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was allowed recovery on the theory of trespass. Furthermore, the *Dunlop* Case is not the only New York decision on *res ipsa loquitur*. New York courts have applied the doctrine in three cases and refused to apply it in two other cases, not because the doctrine is inapplicable to unexplained airplane accidents, but because the requirements for a proper case were not present. The pattern formed by the New York cases can be traced exactly by looking at all the decisions of the other courts on this matter.

Recently North Carolina, in the face of many decisions *contra,* applied the doctrine of *res ipsa loquitur* in the case of an unexplained automobile accident.[40] The same statements that have been made refuting the applicability of *res ipsa loquitur* to unexplained airplane accidents have been made time and again in the past about unexplained automobile accidents; yet the doctrine, as applied to automobile accidents, has gained widespread use. Both automobiles and airplanes have gone through the stage of being called dangerous instrumentalities; yet the automobile in a rapid stage of development has become the most prevalent mode of transportation, and the airplane is following a similar development.

The aviation industry has opposed the application of the doctrine of *res ipsa loquitur* to unexplained airplane accidents because it widens the scope of liability. However, assuredly it cannot be said that aviation is not now capable of taking care of its own liabilities. As a recent author has said, "No one has yet contended that this lusty, new infant of commerce cannot be self-supporting."[41]

To courts which argue that "the time has not yet arrived" for the application of *res ipsa loquitur* to unexplained airplane accidents, it can be replied that the incredible developments in aviation of the past years, partly brought about by the war, have more clearly established the desirability for the treatment of the unexplained airplane accident cases under the rules of negligence and the accompanying doctrine of *res ipsa loquitur.*

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Joint-Tortfeasors—Effect of Payment by Party Not Liable—Subrogation

A pedestrian was injured by falling over a stake protruding about three-eights of an inch from a concrete sidewalk. In a suit against the City of Charlotte the pedestrain obtained a judgment which the City paid. In the present action the City seeks to recover from the abut-

[40] Etheridge v. Etheridge, 222 N. C. 616, 24 S. E. (2d) 477 (1943), 21 N. C. L. REV. 402.

[41] GEORGE B. LOGAN, AIRCRAFT LAW—MADE PLAIN (1928), p. 52.

ting property owners the amount of the judgment or a proportionate contribution thereto under the joint-tortfeasor statute, on the basis that the protruding stake was on the property of the abutting owners who had constructed a paved walk in front of their buildings similar to and connecting with the City's sidewalk. Defendants demurred to the complaint as not constituting a cause of action. On appeal, the Supreme Court held that the demurrer should have been sustained, on the ground that the complaint failed to disclose any negligence on the part of the City, and therefore the City was not a joint tortfeasor under the Statute.[1]

It may be assumed that the City's libality in the previous suit was not on the theory that the defendant's land had been dedicated to public use[2] or that the stake was so close to the public sidewalk as to constitute a public hazard,[3] but rather on a mistake of fact, to wit, that the protruding stake was on the City's sidewalk. Thus the present decision is that the City cannot recover as a joint tortfeasor for the reason that the City was not at fault in any respect since the obstruction was not on its property, whereas the judgment in the previous case necessarily implies the negligent maintenance of a public sidewalk. At least two important questions are presented: (1) Can the injured pedestrian now sue and recover against the abutting property owners for the same accident? (2) Is the City subrogated to the rights of the injured pedestrian?

(1) The authorities are in direct conflict on the question of whether payment to an injured party, by one not liable, operates to bar a subsequent recovery from the party legally liable. The question most frequently presents itself where the injured party seeks to recover after having accepted, in return for a release or a covenant not to sue, compensation from a third party who thought himself liable. There are numerous decisions which hold that regardless of the source of satisfaction the injured party is barred from further recovery, once he has accepted satisfaction for the injury, because the settlement he has made is "so far affected in equity and good conscience that the law will not permit another recovery for the same damages."[4] The principle under-

[1] Charlotte v. Cole, 223 N. C. 106, 25 S. E. (2d) 407 (1943). The statute involved was N. C. CODE ANN. (Michie, 1939) §618.

[2] Whitacre v. Charlotte, 216 N. C. 687, 6 S. E. (2d) 558 (1939); Hemphill v. Forest City, 212 N. C. 185, 193 S. E. 153 (1937); Gault v. Lake Waccamaw, 200 N. C. 593, 158 S. E. 104 (1931); Durham v. White, 190 N. C. 568, 130 S. E. 161 (1925); Tise v. Whitaker-Harvey Co., 146 N. C. 374, 59 S. E. 1012 (1907).

[3] Wall v. Asheville, 219 N. C. 163, 13 S. E. (2d) 260 (1941); Goldstein v. R. R., 188 N. C. 636, 125 S. E. 177 (1924); Myers v. Asheville, 165 N. C. 703, 81 S. E. 1060 (1914); Austin v. Charlotte, 146 N. C. 336, 59 S. E. 701 (1907); Brown v. Durham, 141 N. C. 249, 53 S. E. 513 (1906); Bunch v. Edenton, 90 N. C. 431 (1884).

[4] Lovejoy v. Murray, 3 Wall. 1 (1866).

lying the rule that an injured party is entitled to but one satisfaction is that he is given a legal remedy to obtain compensation only to the extent of the damage done to him, and when that compensation has been received he has no right to further relief.[5]* Where the release or covenant not to sue has been given in consideration of payment intended by both parties to be full satisfaction for the injuries, such release or covenant is held to bar another recovery because of the previous satisfaction.[6] If the compensation received, in return for a release or covenant not to sue, is found to be only partial satisfaction then it is treated as payment pro tanto.[7]* Some courts have refused to permit a suit by the injured party against the party legally liable where he accepted compensation from a third party, on the ground that he is estopped to deny that the party from whom he accepted such compensation was not, in fact, liable.[8]* However, in some jurisdictions, there must have been an appearance of liability and a claim made against the third party before compensation paid by him to the injured party will be held to extinguish the claim.[9]

On the other hand, an almost equal number of courts have held that

[5]* Hawber v. Raley, 92 Cal. App. 701, 268 Pac. 943 (1928); Iowa State Bank v. Frankle, 197 Iowa 1177, 197 N. W. 298 (1924); Middaugh v. Des Moines Ice & Cold Storage Co., 184 Iowa 969, 169 N. W. 395, 18 N. C. C. A. 947 (1918); Snyder v. Mutual Telephone Co., 135 Iowa 215, 112 N. W. 776 (1907); Miller v. Beck, 108 Iowa 575, 582, 79 N. W. 344, 346 (1899) where the court said: "It is entirely immaterial that the one from whom satisfaction was demanded and received was not liable for the entire damage. . . . A satisfaction by whomsoever made, if accepted as such, is a bar to further proceedings on the same cause of action"; Louisville Gas & Elec. Co. v. Beaucond, 188 Ky. 725, 224 S. W. 179 (1920); Lindsay v. Acme Cement Plaster Co., 220 Mich. 367, 190 N. W. 275 (1922); Colby v. Walker, 86 N. H. 568, 171 Atl. 774 (1934).

[6] Latham v. Des Moines Electric Co., 229 Iowa 1199, 6 N. W. (2d) 853 (1942); Hartigan v. Dickson, 81 Minn. 284, 83 N. W. 1091 (1900).

[7]* Young v. Anderson, 33 Idaho 522, 196 Pac. 193 (1921); Jacobsen v. Woerner, 149 Kan. 598, 603, 89 P. (2d) 24, 28 (1939) where the court said: "If part satisfaction has already been obtained, further recovery can only be had of a sum sufficient to accomplish satisfaction. It is not necessary that the party making payment was in fact liable. Anything received on account of the injury inures to the benefit of all and operates as a payment *pro tanto*. The plaintiff is entitled to only one satisfaction from whatever source it may come."

[8]* Leff v. Knewhow, 47 Cal. App. (2d) 360, 117 P. (2d) 922, 925 (1941): "It is immaterial whether or not the releasee was a guilty party, or even claimed to be, and since a person injured is entitled to but one satisfaction, the releasor is held to be estopped to deny the liability of the party expressly relieved, from whom satisfaction was received." Hawber v. Raley, 92 Cal. 701, 268 Pac. 943 (1928); Sands v. Wilson, 140 Fla. 18, 191 So. 21 (1940); Greiner v. Hicks, 231 Iowa 141, 300 N. W. 727 (1941); Barden v. Hurd, 217 Iowa 798, 253 N. W. 127 (1934); Paris v. Crittendon, 142 Kan. 296, 46 P. (2d) 633 (1935); Abbott v. City of Senath, 243 S. W. 641 (Mo., 1922); Hubbard v. Railroad Co., 173 Mo. 249, 72 S. W. 1073 (1903); Galvin v. Malheske, 266 N. Y. Supp. 373, 191 N. E. 486 (1933); Hunt v. Ziegler, 271 S. W. 936 (Ct. of Civil App., Tex., 1925), *aff'd*, 280 S. W. 546 (Ct. of Civil App., Tex., 1926) (Plaintiff's contention that corporation from which they had received money in satisfaction of judgment against it was not liable, held inconsistent with good conscience.).

[9] Kirkland v. Ensign-Brickford Co., 267 Fed. 472 (D. C. Conn. 1920); Cleveland Ry. Co. v. Hilligoss, 171 Ind. 417, 86 N. E. 485 (1908).

a release to, or settlement by, one not in fact liable does not destroy the right to recover against the party legally liable.[10] These decisions are based on two grounds. First, that payment is not satisfaction unless it is made by the party legally liable, and thus does not fall within the rule against double satisfaction, and second, that such settlement cannot operate by way of estoppel since the one legally liable was not a party or privy to the arrangement and thus has no joint interest with the one discharged.[11] All the cases supporting this result involve previous releases and settlements, and none involve previous judgments. But the significant fact is that a recovery against the party legally liable is permitted although compensation had been received from another.

The previous decisions of our court indicate that North Carolina is in line with the courts holding that there can be only one satisfaction for the same injury regardless of who makes the payment.[12] In *Holland v. Utilities Co.*, plaintiff sued for injuries received in a collision between defendants street car and an express truck. Defendant denied that it was negligent and in addition set out a prior covenant not to sue given by the plaintiff to the Express Company in consideration of $500. On the issues submitted the jury found that the defendant was guilty of negligence but that the Express Company was not. The court in granting a new trial held that if the jury found that the plaintiff had been fully compensated for the injury by the money paid by the Express Company he was not entitled to recover against the defendant.[13] As the compensation had taken the form of a covenant not to sue with all rights of action retained against other parties, the court said that it was a matter for the jury to determine whether plaintiff had been fully compensated. Had the compensation been received under a release of the plaintiff's right of action and such not grossly inadequate, it may be reasonably inferred that the court would have held the plaintiff compensated as a matter of law. If the plaintiff had received compensation through satisfaction of a judgment rendered upon a jury verdict it would have been binding upon him as full and complete satisfaction. As the compensation in the present case was received in such a manner, it

[10] Harlee v. Gulfport, 120 F. (2d) 41 (C. C. A. 5th, 1941); Herberger v. Anderson Motor Service Co., 268 Ill. App. 403 (1933); Lang v. Siddall, 218 Iowa 263, 254 N. W. 783 (1934); Caroll v. Kerrigen, 173 Md. 627, 197 Atl. 127 (1938); Lavelle v. Anderson, 197 Minn. 160, 266 N. W. 444 (1936); Brandstein v. Ironbound Transp. Co., 112 N. J. L. 585, 172 Atl. 580 (1934); Stowell v. Texas Employers' Ins. Ass'n., 259 S. W. 309 (Ct. of Civil App., Tex., 1924).

[11] The Ross Coddington, 6 F. (2d) 191 (C. C. A. 2nd, 1925); General Accident, Fire & Life Assur. Co. v. Tibbs, 102 Ind. App. 262, 2 N. E. (2d) 229 (1936); Renner v. Model Laundry, 191 Iowa 1288, 184 N. W. 611 (1921); Jacowitz v. Delaware L. & W. R. Co., 87 N. J. L. 273, 92 Atl. 946 (1915); Turner v. Robbins, 276 Pa. 319, 120 Atl. 274 (1923).

[12] Sircey v. Rees' Sons, 155 N. C. 296, 71 S. E. 310 (1911); Howard v. Plumbing Co., 154 N. C. 224, 70 S. E. 285 (1911).

[13] 208 N. C. 289, 180 S. E. 592 (1935).

would seem that the injured party would not be allowed to recover again.

There remains the possibility of the city being subrogated in equity to the rights of the injured party. Equitable subrogation is distinguished from conventional subrogation which must be brought upon a contract or agreement between the parties.[14] It is distinguished from contribution in that the latter is a legal remedy and the equitable remedy is much broader and includes the former.[15]

Stated generally, the doctrine of equitable subrogation may be invoked if the obligation of another is paid by the plaintiff for the purpose of protecting some real or supposed right or interest of his own.[16*] Since subrogation is an equitable doctrine, it cannot be invoked by a volunteer or intermeddler, or in a case in which the equities of another party are equal to, or greater than, the plaintiff's.[17*] It is a remedy which is highly favored and the courts are inclined to extend this doctrine to meet the circumstances of the cases as they arise.[18]

On the assumption that there cannot be another recovery by the injured party against the party legally liable, the possibility of applying the doctrine in the instant case raises the following questions. Is the city a volunteer or intermeddler? Have the equities of other parties intervened?

Obviously the city paid the debt only because of a judgment against it in favor of the injured party. The city is, therefore, not a volunteer or stranger under no legal or moral obligation to pay. In making the payment it acted to discharge a real or supposed legal obligation. It may be argued that the city should be barred from recovery on the theory that it was negligent in not appealing the case. The city is not under a duty to appeal all cases; and, it would prove rather costly for

[14] Grantham v. Nunn, 187 N. C. 394, 121 S. E. 662 (1924).

[15] Central Banking Co. v. U. S. Fidelity Co., 73 W. Va. 197, 80 S. E. 841 (1904).

[16*] Boney v. Central Mutual Ins. Co. of Chicago, 213 N. C. 565, 197 S. E. 122 (1937); *cf.* Frederick v. Insurance Co., 221 N. C. 409, 20 S. E. (2d) 372 (1942) where the court, in applying the law of South Carolina, added to the requirements another element, to wit, that the party paying the debt must be secondarily liable.

[17*] Wallace v. Benner, 200 N. C. 124, 156 S. E. 795 (1930). The plaintiff was subrogated to the rights of a first mortgagee and the court refused to deny the remedy because of the intervening rights of a junior lien holder since the position of the junior lien holder was not changed by the remedy afforded the plaintiff; Springs v. Harven, 56 N. C. 97 (1856), where an executor, under a mistaken idea concerning his power of sale, sold the land to plaintiff and applied the money to the debts of the deceased. The court refused to let the plaintiff keep the land, but subrogated him to the rights of the creditors of the deceased, saying that it would not allow either the plaintiff or the heirs-at-law to profit from the executor's mistake.

[18] Boney v. Central Mutual Ins. Co., 213 N. C. 565, 197 S. E. 122 (1937); Springs v. Harven, 56 N. C. 97 (1856); Scott v. Dunn, 21 N. C. 425 (1834); Note (1938) 24 VA. L. REV. 771.

the city to take all tort cases to a higher court. Neither have the equities of another party intervened. Thus it seems that the usual requirements for the application of the doctrine of equitable subrogation have been met.

However, equitable relief is barred if the claimant is guilty of neglect of some positive duty to the defendant. But even if the city should have been more careful in ascertaining its true liability such neglect does not seem sufficient to constitute a bar to equitable subrogation.[19*] It has done the defendant no harm.

The courts have frequently held that a party who pays the debt of another because of a mistake concerning his own liability will be subrogated to the rights of the creditor if there is some color of obligation.[20] This is based upon an equitable theory that the court will in good conscience not allow the real debtor to take advantage of the mistake and misfortune of the plaintiff.[21*]

The courts have tended to extend the doctrine to meet the requirments of equity and good conscience. Where a banking superintendent advanced money to pay deposits, he was subrogated to the rights of the bank's creditors.[22] A city official under threat of prosecution paid another's debt to the city. He was given the right of subrogation.[23] Daughter and husband supported the daughter's parents and were subrogated to the rights of the parents to a lien retained upon the land, given to a son, to secure an agreement made by the son to support the parents.[24] A third party paid and released a lien from the land of

[19*] Detroit Building & Loan Ass'n v. Oram, 200 Mich. 485, 167 N. W. 50 (1918). Plaintiff loaned life tenant money to discharge a lien on the land, taking the land as security. It developed that an abstractor had made a mistake concerning the tenant's interest, and that actually he did not have that interest in the land. The court allowed the plaintiff to be subrogated to the lien discharged; Wallace v. Benner, 200 N. C. 124, 156 S. E. 795 (1930). In giving some exceptions to the doctrine of subrogation said that in order to bar this equitable remedy the party claiming the relief must be guilty of culpable negligence; Dixon v. Morgan, 154 Tenn. 389, 285 S. E. 558 (1926). The court said that in order to bar the remedy of subrogation the plaintiff must be guilty of culpable negligence, defining culpabale negligence as failure to perform a duty owed to another, and not to oneself. Under this definition the city, in the instant case, was not guilty of culpable negligence in neglecting to prepare its case properly because it owed a duty to no one else.

[20] Muir v. Berkshire, 52 Ind. 149 (1875); Cobb v. Dyer, 69 Me. 494 (1879); Lee v. Newell, 96 Neb. 209, 147 N. W. 684 (1914); Journal Pub. Co. v. Barber, 165 N. C. 478, 81 S. E. 694 (1914); Walker v. Walker, 138 Tenn. 674, 200 S. W. 825 (1918).

[21*] Journal Pub. Co. v. Barber, 165 N. C. 478, 81 S. E. 894 (1914). For cases discussing mistake of fact as basis for recovery on theory of implied contract or unjust enrichment see: Morgan v. Spruill, 214 N. C. 255, 199 S. E. 17 (1938); Sims v. Vick, 151 N. C. 78, 65 S. E. 621 (1909); Poole v. Allen, 29 N. C. 120 (1846).

[22] Lowe v. Robinson, 161 Miss. 585, 137 So. 499 (1931).

[23] Avery v. American Surety Co., 260 N. Y. Supp. 828 (1930).

[24] Vance v. Atherton, 252 Ky. 591, 67 S. W. (2d) 968 (1934).

another, thinking that he was releasing his own land. He was allowed the right of subrogation.[25]

In the principal case it seems that the rights of other parties would not be altered if subrogation were allowed, since the property owner would be given a trial *de novo* as to his negligence. The injured party in North Carolina cannot maintain a second suit against the defendant. Thus it seems that equity should restore the parties to their proper positions by extending the doctrine of equitable subrogation to this situation.

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[25] Wilder v. Wilder, 75 Vt. 178, 53 Alt. 1072 (1903); Schuetz v. Schuetz, 237 Wis. 1, 296 N. W. 70 (1941).