

position of an assignee *pro tanto*, it must be by operation of law merely, or upon principles of equity established to effectuate the purposes of justice. But if, upon paying this money, Mr. Swann became, upon principles of equity, subrogated to the rights of the Insurance Company for the amount so paid, he must for all purposes, and to every effect, have been placed upon a footing of equality with the Company, and in case the mortgaged premises had not sold for enough to pay the entire mortgage debt, the loss would have fallen in proportion upon the Company and Mr. Swann. The argument is, that upon paying this money, Swann, upon general principles of equity, and independent of the statutory provisions upon the subject, became entitled to an assignment of the security *pro tanto*, and to be substituted to the rights of the Company, to whom the payment was made. Not that he thereby acquired a right to come in next after the Company, but to stand in the shoes of the Company, and with like effect, as if they had executed to him a formal assignment of so much of the mortgage, which would of course have placed them on a footing of perfect equality; and in the case of deficiency in the security, the loss would have been shared by them in proportion to the amount due each.

But can it be contended that such is the effect in equity of this payment by Mr. Swann? For unless it be so, I can conceive of no principle upon which he can maintain the position now assumed for him. There seems to me no middle ground. If by the payment of the money an assignment was effected by operation of law, it was effected then immediately upon the payment, and at once placed the party paying alongside of the party paid, and equally entitled with him to participate in the common security. Such, however, I am very confident was not within the contemplation of the parties, and would not be in accordance with the principles of justice. It never was, or could have been intended by these parties, that by paying this money Mr. Swann should be lifted to a level with the assignee of the mortgage, and if loss occurred, it should fall in proportion upon him as such assignee.