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AN HISTORICAL INTRODUCTION TO THE DOCTRINE OF SUBROGATION:

THE EARLY HISTORY OF THE DOCTRINE II*

M. L. MARASINGHE**

In part one of this article¹ the historical evolution of subrogation until the chancellorship of Lord Hardwicke was examined. His decision in *Randal v. Cockran*² marked its identification with equity. Hardwicke, in his opinion, suggested a possible theoretical basis for the doctrine and a justification for the role of equity in the area of contribution. However, that equity courts were responsible for holding that contribution was applicable in situations devoid of anything akin to a cession of action appears to have been overwhelmingly accepted.

Hardwicke seems to have realized the importance of the steps taken by equity in the area of contribution during his chancellorship. In a letter to Lord Kames,³ Hardwicke noted that new commercial conditions, new methods of dealing with property, and different forms of property made it necessary for equity to play a novel part in the further development of subrogation.⁴ In this role equity had begun to introduce rules into the law for which precedents could be found neither in its own decisions nor in the common law. Commenting on Hardwicke's letter, Holdsworth wrote:

These principles were acted upon by Hardwicke and by his predecessors, with the result that, during the first half of the 18th Century, Equity was more receptive of new ideas, and therefore more progressive, than the Com-

*I wish to acknowledge the most helpful discussions I had with Professor Maurice Millner of University College, London, during the formative stages of this work. Further, I am grateful to my colleague Professor Robert Hane for reading the manuscript and suggesting a number of pertinent alterations.

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1. See 10 VAL. U.L. REV. 45 (1975).

2. 1 Ves. sen. 98, 27 Eng. Rep. 916 (1748).

3. Quoted in full in 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 466-67 (1927).

4. *Id.*

mon Law. It was not until Lord Mansfield, who boasted that he was Hardwicke's pupil, became Chief Justice that the Common Law showed itself able and willing to adapt itself to a changing world by the adoption of some of those rational principles, by means of which Hardwicke and his predecessors had been developing the system of Equity.⁵

IMPLICIT APPLICATION OF *Randal* IN THE COMMON LAW COURTS

In *Randal*, the basis advanced by Lord Hardwicke for the *ipso jure* transference of rights unquestionably used in equity, was readily accepted by the common law courts. In fact, in a decision by Lord Mansfield, the principle as it had been used in equity was succinctly stated: "Every day the insurer is put in the place of the assured. . . . The insurer uses the name of the insured."⁶

Several cases illustrate the common law courts' use of the doctrine of subrogation which had been fashioned in equity. *London Assurance Co. v. Sainsbury*⁷ was decided in a common law court. The insurer paid the assured for a loss arising out of civil riots. Applying a statute which gave the insurer a right of recovery, he sued the municipality ("the hundred") to recover the payment made to the assured. Notwithstanding the prior payment, the assured claimed that he was entitled to any recovery the insurer received from the city.

Denying the assured's claim, three judges wrote separate opinions, all of which relied on *Randal* at least in theory. Justice Ashurst, having raised the question whether the insurer after having paid the assured could recover from the tortfeasors, answered in the affirmative:

Can the owner, after being paid by the insured, recover against the trespasser? Certainly he can. So he may against the hundred [the city]; and when he recovers he is a *trustee* for the insurer.⁸

Another judge also relied on the trust concept when he noted that "an action by the insured, as trustee, would be a bar to an action

5. 12 HOLDSWORTH, HISTORY OF ENGLISH LAW 260 (1938).

6. 3 Doug. 61, 64, 99 Eng. Rep. 538, 540 (1782).

7. 3 Doug. 245, 99 Eng. Rep. 636 (1783).

8. *Id.* at 252, 99 Eng. Rep. at 640 (emphasis added).

by the insurer. So a collusive release might be got over." Thus, it is clear from *London Assurance Co.* that the trust concept enunciated in *Randal* was now equally applicable at common law.

Lord Mansfield's opinion, in which he dissented on a factual question but concurred on the appropriate legal principles, stressed the *ipso jure* transference of rights from the payee to the payor at payment.

The care of a sheriff who has paid the whole debt is very strong, for he stands in the place of the debtor, by *act of Law*; yet he must sue in the name of the plaintiff.⁹

*London Assurance Co. v. Sainsbury*¹⁰ settles three issues for both the common law courts and the courts of equity. In suits for contribution, (1) the trust concept enables the insurer to sue a tortfeasor of the assured once the payment was made pursuant to the policy;¹¹ (2) such an action must be brought in the name of the assured;¹² and (3) the subrogation process occurs by operation of law. *London Assurance Co.* took the principles of subrogation established by equity and forged them into the common law. However, the common law also assumed a major role in fashioning the future progress of the purely equitable doctrine.

In *Lawson v. Wright*,¹³ the plaintiff, who was the executor of a surety who had paid the entire debt, claimed a contribution from a co-surety. The court permitted the plaintiff's claim basing his right in equity. He was said to have "a right to call on another for contribution in cases of this nature . . . [since] the origin of the courts of Equity. . ."¹⁴ A contemporaneous decision in the Court of Exchequer¹⁵ indicates further the purely equitable foundation for the doctrine. The basis of "bottom of contribution" was said to be "a fixed principle of *Justice*, and *is not founded in Contract*."¹⁶ Later, in the same opinion, it was noted that,

9. *Id.* at 253, 99 Eng. Rep. at 640 (emphasis added).

10. 3 Doug. 61, 99 Eng. Rep. 538 (1782).

11. See *Mason v. Sainsbury*, 3 Doug. 61, 99 Eng. Rep. 538 (1782), in which Lord Mansfield avoids reference to the trust concept.

12. See *Lister v. Romford Ice Co.*, [1956] 2 Q.B. 180 (C.A. 1955).

13. 1 Cox. 275, 29 Eng. Rep. 1164 (1786). See also Hodgkin, *Subrogation in Insurance Law*, 1975 J. BUS. L. 114.

14. *Id.* at 276, 29 Eng. Rep. at 1164.

15. *Deering v. Winchelsea*, 2 Bos. & Pul. 270, 126 Eng. Rep. 1276 (1787).

16. *Id.* at 272, 126 Eng. Rep. at 1277 (emphasis added).

[t]his contribution is considered as founded in Equity; Contract is not mentioned. The principle operates more clearly in a Court of Equity than at Law. At Law the party is driven to an *Audita Querela* or *Scire Facias* to defeat the execution, and compel execution to be taken against all.¹⁷

This court clearly saw a distinct difference between how contribution was sought at equity and at law.

The arguments presented in *Lawson*¹⁸ formed the basis for a theory advanced by the Solicitor General in *Rogers v. Mackenzie*.¹⁹ It raised an issue of contribution of two sureties. In adopting the Solicitor General's argument, the court held that as a,

general principle of Law . . . when one surety pays the whole debt, there shall be a contribution. *Sir Edward Deering v. Lord Winchelsea* . . . and *Praed v. Gardner*. . . . It is unjust to throw the whole burden on one estate. They are bound to the Crown jointly and severally. Their several estates are therefore equally liable. By accident they are unequally charged. To correct that inequality is within the principle, upon which the court compels contribution. . . .²⁰

By the end of the eighteenth century, both the common law and the equity courts appeared thoroughly accustomed to applying this equitable doctrine. The accepted doctrine had now developed so that a person who had paid a third party in discharge of another's obligation to him, acquired from that third party a right to sue that other person, upon whom lay the primary obligation to pay, for a contribution or for an indemnity. When the claim was made among joint sureties and where the claim was limited to a portion of the payment, the claim from the primary obligor would be in the nature of a "contribution." However, under a contract of insurance, where the full amount was claimed it would be in the nature of an "indemnity," and the process was referred to as "subrogation."

Whichever label was used, by the beginning of the nineteenth century three elements had become abundantly clear:

17. *Id.* at 273, 126 Eng. Rep. at 1278.

18. The Solicitor General also relied upon *Praed v. Gardiner*, 2 Cox. 86, 30 Eng. Rep. 40 (1788).

19. 4 Ves. jun. 752, 31 Eng. Rep. 389 (1799).

20. *Id.* at 755, 31 Eng. Rep. at 391.

- (1) The person making the payment to the third party was recognized as having acquired at the moment of paying, a right to claim a contribution or an indemnity (as the case might be) from the principal obligor;
- (2) The acquisition of that right did not result from an express agreement to transfer such right, which the third party had against the principal obligor; and,
- (3) It was accepted by both the common law courts and the courts of equity that this acquisition of rights against the principal obligor was an operation of equity, and not of the common law.

EXPLICIT REFERENCE TO *Randal*

The eighteenth century marked the establishment of a theoretical justification for the role which equity had assumed in the area of contribution. However, not until the nineteenth century was a name given to the process introduced by equity. In *Craythorn v. Swinburn*,²¹ the court explained the grounds upon which the courts of law could justify the application of equitable rules in the field of contribution:

It has been long settled that, if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this Court, either upon a principle of Equity, or upon Contract, to call upon his co-surety for contribution; and I think, that right is properly enough stated as depending rather upon a principle of Equity than upon Contract: unless in this sense; that, the principle of Equity being in its operation established, a Contract may be inferred upon the implied knowledge of that principle by all persons, and it must be upon such a ground of implied assumpsit, that in modern times Courts of Law have assumed a jurisdiction upon this subject.²²

21. 14 Ves. jun. 160, 33 Eng. Rep. 482 (1807). See also *Ex parte Gifford*, 6 Ves. jun. 805, 31 Eng. Rep. 1318 (1802), in which the court repeated what had been stated before, namely, that the surety, after payment, has "a clear equitable remedy to stand in the place of the creditor. . . ." *Id.* at 807, 31 Eng. Rep. at 1319.

22. 14 Ves. jun. 160, 164, 33 Eng. Rep. 482, 483-84 (1807).

This explanation, it appears, was the only attempt ever made to justify what for Lord Mansfield was a daily occurrence²³ in the common law courts. It must be stressed that the application of the equitable doctrine of contribution in the common law courts seems to have been utilized without any explicit reference to *Randal* or any explanation as to how it became part of the common law. Nevertheless, in *Sterling v. Forrester*,²⁴ the court recognized that the equitable remedy was applicable both in the courts of equity and at common law. Having stated that in equity a surety of a bankrupt could, after making a payment, stand as a *cestui que trust* to the extent of that payment, the court added:

Formerly it was thought that the remedy was only in Equity (Toussaint v. Martinnant, 2 T.R. 105) but in that case it was held, that if one in the nature of surety has paid a debt, he might bring an action against the parties liable for the debt. Until I became acquainted with that case, I thought the remedy must be in Equity.²⁵

From *Crayton* and *Sterling* it appears that a contractual remedy may arise out of a principle in equity and that its application in the common law courts would then be justified on the grounds of an implied assumpsit. It was not clear, however, that the common law could handle the administration of this new doctrine. Baron Parke, in *Davies v. Humphries*,²⁶ made the point that the common law had "assumed jurisdiction over this subject," because he believed that the common law would be unable to do full justice between the parties when applying this new doctrine.²⁷

Aside from those hesitations, the post-Hardwicke era consistently and continuously strengthened the right of equity to put the insurer in the place of the assured, and the surety in the place of the creditor, provided that the insurer and the surety in each

23. See note 5 *supra* and accompanying text.

24. 3 Bli. 575, 4 Eng. Rep. 712 (1821).

25. *Id.* at 590, 4 Eng. Rep. at 717.

26. 6 M.&W. 153, 151 Eng. Rep. 361 (1840).

27.

This right is founded not originally upon contract, but upon a principle of Equity, though it is now established to be the foundation of the action, as appears by the cases of *Cowell v. Edward* and *Craythorne v. Swinburne*; though Lord Eldon has, and not without reason, intimated some regret that the Courts of Law have assumed jurisdiction on this subject on account of the difficulties in doing full justice between the parties.

Id. at 168, 151 Eng. Rep. at 371.

case had first paid.²⁸ This substitution was accomplished in the absence of a novation or an assignment.

In most of the post-Hardwicke cases,²⁹ however, there was no reference to *Randal v. Cockran*.³⁰ Even in *Blaauport v. Da Costa*,³¹ a case arising under the same statute and, upon similar facts, *Randal* was not mentioned. Nevertheless, the opinion of the Earl of Northington reflects the statement of the law which was laid down by Hardwicke in *Randal*.³² The Earl was,

of the opinion that upon the policy, and the peril happening, and the payment of the money by the underwriters, the whole rights of the assured vested in them. The assured had this right of Restitution vested in them against the Spanish captors, which were afterwards prosecuted by the Crown by reprisals. Satisfaction having been made in consequence of that capture, [he thought] the plaintiffs are entitled to that benefit; and that it was received by the executor of Elias de Paz in trust for them.³³

Up to this point in time, both equity and the common law had avoided any reference to *Randal* or to Hardwicke. Nevertheless, the substantive doctrine introduced by equity, and explained by Hardwicke was being applied in every court both in equity and in the common law.

RANDAL and Hardwicke Recognized as Authority for the Doctrine

In 1938 both Chief Justice Tindal and Justice Parke in *Yates v. Whyte*³⁴ made it clear for the first time that the doctrine they were applying was what had been previously laid down in *Randal*. Chief Justice Tindal in his opinion held,

[t]hat the insurers may recover in the name of the assured after he has been satisfied, appears from *Randal v. Cockran*, where it was held that they had the plainest Equity to institute such a suit.³⁵

28. See generally *Copis v. Hiddleton*, 37 Eng. Rep. 1083 (Turn. & R. 1823); *Dowbiggin v. Bourne*, 159 Eng. Rep. 927 (You. 1830); *Hodgson v. Shaw*, 3 My.&K. 183, 40 Eng. Rep. 70 (1834).

29. See note 28 *supra*.

30. 1 Ves. sen. 98, 27 Eng. Rep. 916 (1748).

31. 1 Eden. 130, 28 Eng. Rep. 633 (1758).

32. 1 Ves. sen. 98, 27 Eng. Rep. 916 (1748).

33. 1 Eden. at 131, 28 Eng. Rep. at 634.

34. 4 Bing. N.C. 272, 132 Eng. Rep. 793 (1838).

35. *Id.* at 283, 132 Eng. Rep. at 797.

Justice Parke added:

This point has been decided ever since the time of Lord Hardwicke; so much so that it has been laid down in text writers, that where the assured, who had been indemnified for a wrong, recovers from the wrongdoer, the insurers may recover the amount from the assured.³⁶

Justice Parke pushed the doctrine even further; he showed that this rule was applicable both in equity and in the common law, without a difference:

In *Randal v. Cockran* it was said they had the clearest Equity to use the name of the assured, in order to reimburse themselves, and in *Mason v. Sainsbury* the judges were all unanimous: they held indeed that the insurers could not sue in their own names; but they confirmed the general doctrine, that the wrongdoer should be ultimately liable, notwithstanding a payment by the insurers.³⁷

The doctrine to which Parke made reference is the same theory framed by Lord Mansfield; "every day the insurer is put in the place of the insured."³⁸

Soon after *Yates*, the courts began to make reference to Hardwicke and *Randal* with ease and confidence. In *Whyte v. Robinson*,³⁹ the Vice-Chancellor said: "My opinion is that this case comes within the principle distinctly stated by Lord Hardwicke in *Randal v. Cockran*."⁴⁰ He then quoted the principle, verbatim, from Hardwicke's opinion. Baron Parke paraphrased the words of Hardwicke in another case because the issues should have been decided "[a]ccording to the doctrine laid down by Lord Chancellor Hardwicke in *Randal v. Cockran*. . . ."⁴¹ Clearly, Hardwicke through his decision in *Randal* was finally getting recognition as an authority on subrogation.

Other cases after *Yates* explicitly recognized *Randal* as the beginning point of the doctrine. In *Dickerson v. Jardine*,⁴² the

36. *Id.*

37. *Id.*

38. *Mason v. Sainsbury*, 3 Doug. 61, 64, 99 Eng. Rep. 538, 540 (1782).

39. 14 Sim. 273, 60 Eng. Rep. 363 (1844).

40. *Id.* at 274, 60 Eng. Rep. at 363.

41. *Morgan v. Price*, 4 Exch. 615, 620-21, 154 Eng. Rep. 1360, 1362 (1849).

42. L.R. 3 C.P. 639 (1868).

plaintiff, a cargo owner, sued the defendant his insurer, under a policy which included jettison⁴³ as one of the perils insured against. The plaintiff, his cargo having been jettisoned, commenced the action against the insurers before seeking general average contribution⁴⁴ from the other cargo owners. Defendant (the insurer) argued that the action could not be brought unless the general average contribution was first sought. In rejecting that argument, the court held that the plaintiff was entitled to proceed against the insurer notwithstanding that general average contribution had not been sought first. The court reasoned that once the insurer pays pursuant to the policy, he becomes entitled to stand in the place of the assured with respect to the general average contribution. The court drew support for its decision from *Randal*:

It has been settled since the case of *Randal v. Cockran* . . . that the underwriters having indemnified the assured, whatever the assured received from the commissioners must be held by them as trustees for the underwriters.⁴⁵

The right of the insurer in *Dickerson* to get the benefit of the assured's right to general average contribution clearly was traced back to *Randal*.

The next case of considerable importance was *Rankin v. Potter*,⁴⁶ in which the court rested its opinion on the equitable doctrine of subrogation as laid down by Hardwicke.

There is no notice of abandonment in cases of fire . . . insurance, but the salvage is transferred on the principle of Equity, expressed by Lord Hardwicke, in *Randal v. Cockran* that the person who originally sustains the loss was the owner, but, after satisfaction made to him, the insurer.⁴⁷

43. Jettison is the intentional casting overboard of any part of a venture exposed to peril, whether it be of the cargo, or of the ship's furniture or tackle, in the hope of saving the rest of the venture.

44. General average contribution is a principle of maritime law. When it is decided by a master of a vessel, acting for all the interests concerned, to sacrifice any part of the venture exposed to a common and imminent peril in order to save the rest, the interests saved are compelled to contribute ratably to the owner of the interest sacrificed so that the cost will fall equally among them.

45. L.R. 3 C.P. at 643-44.

46. L.R. 6 H.L. 83 (1873).

47. *Id.* at 118-19.

There were many tangential references to both Hardwicke and *Randal* in a number of cases prior to *Yates*. But after *Yates* there was express judicial recognition of both Hardwicke and *Randal* as the sources for the proposition that the insurer succeeds to the rights of the assured once payment is made.

Hardwicke's Doctrine is Named Subrogation — The French Influence

By the middle of the nineteenth century, the theory behind *Randal* had received wide acceptance in both English equity and common law courts. They were daily engaged in its application as a method by which a litigant could obtain reimbursement, but the idea had yet to acquire universal application or a name.

Possibly the English looked to other jurisdictions which had a similar kind of equitable doctrine to name the English concept. However, English case law up to 1850 does not suggest that the courts had recognized the existence of a similar equitable remedy in the French law. Admittedly, there were some basic differences between the two doctrines, but the similarities were nonetheless clear and numerous. Furthermore, the corresponding French remedy was more than coincidentally labeled subrogation.

The French traced their remedy without hesitation to Roman subrogation.⁴⁸ However, the French concept was actually more similar to the Roman doctrine of *cessio actionum*. Renusson in *Traite de la Subrogation*⁴⁹ noted this similarity:

It is necessary to observe that the term "cession" is a common and equivocal term that includes many different things. The name "cession" is given to the transfer of a debt, to the delegation, the subrogation, and the voluntary transference of a debtor's goods to his creditors, and to the cession of wealth that a debtor does in Law to obtain his freedom of his person. All these things are different: nonetheless they are often called "cession." As this may cause errors and mistakes and because it has already created some confusion in the textbooks of Roman Law it is necessary to explain their differences.⁵⁰

Thus, Renusson recognized that cession meant a variety of things, and therefore the Roman texts were confused. But Renusson elimi-

48. *Yates v. Whyte*, 4 Bing. N.C. 272, 132 Eng. Rep. 793 (1838), and note 34 *supra* and accompanying text.

49. RENUSSON, *TRAITE DE LA SUBROGATION* (Paris ed. 1760).

50. *Id.* at Ch. II, Section 1 at 4.

nated the confusion as far as the French law was concerned when he noted that,

[t]he transfer of a debt is what is properly called a cession. The two terms are ordinarily joined together and we commonly say cession and transfer in order to distinguish from a simple cession of action that we call subrogation. Cession and transfer are true sales which are made by a creditor who disposes of what is owed to him; and it is so called in the textbooks of Roman Law.⁵¹

However, it must be stressed that the law discussed by Renusson was similar to the assignment or novation originally required for subrogation by the English common law. The French, however, based their requirement of an express act of transference upon *cessio actionum*. The English common law had difficulties with the need to observe both the principles of privity and consideration. It was these difficulties that equity had succeeded in circumventing by the nineteenth century.

In 1851, the Privy Council had *Quebec Fire Insurance Company v. Augustin St. Louis and John Molson*⁵² before them, on appeal from the Court of Appeals of the Province of Lower Canada. This case requires careful analysis because it appears to be the first case where the French concept of "subrogation" was used. The respondent's servants were held negligent in causing a fire which partially destroyed a parish church. The appellants, as insurers, paid pursuant to the insurance policy. In consideration of this payment, the priest and the Marguilliers-in-charge transferred to the appellants by a notarial instrument the right to sue the respondents for the amount paid.

By virtue of this transference of rights, the insurers commenced action against the original tortfeasors. The Court of Appeals of Lower Canada reversed the judgment of the Court of Queen's Bench for the District of Montreal on the ground that there had been no subrogation of the insurers to the rights of the assured. The court held that the action was not maintainable by the insurers in their own right or under rights derived from the assured.⁵³ The insurance company then appealed to the Privy Council. On appeal, the Privy Council held that the notarial instrument had the capacity to transfer to the insured the rights which the assured held against the respondents.

51. *Id.* at Ch. II, Section 2 at 4-5.

52. 7 Moo. P.C. 286, 13 Eng. Rep. 891 (1851).

53. *Id.* at 297-99, 13 Eng. Rep. at 896.

In *Quebec Fire*, appellants relied on Pothier and his *Coutumes d'Orleans*⁵⁴ for their argument. In that work, Pothier had enumerated four types of subrogation:

- 1) by operation of law;
- 2) by requisition with the creditor;⁵⁵
- 3) by contract between the creditor and a stranger who pays a debt which in effect is a mere sale of the debt; and,
- 4) by contract between the debtor and another who pays the debt for him.

Appellants submitted that the issue fell into the second category. They argued that, according to Pothier, the transference of rights should take place before a notary so as to establish the intention of the parties in relationship to the transference. In this respect, it differed from subrogation by operation of law. Arguing that the appeal should be permitted, appellants' counsel stated the principle that "an insurance company after paying for the damage done has a right to be subrogated, as against the party causing the damage, is laid down in every French textbook on Terrestrial Assurance."⁵⁶

Baron Parke, who wrote the opinion of the court, relied heavily on the appellants' contentions. Parke, in accepting appellants' arguments, stated that,

[a]n assuree, by a policy against maritime or terrestrial risks, is clearly within the Equity of the rules, and has a similar right to require a Subrogation at the time of the payment of the loss. The authorities cited in support of that position seem to us to establish that the assurees have that right. . . .⁵⁷

Baron Parke, in reference to authorities cited in appellants' argument, singled out Pothier's *Treatise on Assurance*.⁵⁸ In adopting Pothier, Parke observed that,

54. POTHIER, *COUTUMES D'ORLEANS* 66-69 (—).

55. By agreement with the creditor.

56. 7 Moo. P.C. at 303-04, 13 Eng. Rep. at 898. The passage appears to be poorly written. It is suggested that the passage should read:

That an insurance company after paying for the damage done has a right to be subrogated, as against the party causing the damage, is now laid down in every French text on Terrestrial Assurance.

57. 7 Moo. P.C. at 316, 13 Eng. Rep. at 903.

58. POTHIER, *TREATISE ON ASSURANCE* 248 (Fr. ed. 1810).

in the case of a general average [contribution] the assurer, after having indemnified the assured against the losses sustained for the common benefit, ought to be subrogated to the rights of the assured to the contribution, which in such a case must be made.⁵⁹

Quebec Fire is important because it appears to be the first usage of the word subrogation in an English court.

Subrogation, as discussed in *Quebec Fire*, is similar to the Roman doctrine of *cessio actionum*.⁶⁰ It differed from the English doctrine expressed in *Randal* in that in *Quebec Fire* the express act of cession was vital for the appellants' success. Baron Parke appears to have recognized this point by refraining from associating the instant case or the newly acquired word "subrogation" with *Randal*, in spite of the submission by appellants' counsel that "[English law] has recognized the same principle in *Randal v. Cockran*."⁶¹

In succeeding years, the word "subrogation" and the decision in *Randal* blended into a doctrine of subrogation applicable as such in English law; Lord Hardwicke became accepted as its founder. The odd aspect of this development was that the word "subrogation," as later applied in English courts, appears to have come from Quebec, with its roots more in French law than in the English law of the time.

The exact source from which Quebec derived its law relating to subrogation was not altogether clear. The general law of Lower Canada was the French civil law after the passage of the Constitutional Act of 1791. This position remained unaffected in spite of the act of union in 1840. It was, however, unclear which French law was applicable until the decision of the Privy Council in *Hutchinson v. Gillespie*.⁶² There the Privy Council laid down that,

[t]he *Ordonnances* cited do not apply; they were never registered, and it is a principle of the French Law that all *Ordonnances* not registered are void. Registration was necessary to give them authority. It is the check which the Parliament of Paris had over the edicts of the

59. 7 Moo. P.C. at 316-17, 13 Eng. Rep. at 903.

60. The court was applying Quebec law and not the English law and as such was applying the civil law concept of subrogation which was a derivative of Roman law.

61. 7 Moo. P.C. at 304, 13 Eng. Rep. at 898.

62. 4 Moo. P.C. 378, 13 Eng. Rep. 349 (1844).

Crown. The *Ordonnance* of 1766 throughout assumes registration to be necessary. The mere fact, therefore, of the existence of certain *Ordonnances* is not sufficient to make them in force in Canada.⁶³

That decision wiped out completely all the *Ordonnances* except the *Ordonnance Civile* of 1667, which alone had received registration.⁶⁴ The view taken by the Privy Council in *Hutchinson* instigated a great debate among students of French and Quebec law. But Article VIII of the Quebec Act of 1774 provided some clarification by recognizing non-registered *Ordonnances* as a part of the customary law of Quebec. This automatically revived the non-registered *Ordonnances*, which then became a significant source of law.

Until 1866, the law applicable in Quebec came largely from the *Coutume d'Paris*. These were compiled in 1510, reformed in 1580, and were constantly interpreted with the aid of French commentators like Dumoulin and, at a later stage, by Ferriere and Pothier. It is therefore possible that the *Ordonnance Civile* of 1667 represented the *Coutume d'Paris*. It was on this *Coutume* that Quebec's law of subrogation was based.

Baron Parke, in *Quebec Fire*, failed to indicate the precise source of the word "subrogation."⁶⁵ However, he was correct in asserting that it did not come from the *Code Napoleon*. It was obvious to Parke that the concept of subrogation had not been derived "as was suggested in argument from the *Code Napoleon* which is not in force in Canada."⁶⁶

It will be seen that subrogation had a smooth passage into English law. The succeeding English cases gave not the slightest indication that it was received from a foreign legal system where the word was used to connote a meaning different from what both equity and Lord Hardwicke envisaged. The contemporary doctrine of subrogation appears, therefore, to have had its birth in equity, to have been nurtured by both equity and the common law, and to have been named after a French doctrine.

63. *Id.* at 385, 13 Eng. Rep. at 352.

64. The following *Ordonnances* were regarded as void:

- i. *Ordonnance Sur La Marine*, Louis XV;
- ii. *Ordonnance Sur Les Testaments*, 1735;
- iii. *Ordonnance Sur Les Donations*, 1731;
- iv. *Ordonnance Sur Les Substitutions Fides Commissaires*, 1747.

See CASTEL, THE CIVIL LAW SYSTEM IN THE PROVINCE OF QUEBEC 12-16 (—).

65. 7 Moo. P.C. 286, 13 Eng. Rep. 891 (1851).

66. 7 Moo. at 317, 13 Eng. Rep. at 903.

APPLICATION OF THE CONTEMPORARY DOCTRINE

The first English case to adopt the word "subrogation" was *Stringer v. The English and Scotch Marine Insurance Co.*⁶⁷ In this case, the plaintiffs insured a ship cargo with the defendants for "taking at sea, arrests, restraints, and detainment of all Kings, princes and people." The ship was subsequently captured by a United States cruiser and taken into New Orleans, where a suit for its condemnation was instituted. The plaintiffs contested the action successfully and the captors appealed. The court ordered the plaintiffs to furnish security against costs which they could not afford. As a result, the ship was condemned, the plaintiffs gave formal notice of abandonment of the cargo, and requested the insurers pay for their total loss.

The court, in holding for the plaintiff, noted that the plaintiff as the assured was free to choose between defending the appeal before the American court or claiming a loss under the policy. Because the assured chose the latter, the insurers were obligated to pay. However, having paid, the insurers were entitled "to be subrogated to them, and get what they can out of the hands of the Americans for their own benefit."⁶⁸ Significantly, the authorities which were cited in support of the application of subrogation were *Randal v. Cockran*,⁶⁹ *Mason v. Sainsbury*⁷⁰ and *Yates v. Whyte*.⁷¹

Other cases contemporaneous to *Stringer* completely avoided the use of the new word. Two years later, in *North of England Insurance Association v. Armstrong*,⁷² the insurers paid £6000 to the insured pursuant to the policy. The insurers then sued the original tortfeasors for the damage caused to the insureds' ship. In that action £5683 was awarded to the insured. The insured claimed £3000 of that sum, on the grounds that the real value of their loss was £9000. The Court of Appeals was unanimous in refusing the shipowners' claim. The important aspect of this decision was that none of the judges made any reference to subrogation or to *Randal*. However, the court did indicate that the doctrine was at least applicable in theory at "the moment [the underwriter] is called upon to satisfy the exigency of the policy, and he does satisfy it."⁷³

67. L.R. 4 Q.B. 676 (1868-69).

68. *Id.* at 692.

69. 1 Ves. sen. 98, 27 Eng. Rep. 916 (1748).

70. 3 Doug. 61, 99 Eng. Rep. 538 (1782).

71. 4 Bing. N.C. 272, 132 Eng. Rep. 793 (1838).

72. L.R. 5 Q.B. 244 (1870).

73. *Id.* at 248 (emphasis added).

The court's opinion highlighted the *ipso jure* nature of the doctrine. However, it is interesting that the headnote⁷⁴ of the case used the word "subrogation," despite the fact that the word does not appear in the opinion. At least from *Armstrong*, it is difficult to determine exactly what connotation the English courts intended by the use of the word "subrogation."

The meaning of subrogation became much more clearly defined in *Darrell v. Tibbitts*.⁷⁵ In *Darrell*, Forbes owned a house which he leased. The lease placed the duty upon the lessee to make repairs in the event of an explosion. An explosion occurred, due to the negligence of an employee of the Brighton Corporation. The lessee made the repairs and the corporation reimbursed him. The lessor then sold the house to Tibbitts with the benefit of the insurance policy. The insurer (plaintiff), without knowledge of the payment made to the original lessee by the Brighton Corporation, paid the new owner pursuant to the policy. Subsequently, the insurers became aware of the first payment and sought to recover it. The insurers lost in the trial court but successfully appealed. In the opinion, Lord Justice Brett clearly stated the doctrine of subrogation as it applied to insurance:

The doctrine is well established that where something is insured against loss either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject matter insured. . . ."⁷⁶

Having thus stated the principle, the learned Lord Justice applied the principle to the facts of the case:

So that immediately after the insurance company had paid the landlord, they were put into his place with regard to the contract to rebuild, which was a contract respecting the subject-matter insured, that is, the building, and which contract was affected by the safety, or the loss of that building by reason of the explosion, which was a peril insured against, and therefore they are to be subrogated or to be put into the place of the landlord with regard to his rights; they might have sued in his name the tenants if the latter had not repaired, and when the

74. *Id.* at 244.

75. 5 Q.B.D. 560 (1880).

76. *Id.* at 563.

tenants have repaired, the insurance company are to have the benefit of those repairs.⁷⁷

Subrogation, as applied in *Darrell*, is identical with the doctrine as laid down by Lord Hardwicke and those who came after him. The payment is the crucial event; once that is made, the payor slips automatically into the shoes of the payee. *Darrell v. Tibbitts*⁷⁸ clearly demonstrates how subrogation was then to be used.

Lord Justice Thesieger, in the same decision, gave a similar interpretation to subrogation. He said:

It is also maintainable as a kind of suit in Equity founded upon the following grounds; the assured having been indemnified against the loss sustained by him through the payment by the insurance company, the latter has a right to be subrogated into the place of the assured. . . .⁷⁹

Thesieger's dictum carries a somewhat deeper significance in that he related the word "subrogation" to equity, upon which he bases its origin and validity.

In *Castellain v. Preston*,⁸⁰ the word "subrogation" was explicitly applied to insurance law. In *Castellain*, a vendor who had insured his house against fire was in the process of selling this house. After the contract of sale was executed, but before the actual transfer was made, a fire destroyed the house. The vendee, nonetheless, paid the full and previously agreed upon purchase price. The insurer, who had no knowledge of the sale, paid the vendor damages pursuant to the policy. After the facts surrounding the sale became known, the insurer sued the vendor for return of the money paid.

The court refused the action on the ground that the insurer was claiming a right to be subrogated to a contract between the insured and a third party which did not exist at the time of maturity of the insurance policy.⁸¹ The court observed that "the contract should be one which subsists at the time when the claim under the policy of insurance has been matured."⁸² The insurers, however, appealed. The Court of Appeals⁸³ in reversing the lower

77. *Id.*

78. 5 Q.B.D. 560 (1880).

79. *Id.* at 568.

80. 8 Q.B.D. 613 (1881-82).

81. *Id.* at 615-26.

82. *Id.* at 625.

83. *Castellain v. Preston*, 11 Q.B.D. 380 (1883).

court's decision, stated what they termed the fundamental principle of insurance law:

The very foundation . . . of every rule which has been applied to insurance law is . . . that the contract of insurance contained in the marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified. That is the fundamental principle of insurance. . . .⁸⁴

In *Randal v. Cockran*,⁸⁵ Hardwicke, by making the insured a trustee for the insurer after payment was made, achieved exactly the same result. The insured, after receiving payment for his loss from the insurer, would be getting a windfall if he were allowed to retain payments which he subsequently received from other sources, in respect of the same loss. The fact that he received the latter payments as a trustee for the insurer prevented him from being "more than fully indemnified." This appears to have been the aim of Hardwicke and is indeed the aim of subrogation.

The court in *Quebec Fire Insurance Co. v. St. Louis*⁸⁶ also adopted the contemporary theory of subrogation and readily applied it to insurance problems. The court, after stressing the necessity of the notice of abandonment⁸⁷ to the insurer, only mentioned it,

for the purpose of coming to the doctrine of Subrogation. That doctrine does not arise upon any of the terms of the contract of insurance; it is only for the proposition which has been adopted for the purpose of carrying out the fundamental rules which [was mentioned] . . . in order to prevent the assured from recovering more than

84. *Id.* at 386.

85. 1 Ves. sen. 98, 27 Eng. Rep. 916 (1748).

86. 7 Moo. P.C. 286, 13 Eng. Rep. 891 (1851).

87. The requirement to give notice of abandonment is necessary to maintain the indemnity character of a contract of insurance. It is the assured who knows the condition of the vessel, and if it is a "constructive total loss" (if the cost of repairs is likely to exceed the repaired value of the vessel), then the assured must give notice of abandonment to the insurer at once. Thereafter the assured may claim an "actual total loss." See *Kaltenbach v. Mackenzie*, 3 C.P.D. 467 (1878) and *Dave v. The Mortgage Insurance Corp.*, 1 Q.B. 54 (1894), where the doctrine of abandonment received the most careful examination by Lord Justice Brett.

a full indemnity; it has been adopted solely for that reason.⁸⁸

Lord Justice Bowen, in the same case, clarified the relationship of subrogation to the principle of indemnity for "subrogation is itself only the particular application of the principle of indemnity to a special subject matter. . . ."⁸⁹ Having discussed the true nature of the rights to which the insurer could subrogate, Lord Justice Bowen concluded that "[t]he true test is, can the right to be insisted on be deemed to be one that enforcement of which will diminish the loss?"⁹⁰

The purpose of contemporary subrogation and the purpose of Hardwicke's principle had thus begun to coincide. Therefore, the utilization of the word "subrogation" by English lawyers to denote the equitable doctrine laid down by Hardwicke was a natural development.

EXPANSION OF THE CONTEMPORARY SUBROGATION DOCTRINE

Once the judges began to trace their authority to Hardwicke⁹¹ and began to freely use their newly acquired word, it became necessary to elaborate and clarify the doctrine which was firmly established in English law.

New openings in the field of commerce as a result of colonial expansions and the increase of markets are factors which greatly influenced the doctrine. For these reasons, the mid-nineteenth century is significant for its increase in commercial litigation. Soon after *Quebec Fire Insurance Co. v. St. Louis*,⁹² the doctrine of subrogation underwent changes and expansion in response to the new commercial needs of England. Cases emphasized that the doctrine of subrogation did not permit the insurer to do better than the assured could have. In *Simpson and Company v. Thomson, Burrell*,⁹³ Mr. Burrell owned two ships which were insured with Thomson. The two ships collided and, as a result, the insured paid the assured under the policy of insurance. The assured sought to limit his liability for claims arising from that collision to £3590. In the present action by the cargo owners, the insurer claimed to stand in *pari passu* with them, claiming

88. *Castellain v. Preston*, 11 Q.B.D. 380, 387 (1883).

89. *Id.* at 403.

90. *Id.* at 404.

91. *Randal v. Cockran*, 1 Ves. sen. 98, 27 Eng. Rep. 916 (1748).

92. 7 Moo. P.C. 286, 13 Eng. Rep. 891 (1851).

93. 3 App. Cas. 279 (1877).

that he was entitled to recover from the assured the loss that he had incurred under the policy as a result of the accident.

In holding that the insurer could not use such a remedy, the court noted that the insurer had no right independent of the rights of the assured. The insurer, therefore, could enforce only those rights which the assured had. The court decided that the assured was the owner of both vessels, and therefore it could not be said that the assured held a right against himself.

Nowhere in the opinion of the court does the word "subrogation" appear. But the following passage is surely the epitome of that doctrine:

I know of no foundation for the right of the underwriters, except the well known principle of law, that where one person has agreed to indemnify another, he will on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss.⁹⁴

Thereafter, the learned Lord Chancellor proceeded to point out that "if the person insured, be the person who has caused the damage . . .,"⁹⁵ then no right was available to the insurer to succeed and prosecute to reduce the loss which he had incurred.

The case established the central theme of subrogation. What the insurer acquires by way of subrogation are the rights of the assured, and no more. And, therefore, if the assured had no rights, there is nothing which the insurer could acquire by subrogation.

On the other hand, it is the existence of such rights in the assured which could be enforced to his benefit, which gave rise to the classic principle that the assured should not be more than fully indemnified. Subrogation will not permit a windfall. The assured must have rights which could be enforced to his benefit; otherwise subrogation is inapplicable, as emphasized in *Simpson v. Thomson, Burrell*.⁹⁶

In *Burnand v. Rodocanachi*,⁹⁷ another aspect of subrogation came up for adjudication. The Confederate cruiser "Alabama"

94. *Id.* at 284.

95. *Id.*

96. *Id.* at 279.

97. 7 App. Cas. 333 (1882).

had destroyed the respondent's cargo which was insured with the appellants. The appellants paid the respondents under the war risks clause of the policy. Subsequently, the United States Congress passed an act under which the United States was empowered to pay the difference between the real loss and the sum received from insurance companies to those who had suffered through the activities of war. As a result of this Act of Congress, the respondents received a sum of money which the insurance company claimed in its action.

To support their claim, the insurance company presented the classic argument that having indemnified the assured, they were entitled to stand in his place for every benefit that may subsequently fall upon him. *Randal v. Cockran*⁹⁸ and *Blaauwport v. Da Costa*⁹⁹ figured prominently in their argument. The opinion of the court referred to them as authorities. The conclusion, which was unanimous, was that the insurer had no claim to the money.

The next significant contribution came from Lord Justice Brett in *Castellain v. Preston*.¹⁰⁰ The Lord Justice first enunciated what he believed to be the fundamental principle of insurance law, namely, the principle of indemnity.¹⁰¹ Thereafter, he clarified the doctrine of subrogation in the following passage:

In order to apply the doctrine of Subrogation, it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer must be placed in the position of the assured. Now it seems to me that in order to carry out the fundamental rule of Insurance Law, this doctrine of Subrogation must be carried to the extent which I am now about to endeavor to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss

98. 1 Ves. sen. 98, 27 Eng. Rep. 916 (1748).

99. 1 Eden. 130, 28 Eng. Rep. 633 (1758).

100. 11 Q.B.D. 380 (1883).

101. *Castellain v. Preston*, 11 Q.B.D. 380, 386 (1883).

against which the assured is insured, can be, or has been diminished.¹⁰²

To ensure that he had omitted nothing which would help in representing the doctrine in its widest form, he added:

That [it] seems to me to put this doctrine of Subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated.¹⁰³

This statement of the law is regarded as a *locus classicus* pertaining to subrogation.

In succeeding decades, *Randal v. Cockran*¹⁰⁴ was certainly referred to, but the bulk of the case law that developed in both equity and common law courts rendered it less significant. Both judges and jurists cared very little for the explanation by Lord Hardwicke of how equity could justify its activities, if called upon to do so, in this field. For such an explanation had become superfluous by the middle of the nineteenth century. Be that as it may, the importance of Lord Hardwicke's explanation to this inquiry is immeasurable, because it shows how one could explain the theory behind the workings of equity in this field. This in turn has shown how the *ipso jure* transference of rights was brought about so as to establish the doctrine of subrogation. As has been previously stressed, this constitutes the major difference between *cessio actionum* and subrogation.

No further exposition of the doctrine was made until 1962. In *Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co.*,¹⁰⁵ the court had a very modern problem before them—the effect of monetary devaluation on subrogation. The plaintiff insured the defendant's vessel for £72,000. Due to the negligence of those who manned a Canadian ship, a collision resulted and the insured's ship became a total loss. The insurer paid fully upon the policy of insurance and, with the insurer's consent, the insured sued the Canadian government. As a result of that action, the insured was awarded \$336,039.52, which was equivalent to £75,514.9.11d sterling. At this stage the pound sterling was devalued, and when the Canadian dollars were exchanged they

102. *Id.* at 388.

103. *Id.*

104. 1 Ves. sen. 98, 27 Eng. Rep. 916 (1748).

105. [1962] 2 Q.B. 330.

yielded a sum of £126,971.1411d sterling. The insurer claimed this increased sum was the payment they had made under the policy, while the insured argued that the sum payable was £72,000, and the balance which was £55,000, should go to them.

The court found for the insured on the ground that the insurer cannot recover more than the sum he had actually paid the insured. Three passages from the court's opinion are worthy of comment. First,

[t]he doctrine of Subrogation is not restricted to the law of insurance. Although often referred to as an "equity" it is not an exclusively equitable doctrine. It was applied by the Common Law Courts in insurance cases long before the fusion of law and equity. . . .¹⁰⁶

It is the belief of this writer that the doctrine of subrogation is not restricted to insurance cases. The doctrine, as suggested, is a general doctrine, which may be applicable in cases meriting contribution, such as between co-sureties, co-trustees, co-partners, and joint tortfeasors. It may also be suggested that the doctrine of subrogation, in an extended form, could be used to cut through the limitations placed on the contractual capacities of certain legal persons.¹⁰⁷

To that extent, the observations of the court in *Nisbet Shipping* appear to be eminently correct. But what is clearly wrong is to preach that the doctrine was not exclusively equitable. For it has already been adequately demonstrated¹⁰⁸ that long before the first common law case¹⁰⁹ accepted this doctrine, it was firmly established as a restitutory remedy in equity.

Second,

[i]f, before the insurer has paid under the policy, the assured recovers from some third party a sum in excess of the actual amount of the loss, he can recover nothing from the insurer because he has sustained no loss, but it has never been suggested that the insurer can recover from the assured the amount of the excess.¹¹⁰

106. *Id.* at 339.

107. *E.g.*, companies, infants, married women and insane persons.

108. *See* 10 VAL. U.L. REV. 45 (1975).

109. *Mason v. Sainsbury*, 3 Doug. 61, 99 Eng. Rep. 538 (1782).

110. *Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co.*, [1962] 2 Q.B.

This doctrine appears to cut both ways. In one way, unless the insurer pays pursuant to the policy, there is no loss which he has sustained and therefore there arises no right of recovery. In another way, it limits the right of recovery to the exact amount the insurer pays to the assured. This means that by the operation of this doctrine neither the insurer nor the assured could make a profit from the other's loss.

And third, the following is noteworthy from Diplochs' opinion, [i]n the action brought in the name of the assured, pursuant to the equitable remedy, it is the assured who recovers judgment against the third party, and the judgment can be satisfied only by payment to him. When he receives it, the insurer can recover from him at common law, as money had and received, such sum as he has overpaid to the assured under the contract of insurance.¹¹¹

In this passage, the court points out that the primary right is in the assured. It is he who could give a discharge in an action brought in a matter connected with the insurance policy. The question which this raises is how the money, once paid, could be recovered from the assured. Under common law, the money could be recovered as money had and received. This statement is important for the fact that the court recognized the absence of a right in contract or in tort, which the insurer may use against the assured. It is this absence of a right in contract or in tort which led to the application of a trust in equity by Hardwicke. Common law found it difficult to accept an explanation based on the trust, and therefore the remedy of "money had and received" was put forward.

CONCLUSION

The examination of the common law doctrine of subrogation and its civil law counterpart, *cessio actionum*, has revealed several similarities and distinctions. The most obvious similarity between the two is that both doctrines impart a transfer of rights from one person to another. The distinctions between the two doctrines, however, are less obvious. This historical development of *cessio actionum* can be traced back as far as Roman sources. However, the English doctrine of subrogation is a "local" creation. Its beginnings may be found in equity, particularly during the Chancellorship of Hardwicke. One specific distinction between the two

111. *Id.* at 341-42.

doctrines is found in the manner in which rights are transferred from one person to another. At common law, subrogation applies *ipso jure* without any requirement of any express agreement to transfer rights. In contrast, however, in *cessio actionum* an express agreement to transfer rights must always precede the payment. Summarizing, what one witnesses in subrogation is an application of equity, where as what one witnesses in *cessio actionum* is the enforcement of a simple contract between two parties.

While distinctions between the two doctrines exist, they have often become muddled and confused through the historical development of subrogation. For example, in 1851 the word subrogation entered the language of the common law in the opinion of the Privy Council in *Quebec Fire Insurance Co. v. Augustin, St. Louis and John Molson*.¹¹² In that case, the term subrogation was used in a context which required an express agreement to transfer the rights of one party to another. In other words, in that decision subrogation was used synonymously with *cessio actionum*. However, since 1851, the English courts have used the term subrogation as associated with the particular application of equity, and not within the narrower application of *cessio actionum*.

In the final analysis, it is the view of this writer that the term subrogation was borrowed from a foreign system of jurisprudence, which had no capability of either comprehending or applying the particular remedy which equity made available to an indemnifier. Additionally, the failure of the common law courts to recognize the antecedents of this particular remedy has resulted in a distortion of the fact that subrogation is clearly an equitable remedy. It is the belief of this writer that subrogation is one of the remedial aspects of the constructive trust. It is his hope that he shall succeed in establishing that fact in a subsequent writing.

112. 7 Moo. P.C. 286, 18 Eng. Rep. 891 (1851).

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