recovery of one legally subrogated to the right of another could be easily circumvented to the detriment of fairness. For example, a solidary obligor or surety who pays the obligee less than the full amount of the obligation and together with a full release obtains an assignment of the obligee's right, may not attempt to recover more than he actually paid the obligee from another solidary principal obligor by invoking the assignment. That is so because parties are not free to do what the law does not want them to do.

197. See La. Civ. Code art. 1827. See also 1157 supra.
199. See 7 M. Planiol et G. Ripert, supra note 3, at 647.
201. See La. Civ. Code art. 1830 comment (c).
A question may arise when an obligee receives successive partial payments from different persons, all of whom are entitled to legal subrogation. When that is the case the one who makes the second payment, for example, could be regarded as subrogated to the obligee's right to be paid with preference to the one who made the first partial payment. The obligee's right of preference over a partial subrogee, however, is regarded as personal and therefore not transferable by subrogation to another partial subrogee. As a consequence all partial subrogees share the same rank as creditors of the obligor.\textsuperscript{203}

Legal subrogation does not prevent the subrogee from availing himself of his own action against the obligor rather than the obligee's, such as the action belonging to the manager of the affairs of another, which in certain circumstances may be to his advantage.\textsuperscript{204}

**THE REVISION**

*Place in the Civil Code*

In the revision of the Louisiana law of obligations enacted in 1984, the regulation of subrogation is contained in a section of a chapter devoted to the transfer of obligations rather than in a section on the regulation of payment, as it was in earlier Louisiana law, which followed a traditional approach.\textsuperscript{205} Indeed, in traditional law subrogation is regarded as an incident of the payment or performance of an obligation by a person other than the obligor, or by one of multiple obligors bound each with the others or for the others, which gave rise to the traditional expression, "payment with subrogation." The fact is, however, that subrogation is a way of effecting a transfer of obligations, which is the approach followed in modern law and doctrine.\textsuperscript{206} When subrogation is regarded as an incident of payment, the emphasis is placed on the extinction of the obligation with respect to the original obligee, which makes the survival of the obligation difficult to explain, in spite of a change of obligee, unless refuge is sought in the readily acceptable, but actually unsatisfactory, explanation of a legal fiction.\textsuperscript{207} On the other hand, when subrogation is regarded as a manner of effecting the transfer of a legal relation, it is the survival of the obligation that

\textsuperscript{203} See 7 M. Planiol et G. Ripert, supra note 3, at 649-50.

\textsuperscript{204} See La. Civ. Code arts. 2295, 2299. See also 7 M. Planiol et G. Ripert, supra note 3, at 651-52.


\textsuperscript{207} See La. Civ. Code art. 1826 comment (a).
is emphasized, and its extinction for the original obligee appears as a natural consequence of a substitution of persons at the active end of the obligation. Finally, it is simply not true that subrogation takes place only on occasion of the payment or performance of an obligation, as it is quite clear that it also results from a contract of sale where the buyer subrogates himself to the seller's rights and actions in warranty against other persons.208

That change of place within the framework of the systematic arrangement of the articles on obligations in the civil code should contribute to a better understanding of the true nature of subrogation.

Definition and Statement of General Effect

A new article defines subrogation as the substitution of one person to the rights of another.209 A different new article provides a statement of the general effect of subrogation by explaining that when subrogation results from a person's performance of the obligation of another, that obligation subsists in favor of the person who performed it, who may avail himself of the action and security of the original obligee against the obligor, but it is extinguished for the original obligee.210

Without introducing any change in the law, the definition and statement of general effect merely give express legislative formulation to theoretical foundations of subrogation that are traditional in the civil law.211 That express formulation should help dispel misconception regarding the nature and practical consequences of subrogation.212

Beyond Privileges and Mortgages

An earlier article of the Louisiana Civil Code stated that a third person rendering performance to an obligee subrogated himself to the latter's rights, actions, privileges and mortgages.213 The new article states that the third person may avail himself of the action and "security" of the original obligee.214 That is not a change in the law, but merely a change in formulation made for the purpose of eliminating the risk of mistaking the listing in the earlier article for an exclusive one. Indeed,

211. See 1 C. Aubry et C. Rau, supra note 12, at 187-88. See also La. Civ. Code art. 1826 comment (a).
A subrogee may avail himself of security devices of the original obligee other than privileges and mortgages.215

**Subrogation by the Obligee, Change in the Law**

One new article introduces a significant change in the law by providing that conventional subrogation by the obligee is subject to the rules governing the assignment of rights.216 Under that article, the conventional subrogee is substituted to all the rights of the original obligee and is entitled to recover the full amount of the debt from the obligor, regardless of the amount actually paid by the subrogee to the original obligee.217 Thus, prior jurisprudential conclusions that limited the subrogee's recovery to the amount he actually paid in the case of conventional subrogation by the obligee have been overruled.218 That change eliminates the task, almost impossible in certain factual situations, of ascertaining whether the transferring of a sum of money between persons is an act of payment by one of a debt a third owes to the other or an act of purchase by one of a right the other has against a third person, a task whose difficulty has been clearly shown in some Louisiana decisions.219 In so doing the change better meets the important need of facilitating the unimpeded flow of business transactions.

An earlier article of the Louisiana Civil Code required that conventional subrogation by the obligee be expressed and be made at the same time as the payment.220 The new article just discussed eliminates those requirements, effecting another change in the law.221 The agreement for subrogation may now be made before the subrogee renders performance and need not be in writing.222 Prior jurisprudential conclusions to the contrary have been overruled.223

**Subrogation by the Obligor, Change in the Law**

An earlier article of the Louisiana Civil Code provided that conventional subrogation by an obligor in favor of a third person from whom he borrowed the money to pay a debt had to be made by authentic

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215. See 1159 supra.
217. See 1159 supra. Also La. Civ. Code art. 1827 comment (d).
222. See 1155 supra.
act reciting the loan and its purpose. It further required that the obligee of that debt extend a receipt, also by authentic act, reciting that the payment he received was made with money borrowed from a lender who became the new creditor.\textsuperscript{224} The new article eliminates the requirement of an authentic act and also the need for a receipt extended in the same form by the original obligee.\textsuperscript{225} All that is now required is a writing that may be executed under private signature.\textsuperscript{226} That change has no other purpose than making the regulation of conventional subrogation by the obligor more consistent with contemporary business practices.\textsuperscript{227}

The same article contemplates that the means borrowed by an obligor in order to perform his obligation may be fungible things other than money.\textsuperscript{228} That minor change also accounts for contemporary business practices and expands the scope of conventional subrogation by the obligor in a manner consistent with general principle.\textsuperscript{229}

\textit{Legal Subrogation, Change in the Law}

An earlier article of the Louisiana Civil Code provided that, among other situations, subrogation by operation of law takes place for the benefit of the purchaser of any immovable property who employs the price in paying creditors to whom the property was mortgaged.\textsuperscript{230} The new article extends that benefit to buyers of movable property since there is no longer a reason to distinguish between movables and immovables as objects on which a real right of security can be granted.\textsuperscript{231} The same new article also extends that benefit to buyers who use the purchase price to pay creditors who hold any privilege, pledge or security interest on the property, as well as to buyers who pay a mortgage.\textsuperscript{232} That change is a natural consequence of the inclusion of movables within the scope of that rule.

\textit{Effects of Legal Subrogation, No Change in the Law}

A new article provides that when subrogation takes place by operation of law the new obligee may recover from the obligor only to the extent of the performance rendered to the original obligee.\textsuperscript{233} That

\begin{itemize}
\item \textsuperscript{224} La. Civ. Code art. 2160(2) (1870).
\item \textsuperscript{225} La. Civ. Code art. 1828.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} See La. Civ. Code art. 1828 comment (a).
\item \textsuperscript{228} La. Civ. Code art. 1828.
\item \textsuperscript{229} See La. Civ. Code art. 1828 comment (b).
\item \textsuperscript{230} La. Civ. Code art. 2161(2) (1870).
\item \textsuperscript{231} La. Civ. Code art 1829(2) and comment (b) thereto.
\item \textsuperscript{232} Id.
\item \textsuperscript{233} La. Civ. Code art. 1830.
\end{itemize}
is an express legislative formulation of a rule that has always been recognized by doctrine and jurisprudence. No change is effected by that formulation. It is clear, however, that the new article limits recovery by the subrogee in that way only when subrogation takes place by operation of law, since another article does not so limit recovery by the subrogee from the obligor in the case of conventional subrogation by the obligee.

The same new article provides that the new obligee may not recover more by invoking conventional subrogation. No change in the law is effected, since that conclusion can be readily derived from general principle, as recognized by the jurisprudence.

**Partial Subrogation, No Change in the Law**

No change has been effected concerning the effect of a partial subrogation. A new article clearly states that an original obligee who has been paid only in part may exercise his right for the balance of the debt in preference to the new obligee. The earlier article also stated that subrogation was effective not only against debtors, but also against sureties. Without attempting any change, that sentence of the earlier article has been suppressed, since it merely restates one of the general effects of subrogation.

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237. See 1176 supra.
238. La. Civ. Code art. 1826 and comment (e) thereto.