ValpoScholar Valparaiso University Law Review

Volume 10
Number 1 *Fall 1975*

*pp.*45-65

Fall 1975

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AN HISTORICAL INTRODUCTION TO THE DOCTRINE OF SUBROGATION: THE EARLY HISTORY OF THE DOCTRINE I*

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The word subrogation has different meanings in different legal systems. Therefore, it is of prime importance to state the context in which the word is used in the course of this writing. Since this writing is principally concerned with the doctrine of subrogation in the English common law, the unqualified use of the word subrogation will refer to its use in an English law context. The migration of the English common law has resulted in introducing into American jurisprudence the English notion of subrogation. To that extent, therefore, the doctrine of subrogation on both sides of the Atlantic shares common characteristics.[1] Any historical survey of the development of this doctrine must, therefore, necessarily involve an exposition of its antecedents in the English common law and ultimately, to doctrines of Roman jurisprudence. Thus, through this developmental process the American notion of subrogation is tied both to the English common law and to the Roman civil law.

The article has been written in two sections. Part two will appear in issue two of this volume. Part one explores the possible bases for the English notion of subrogation. Roman and French rudimentary concepts of subrogation are examined and rejected as the sole influence and root of the English notion. Although the similarities between the English and Roman principles are apparent, the Roman law required more of a positive act of transference of rights before subrogation could occur. The possibility is then posited that the doctrine arose independently of the Roman law as a purely English theory. It seems to have had its origins in the courts of equity. The last several sections of Part one explore the practical and theoretical equitable beginnings.

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*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 Howe for reading the manuscript and suggesting a number of pertinent alterations.

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1. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (Story, J.).

Commenting on Roman equity, Buckland[2] has expressed the view that subrogation was unknown to the Romans in the context in which it appears in the English common law today. In Roman law, the term subrogation was a well-known term of constitutional law, denoting the replacement of one official by another, or replacing one official's actions with another's action.[3] Buckland in discussing the concept of subrogation in the area of private law wrote:

> It is not until the time of Justinian that it [subrogation] certainly appears in private law, and even then it is not in our sense. In an enactment in the code Justinian says [C.6.23.28.4], dealing with testators who cannot for certain reasons get all the witnesses present together, that those who came later can be 'subrogated,' being formally notified as to what has been done in their absence.[4]

But this use of the subrogation concept still did not approach the meaning of that word in English law. Buckland proceeded to cite a number of texts[5] which display a remarkable factual resemblance to instances in which subrogation would apply in English law. But the point remained clear that in Roman law there is no subrogation by law. There is no right unless the actions are actually transferred.[6] Buckland further conceded that the

> corresponding right in English Law, at least in case of a surety, amounts to actual Subrogation, and is declared to be based on natural justice, no attempt being made to deduce it from any defined principle.[7]

Therefore, under the English doctrine, no express transference of rights was necessary. The transference of rights was said to be *ipso jure*. The theoretical difference between subrogation and the process displayed by the texts to which Buckland made reference[8] appeared to be that when subrogation was *ipso jure*, no actual transference of rights was required; however, the process employed in the texts quoted by Buckland required an express act, an actual transference of rights, which must have taken place

2. W. W. BUCKLAND, EQUITY IN ROMAN LAW 47-54 (1911) [hereinafter cited as BUCKLAND].

3. *Id.*

4. *Id.* at 47-8.

5. DIGEST 50.15.5 pr., DIGEST 46.1.36, DIGEST 46.1.17.39, CODE 8.40.11, DIGEST 27.3.21, DIGEST 46.3.76 and CODE 5.58.2.

6. *See* BUCKLAND, *supra* note 2, at 53.

7. *Id.* at 54.

8. *Id.*

on or before payment. Failure to do so would result in the extinction of the obligation, leaving nothing to transfer.

In the course of his lecture, Buckland made several references to previous attempts to explain this theoretical difference, which alone makes it difficult to trace the ancestry of the English doctrine to Roman sources. Buckland at one point[9] referred to Pothier and to the *Code Civile*, where the modern doctrine of subrogation, which is shared by both the English and French legal systems, was said to operate as an implied assignment. The implication of an assignment was regarded as producing the *ipso jure* effect in the modern doctrine. Buckland further referred to Savigny who held the view that "wherever transfer of actions could be compelled, the law would presume it, so that the case would be one of true subrogation."[10]

Although it is not altogether clear to which law Savigny was referring, Buckland, in his reply, rejecting Savigny, appeared to treat the latter's observations as representing the classical Roman law. Buckland discredited Savigny by stating:

> But there is no hint of this in the texts, and some of those above[11] directly negative the idea. As a general proposition it is now universally discredited, and the dominant view seems to be that there was in no case any such implied cession of actions.[12]

In another portion of the lecture, Buckland referred to Girard.[13] He alleged that Girard had traced the ancestry of the "Modern Theory of Subrogation"[14] to a fusion of two Roman notions, namely, *Beneficium Cedendarum Actionum* and *Successio in Locum Creditoris*.[15]

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9. *Id.* at 49.

10. *Id.* at 53-4.

11. *See* note 5 *supra*.

12. *See* BUCKLAND, *supra* note 2, at 54.

13. *Id.* at 50. The reference is to GIRARD, MANUEL ELEMENTAIRE DE DROIT ROMAIN § 780.

14. Presumably Girard was referring to the post-revolutionary French law. It must also be remembered that "subrogation" in the French law was similar to subrogation in English law, and they together constituted what was generally known as the "Modern Theory of Subrogation."

15. Although Buckland agrees with Girard's observation, this author finds it somewhat difficult to accept that Girard was correct. In W. W. BUCKLAND, TEXT BOOK ON ROMAN LAW 479 (2d ed. 1950), Buckland states

However, the modern French doctrine displayed, at least in a functional sense, a remarkable resemblance to subrogation. During the process which the French law underwent towards achieving this resemblance, the French jurists lost no opportunity to point out that there was a basic difference between the modern doctrine and its Roman counterpart.[16] Having done so, they made it a major issue to explain away the difference to a point of reconciliation and made it logically probative to draw the inference that *Cessio Actionum* was indeed the precursor of the French Doctrine.[17]

Equity's Early Use of Subrogation

English judges, on the other hand, found no such relationship either to the French law or with the Roman law. Rather, they linked subrogation to the equitable principle of contribution.[18] By the time of Lord Chancellor Hardwicke, the functional aspect of subrogation had so strengthened itself, that it appeared worthwhile for Hardwicke to formulate a theoretical justification for its existence in equity. This theoretical justification, it will be shown at a later stage, was the constructive trust.[19] Even at this stage, in 1748, the judges had not begun to use the term subrogation for the technique they had newly introduced, in cases deserving contribution,

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that in two instances, "[t]he order of priority might be modified by *Successio in locum*, a principle under which the later change could be put in the position of an earlier one." Both instances are cases which English law would label "Quasi-Subrogation." In the first of Buckland's examples, the the later creditor pays the debtor expressly for the purpose of discharging an earlier debt. *See* DIGEST 20.3.3 and CODE 8.18. In the second case, the later creditor pays the debtor expressly for the purpose of discharging debt. *See* DIGEST 20.4.19, DIGEST 20.5.5 and DIGEST 20.6.12. In both cases the later creditor takes the position of the creditor whom he discharges. This clearly is a case of quasi-subrogation in the English law. Further, Buckland says of *Beneficium Cedendarum Actionum* that the surety could, before payment, require the creditor to transfer to him by way of *Procurator in rem suam*, all his rights and securities against the debtor or the sureties. This dissimilarity of the two principles is clear. *Successio in Locum Creditoris* requires no act of cession, and as such is very similar to subrogation, while *Beneficium Cedendarum Actionum* involves the act of an express cessation. Therefore to suggest that the fusion of these two doctrines of dissimilar characteristics may have resulted in what Girard calls the "Modern Theory of Subrogation" appears to be illogical. *See* BUCKLAND, *supra* note 2, at 449.

16. POTHIER, TREATISE ON OBLIGATION 259 (3d Amer. ed. 1853) [hereinafter cited as POTHIER].

17. *Id.* at Part III, ch. 2, Art. 8.

18. *Anon.*, 21 Eng. Rep. 1 (Cary, *circa* 1557).

19. Randal v. Cockran, 1 Ves. sen. 98, 27 Eng. Rep. 916 (1748). It is the intention of this article to develop the theory in a subsequent writing that subrogation is a particular aspect of a constructive trust.

or in cases involving problems of indemnities such as insurance[20] and suretyships.[21]

By 1782 the common law courts had recognized the doctrine of subrogation and were using it as if it had always been a part of the common law of England. In *Mason v. Sainsbury*,[22] Lord Chief Justice Mansfield was found to say: "Every day, the insurer is put in the place of the insured. The insurer uses the name of the insured." However, not until the middle of the nineteenth century did the word subrogation enter the English legal vocabulary. By then the doctrine had become irrefutably established in the English legal system. By that time, whether or not it was of Roman origin was a matter of little importance. The judges in equity were quite content to believe that equity was the hand that created it. This belief appears to have been enhanced by the explanation tendered by Hardwicke in *Randal v. Cockran*.[23]

In *Simpson v. Thompson*,[24] Lord Chancellor Cairnes used the word subrogation to denote the right of one person who, having agreed to indemnify another,

> 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.[25]

The celebrated note in this field was not struck until Lord Justice Brett (as he then was) delivered his judgment in *Castellain v. Preston*[26] in 1883.

It must not be assumed that there were no leanings towards the view that subrogation was of Roman origin, at least among some of the judges in England.[27] But it was true that no effort was made by the judges to establish these origins beyond doubt.

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20. *Id.*

21. Fleetwood v. Charnock, 21 Eng. Rep. 776 (Nels. 1629); Morgan v. Seymour, 1 Chan. Rep. 120, 21 Eng. Rep. 525 (1637).

22. 3 Doug. 61, 64, 99 Eng. Rep. 538, 540 (1782).

23. 1 Ves. sen. 98, 27 Eng. Rep. 916 (1748).

24. 3 App. Cas. 279 (1877).

25. *Id.* at 284.

26. 11 Q.B.D. 380 (C.A. 1883).

27.

> The doctrine of Subrogation must be briefly considered. It was derived by our English Courts from the system of Roman Law. It varies in some important respects from the doctrine as applied in that system and indeed for the actual term "subrogation" does not, I

Roman Origins for English Subrogation

The Roman doctrine of *Cessio Actionum* bore the closest resemblance to subrogation, as known in England, and it is that doctrine that had been regarded as the precursor of subrogation. Supposing A lends money to B, where C stands as surety for B. C is subsequently called upon to repay the loan to A. C accordingly repays. In English law, C was automatically subrogated to the rights which A had against B. This occurred *ipso jure,* and if necessary even against the wishes of A. But in Roman law, C could not acquire the rights of A against B unless they were ceded to him expressly,[28] at or before the repayment.[29] *Cessio Actionum* was a right which the party paying another's debt or obligation had, which he may or may not have used, to obtain the benefit of cession.[30] The option was his, and if he failed to make use of it he lost an opportunity to have transferred to him all rights and securities which A held against B. It was thus stated in the *Digest.*[31]

> Fideiussoribus succurri solet, ut stipulator compellatur ei qui solidum solvere paratus est, vendere ceterorum nomina.

In subrogation, the party making a payment (the insurer) would acquire an immediate right, without more against the tortfeasor. This was a result of an automatic transfer to the insurer of the rights which the assured had against his tortfeasor. In a case where the insurer, having paid the assured, had brought an action against the tortfeasor, by virture of the aforementioned rights, Lord Justice Denning pointed out that:

> The Romford Ice and Cold Storage Co. Ltd. are only nominal plaintiffs. The managing director of the Cold Storage Co. came to the court and gave evidence. He said that the Company was not consulted about this action. The insurers bring it under their right of Subrogation. . . .[32]

Pothier, in his *Treatise on Obligation,* used the word 'subrogation' synonymously with the Roman concept of *Cessio Actionum.* At one point he asked: "Suppose the debtor had paid without requiring a

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think appear in Roman Law in relation to the subjects to which it has been applied by English Law.

John Edwards & Co. v. Motor Union Insurance Co. Ltd., 2 K.B. 249, 252 (1922).

28. Sometimes the court may enforce a cession.

29. CODE 8.40.11.

30. *I.e. Beneficium Cedendarum Actionum.*

31. DIGEST 46.1.17.

32. Lister v. Romford, [1956] 2 Q.B. 180 (C.A. 1955).

Subrogation?"[33] His answer was that in such a case there could be no subrogation because

> the pure and simple payment which he had made, having entirely extinguished the credit and all the rights and actions resulting from it, that credit cannot afterwards be ceded which does not any longer exist.[34]

Further in his treatise, Pothier stated:

> A surety may exercise the actions of the creditor against his co-sureties, when he has had the precaution to obtain a subrogation; but according to the roman laws, he had not in his own right any action against them, even when he had paid the debt: this is the decision of the Law.[35]

The theoretical difficulty was indeed this: on payment, the obligation between the cedent and the debtor was extinguished and nothing therefore remained to be ceded.

The Romans overcame this difficulty by regarding the payment as the price for the sale of the cedent's rights to the cessionary. These rights were the rights which the cedent held against the debtor, and the payment which the cessionary made represented the debt.

Justinian quotes Paul in the *Digest* with approval.[36] Paul commented on the classical Roman law, stating that it was believed that the payment by a surety extinguished the debt. He added:

> Sed non ita est; non enim in solutum accipit, sed quodam modo nomen debitoris vendidit, et ideo habet actiones, quia tenetur ad ideam ipsum, ut praestet actiones.[37]

Sande[38] quoting Modestinus with approval wrote:

> [A]fter receipt of the money, the creditor's actions . . . remain intact, and the amount paid is considered as the price of the assignment of the actions. . . .[39]

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33. *See* POTHIER, *supra* note 16, at 53.
34. *Id.*
35. *Id.* at 259.
36. *See* note 37 *infra.*
37. DIGEST 46.3.76.
38. SANDE, COMMENTARY ON CESSION OF ACTIONS (1906).
39. *Id.* at 132. Sande wishes to consider the payment as the price for the assignment, "[r]ather than that the action which has existed has been purchased." This distinction is far too minute to have any effect, at least as far as this writing is concerned.

For this reason the cession of rights must take place *"ante solutionem . . . vel, cum convenisset,"*[40] for thereafter, the rights having been extinguished, nothing is left for the creditor to sell, *"Nemo dat quod non habet."*

Sande,[41] too, supported this proposition. His contention was as follows:

> When several persons are bound equally as principal debtors in the same obligation, and action as, for instance, co-debtors, the action cannot be ceded to one against the other after an interval between the date of payment and the cession. . . .[42]

He derived his support for this proposition too from Modestinus, from whom he quoted a further opinion with approval:

> If, without any stipulation, after payment of everything due under and by virture of a tutelage, actions have been ceded after a certain interval, such cession is of no avail since no action has survived.[43]

Based upon Modestinus' theory, Sande contended that the payment made,

> *ipso jure* destroyed and extinguished the whole obligation *in toto*, so that no action remains any longer which is capable of being ceded.[44]

These observations pertaining to the classical Roman law, point to the fact that, unless a cession of action took place before the time of payment, the obligation *in toto* was destroyed, leaving nothing to cede. When an agreement was made at the time of payment, to cede the actions, then the payment was deemed to be in the form of price for the sale of the rights from the cedent to the cessionary, and not in discharge of the obligation. This was believed to keep the obligation alive.

English Subrogation as it Differs from Roman Law

Subrogation, as it appeared in English law, took a very different view of the effect of the payment. The payment, be it by a surety, a co-debtor, the co-obligor or the tortfeasor respectively,

40. DIGEST 46.1.36.
41. *See* note 38 *supra.*
42. *Id.* at 133.
43. *Id.*
44. *Id.*

was regarded as a benefit for which one must pay. One of the effective methods of securing such a repayment was to recognize a right in the payor to sue the benefitted party. The theoretical difficulty was that there existed no recognizable legal relationship such as in contract or in tort between the party that makes the payment and the party that benefits from it.

Further, there was no legal basis upon which the surety or the insurer may induce the creditor, or the insured, to sue the debtor or the tortfeasor on behalf of the party making the payment. Even if such an action was in fact pursued, there would be no common law basis for claiming the proceeds from the creditor, or the insured, after the successful completion of the proceedings. It was to remedy such a situation that the doctrine of subrogation appeared to have been introduced.

In *Simpson v. Thompson,*[45] Lord Cairnes stated the rule in this way:

> I know of no foundation for the right of 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 reimbursed himself for the loss.[46]

The breadth of this doctrine was emphasized by Lord Justice Brett in *Castellain v. Preston:*[47]

> This doctrine of Subrogation must be carried to the extent . . . 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.[48]

Such was the doctrine. It must be made clear from the outset that little or no evidence is available as to the history of this doctrine in English law. All that need be mentioned at this stage is that on payment, and without more, the party making the payment succeeded to the rights of the party receiving that payment. Thereafter, that party could exercise all the rights of the party

45. 3 App. Cas. 279 (1877).
46. *Id.* at 284.
47. 11 Q.B.D. 380 (C.A. 1883).
48. *Id.* at 388.

who received the payment, to the extent which Lord Justice Brett had laid down in his judgment quoted above.[49]

However, if an explanation could be found to show how the doctrine of subrogation became capable of effecting an *ipso jure* succession to another's rights, it may then be possible to suggest that the *Cessio Actionum* of Roman jurisprudence could indeed be its predecessor.

There is, of course, another possibility. Despite the explanation of how subrogation acquired the ability to transfer rights *ipso jure*, without the interposition of an act of cession, and despite the marked resemblance to *Cessio Actionum*, subrogation may well have arisen quite independently of the Roman law as a purely English doctrine, molded by the tenets of the English law. This possibility will receive close attention at a later stage of this writing.

The Role of Equity in Establishing an Independent English Doctrine

When one person pays in circumstances in which another ought to have paid, equity has, since the sixteenth century, displayed an ability to extract a contribution from the one who ought to have paid. The significant fact here is that this had been effected by equity in the absence of any cession of action by the person who received the payment in favour of the person who made it.

The earliest decision which demonstrated contribution was an anonymous one of *circa* 1557, where the Court of Chancery decided that:

> If a man grants a rent-charge out of all his lands, and afterwards selleth his lands by parcels to divers persons, and the grantee of the rent will from time to time levy the whole rent upon one of the purchasers only, he shall be eased in the chancery by a contribution from the rest of the purchasers. . . .[50]

Although the report gave neither reasons nor precedents for the ruling, two issues appeared to emerge from the case. First, there had not been a cession of rights by the grantee on receiving the rents from one of the purchasers. Second, the remedy granted was one in equity.

In 1629, the Court of Chancery, an equity court, had two cases before it which were relevant to the development of this doctrine.

49. *Id.*

50. *Anon.*, 21 Eng. Rep. 1 (Cary. *circa* 1557).

In *Fleetwood v. Charnock*,[51] "[t]he plaintiff and the defendant were jointly bound for a third person, who died leaving no estate; the plaintiff was sued and paid the debt. . . ."[52] It was decreed that the defendant would be liable for contribution to the extent of his proportional part.[53]

In the other case, *Peter v. Rich*,[54]

> [t]he plaintiff and the defendant were co-sureties. As a result of this suretyship the plaintiff was called upon to pay £105. The plaintiff after paying that sum sought contribution from the defendant. It was held that he was entitled to receive a moiety, so that the payment that was made could be shared between the parties.

In neither of these cases did the courts tender any reasons or precedents in support of their decisions. However, it is noticeable that in both cases, any attempt to discover a legal relationship which would have conferred a right on the plaintiffs to claim contribution from the defendants, would have been fruitless. They were bound neither in tort nor in contract. The rights which the contract of suretyship created were rights only in the creditor's favor. The primary right was the right against the surety under the contract of suretyship. It was a result of the exercise of this latter right that the plaintiffs in the aforementioned cases were called upon to pay. Having paid, Fleetwood and Peter could not, in their own right, have brought an action against the co-sureties claiming contribution. The only method available to them for obtaining contribution was the acquisition and use of the rights which the creditors had against the other sureties.

There were possibly two methods by which the sureties may acquire the rights vested in the creditors. The first was by agreement, in which case the rights were expressly ceded to the surety who made the payment. The second was by operation of law, where, upon payment, the surety was given a right of action against the other co-sureties. The former was similar to the concept of *Cessio Actionum*. The latter could be likened to subrogation as it operated in English law.

It did, however, appear from the two cases discussed above that the sureties did successfully use the rights of the creditor without

51. 21 Eng. Rep. 776 (Nels. 1629).
52. *Id.*
53. *Id.*
54. 1 Ch. Rep. 34, 21 Eng. Rep. 499 (1629).

any express cession of action. The conclusion that the principle in action here is very close to subrogation is compelling.

In 1673 the Chancery had the case of *Morgan v. Seymour*[55] before them. The plaintiff and Sir Edward Seymour had stood as sureties for Sir William St. John, who had borrowed £200 from one Rowland upon a bond. Because Sir William had become insolvent, Rowland sued the plaintiff for the whole amount. The plaintiff sought to have Seymour, co-surety, contribute and pay his part of the said debt and damages.

The court held:

1. That Sir Edward was liable to contribute and pay one moiety to the said Rowland.

2. That Rowland should assign the bond to the plaintiff and the defendant (Sir Edward), so as to "help themselves against the said St. John for the said debt."[56]

This case raised a number of issues. First, its name betrayed the fact that it arose out of a claim by the creditor (Rowland) against one of the sureties, namely, Morgan. It was as a sequel to this claim that Morgan was bringing in his co-surety, Sir Edward Seymour, as a third party defendant. The report is mainly concerned with this aspect of the action. Therefore it must not be overlooked that Rowland was indeed a party to the action. Second, Rowland succeeded in his action, but the court directed him to collect his debt, proportionately, from both co-sureties, Morgan and Seymour. Third, the reason why Rowland was asked to collect his debt from both sureties was because Morgan's right to contribution had been vindicated.

The significant factor in the *Morgan* case was that the Chancery was able to discover a right in Morgan to recover a contribution from his co-surety (Seymour) once his liability to pay the creditor not only his own share, but also the share of his co-surety, became, in a sense, crystallized.

In *Morgan*, Rowland had not expressly assigned his rights to Morgan. Nor had he been compelled by the court to do so. But the court, however, found it possible to recognize an assignment in an *ipso jure* sense, and in so doing made Seymour liable to contribute. As pointed out above, the right of a co-surety to claim a contribution

55. 1 Chan. Rep. 120, 21 Eng. Rep. 525 (1637).

was the right originally found to reside in the creditor, and it was only by a process of transference of these rights from the creditor to the co-surety that the latter acquired a right to claim a contribution.[57] It is as a result of such a transference of rights that Morgan succeeded in obtaining a moiety from Seymour. And this transference had clearly been by the operation of law, *i.e. ipso jure.*

Four years later the Chancery decided *Swain v. Wall.*[58] Three persons were sureties for one H to the extent of £300. If H were to default, the three persons were to pay their respective portions. Two of the sureties proved insolvent, and the third paid the £300 upon H's default. The question before the court was what would the other sureties be expected to pay, in the event of their becoming solvent.

Mr. Justice Hatton decreed that each of the sureties should contribute £100 by way of their proportion of the debt, and £7.10.0. as their portion for the damages payable for the delay of nine months: a total of £107.10.0.

In the course of this decision the learned judge made the following statement:

> [I]f the plaintiff hath recovered or received anything towards the said £107.10.0., of the counter security before mentioned, he is to allow the same defendant.[59]

The plaintiff was the solvent surety who has paid the entire debt. The decree of the court affected the sureties who are insolvent, and whose liability to pay a portion could not be enforced until they have become solvent. Therefore it is submitted that the above statement of Mr. Justice Hatton would only be applicable when the sureties became solvent, and had paid their respective portions. Thereafter, according to the dictum, the plaintiff would become accountable to his co-sureties for what he receives (presumably from H). For such a receipt of payment by the original debtor would be deemed as a receipt towards the £107.10.0. paid by each of the sureties.

The judgment was admittedly devoid of phrases like "standing in the place of the plaintiff." But the decision appeared to reflect a particular aspect of subrogation, namely, that after payment the payor, who may be the insurer or the co-surety, stands in the place

57. *See* notes 54 and 55 *supra* and accompanying text.
58. 1 Chan. Rep. 149, 21 Eng. Rep. 537 (1641).
59. *Id.* at 152, 21 Eng. Rep. at 539.

of the assured or the creditor, to collect anything that may fall into their hands which could be regarded as money which belongs to the transaction in question. The popular basis for this operation has been attributed to equity. This attribution to equity is made with such profound learning, and with such conviction that the judges in the succeeding decades appear to have regarded it as a waste of judicial time to pause and examine the theoretical basis upon which equity justified its action in permitting the insurer, after payment, to stand in the place of the assured or the creditor, as the case may be.

The next two cases involved the transference of rights created by a judgment. It will be noticed that the intervention of the court became necessary to effect the transfer, and it may appear that this indicates a divergence from the pattern set by equity; namely, that upon payment, and without more, the transference of the right of action should take place. However, it is submitted that that is not the effect of the intervention of the court. In the cases discussed below, unlike the former cases, the right is a right arising out of a judgment of a competent court. A judgment creates a right *in rem*, and being so, unlike a right *in personam*, it binds the whole world. Such a right could only be varied, when it is transferred by the intervention of the organ which created it, *i.e.* the court.

The two cases are *Hole v. Harrison*[60] and *Parsons and Cole v. Briddock.*[61] In *Hole v. Harrison,* one of the sureties having paid under a recognizance, successfully claimed a moiety by way of contribution from his co-surety. In the course of the order the judge observed:

> [T]herefore upon Hole's paying a moiety of the said £260 to Harrison, it was now ordered, that he shall assign the said decree, and the benefit thereof to Hole, with authority to prosecute Gilpin, to enforce him to pay what Hole had paid to Harrison with interest and costs; and Hole to indemnify Harrison against Gilpin, by prosecuting him in Harrison's name.[62]

This dictum pointed particularly towards another aspect which in later years became one of the most common procedural facets of subrogation; namely, once a payment was made in discharge of another's obligation an action could be commenced in the name of

60. Rept. Finch 203, 23 Eng. Rep. 111 (1675).
61. 2 Vern. 608, 23 Eng. Rep. 997 (1708).
62. Rept. Finch at 204, 23 Eng. Rep. at 112 (1675).

the payee,[63] by taking over his rights against the obligor or debtor. Such a line of argument could be found in *Parsons and Cole v. Briddock.*[64] There, the plaintiffs were bound as sureties upon a bail bond in which the defendant was the principal. The plaintiffs, paid the sum due under that bond. Thereafter, they brought the present action to have the judgment obtained under the bail bond assigned to them.

Lord Chancellor Cooper, allowing the request, said:

> The bail stands in the place of the principal, and cannot be relieved on other terms than on payment of principal, interests, and costs, and the sureties in the original bond are not to be contributory; and therefore decreed the judgment against the bail to be assigned to the plaintiffs, in order to reimburse what they had paid, with interest and costs.[65]

One observation could be made here, with reference to the equity in this field. Equity had consistently disregarded the proposition that payment without cession extinguished the obligation, leaving nothing to cede. For if this was not the position, in both those cases, the payment, having discharged the obligation, leaves nothing by way of a right *in rem* to transfer. It is therefore submitted that despite the apparent oddity by which the court itself had to intervene in order to effect the transfer of the rights, *Hole v. Harrison* and *Parsons and Cole v. Briddock* do fall into line with the pattern set by equity.

The foregoing demonstrated the significant part equity has played in the field of contribution. Where a person makes a payment under a legal obligation to do so, the person who benefits from such a payment would in equity be made to contribute or to indemnify the person who has made that payment in discharge of that obligation.

Unlike the effect of *Cessio Actionum,* equity permits contribution in the complete absence of an express cession of rights.

Despite the practicality of this operation, equity appears to be uncertain of a theoretical basis for its activity. Equity has failed, in the above cases, to lay down any theoretical justification for its

63. *See* Listor v. Romford Ice Co., [1956] 2 Q.B. 180 (C.A. 1955). (dictum), in which Lord Justice Denning held that the "payee" could be the creditor or the assured.

64. 2 Vern. 608, 23 Eng. Rep. 997 (1708).

65. *Id.*

operation. And this failure has denied the very foundation of the doctrine of subrogation. The question remains: What was the basis upon which equity secured to a co-surety or to an insurer who pays, the possibility of obtaining contribution (or an indemnity) from the other co-obligors (co-sureties or debtor), or from the assured's tortfeasor respectively, without there being a cession of action at the time of payment?

Among other matters, the answer to this question may help considerably in determining the character of the doctrine of subrogation. The period of Hardwicke's Chancellorship would appear particularly significant in answering the foregoing question.

The Period of the Chancellorship of Hardwicke

In 1737, Hardwicke became the Lord High Chancellor of England. By that time it was settled that one co-obligor was able in equity to claim a contribution from other co-obligors, provided that he had first settled with the creditor. This was so, even though there was no assignment of the creditor's rights to the payor. But what Lord Hardwicke was faced with was the task of setting out a juridical basis for such an operation. The courts of equity could not look to Roman law, which indeed was a convenient, a respectable, and a popular source to which the judges at the time looked for guidance. This was because of the clear theoretical difference between the present activity of equity and the *Cessio Actionum* of the Roman law. At that time the French law, too, followed the Roman law,[66] and therefore afforded no help. English common law, plagued with the idea of privity, provided no room for anything less than an express cession of rights, and in that sense provided no new ground for equity to work upon. This left equity with only one avenue open, and that was equity itself. It will therefore become evident from what is to follow that Lord Hardwicke, using equitable raw materials, proceeded to forge a juridical basis for this activity of equity which, in the succeeding

66. RENUSSON, TRAITE DE LA SUBROGATION (1760). This treatise contains the pre-revolutionary French law. The principal assertion was that the French conception of subrogation was derived from Roman origins, particularly from *Cessio Actionum*. Therefore, an express cession of rights was an essential requirement for subrogation in French law. In POTHIER, TREATISE ON OBLIGATION (3d Amer. ed. 1853), Pothier acknowledged the position, but in the name of justice proposed that the requirement of an express cession be overlooked. It was Pothier's view that ultimately prevailed in France and has influenced the modern Roman Dutch law of South Africa.

centuries, came to be known as the doctrine of subrogation. *Ex Parte Crisp*[67] marked the beginning of Lord Hardwicke's work.

In *Crisp*, one partner of a partnership of three became bankrupt. A commission was issued against all three. Two solvent partners, however, appeared to be both able and willing to discharge the several claims made by the creditors. Lord Hardwicke made the following order:

> Upon the petitioners[68] paying within one calendar month from the date thereof, to all the creditors who have already proved their debts under the said Commission, the whole of their respective debts so proved by them under the Commission, and the costs of the Commission, and of the proceedings at law, the Commission be thereupon superseded; and he also ordered the several creditors of the petitioner, who have proved their debts under the Commismission, to assign the several securities that have been given to them by any of the partners, for their respective demands proved under the Commission, to a trustee or trustees to be appointed by the Commissioners, in trust to secure to the petitioner, and any other of the partners, so much money as he or they have respectively paid or shall pay towards the discharge of such debts, over and above their respective just proportions thereof; and ordered that the assignees under the Commission do reassign to the petitioner all his estate and effects which have been assigned to them, and that they come to an account before the Commissioners, for the estate and effects of the petitioner come to their hands, and that they pay to the petitioner the balance which upon such account to be taken shall appear to be remaining in their hands.[69]

There are a number of important features in this order. First, the Lord Chancellor ordered the creditors to transfer, by assigning to trustees,

> the several securities that have been given to them by any of the partners, for their respective demands proved under the Commission . . . .[70]

67. 1 Atk. 133, 26 Eng. Rep. 83 (1744).

68. Petitioners in this case were the solvent partners who had petitioned the court to have the partnership released from a declaration of bankruptcy. They would pay all partnership creditors in full.

69. 1 Atk. 133, 135-36, 26 Eng. Rep. 83, 88-89 (1744).

70. *Id.*

Second, the Lord Chancellor directed the trustees who had received the assignment of the securities to hold them,

> in trust to secure to the petitioner, and any other of the partners, so much money as he or they have respectively paid or shall pay towards the discharge of such debts, over and above their respective just proportions thereof . . . .[71]

The cumulative effect of these two passages was to ensure that there would be an equitable apportionment between the two partners of the payment made to the creditors by one of them. This would indeed be the result if a contribution was obtained from the partner who had not paid the creditor, and paid to the partner who had paid the entire debt. The order, as it stood, placed the trustees in a position to effect such an equitable result.

However, such a result could well have been achieved by other means too. The learned Lord Chancellor could have directed the creditors to transfer the securities to the partners, against the discharge of the debts, leaving the problem of contribution to be resolved by the partners themselves. However, the noteworthy feature of his judgment was that he demonstrated how the trust concept could be pressed into service in issues involving problems of contribution.

In the following year, Lord Hardwicke used the trust concept somewhat obliquely in *Sir Daniel O'Carrol's Case*.[72] There, a surety, having discharged the debts of Sir Daniel who had become insolvent, claimed a remedy over against Sir Daniel, the principal. Lord Hardwicke had agreed to decree,

> and likened the case to that of a privileged person, who is decreed to satisfy . . . and on refusal, instead of an attachment, a sequestration issues immediately after the writ of execution, and the estate and effects are detained in the hands of the officer, till the party has complied with the decree.[73]

The officer who was designated to hold Sir Daniel's property would in equity be a trustee. The order which followed stated that, "Defendant . . . shall have remedy against Sir Daniel's estate and effects, except his wearing apparel. . . ."[74]

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71. *Id.*
72. 27 Eng. Rep. 35 (Amb. 1745).
73. *Id.*
74. *Id.*

The case had the appearance of a proceeding in bankruptcy, which generally involves a trustee who takes charge of the insolvent estate.[75] However, it is difficult to resist the thought that the introduction of the trust concept in his decree was not altogether necessary for it. But it was possible, as may be seen later, that by this time Hardwicke's sights were set on another object. Three years later Lord Hardwicke appeared to have achieved his goal in *Randal v. Cockran.*[76] The King issued general letters of reprisals, to be carried out against the Spaniards, in retaliation for losses and unlawful seizures they had visited upon British sea-going vessels. These reprisals were duly carried out and the vessels so captured were brought before the Prize Commissioners. The insurance companies, having previously paid the British ship owners for their losses, claimed the vessels as their own. The Prize Commissioners refused to accede to their request, decreeing that the vessels should go to the ship owners. The insurers appealed from that decision. Lord Hardwicke allowed the insurers' appeal. Lord Hardwicke,

> was of opinion that the plaintiffs had the plainest equity that could be. The person originally sustaining the loss was the owner; but after satisfaction made to him, the insurer.
>
> No doubt, but from that time, as to the goods themselves, if restored *in specie,* or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he paid. . . .[77]

Until the insurer paid the assured, the owner of the lost vessels, the assured was the person who sustained the loss. Once he received the payment, the assured was no longer the loser because his loss has been remedied by the insurer. At that point the insurer became the loser.

In this state of affairs, if the assured were to receive the goods back *in specie,* or compensation for them, and if he then were to be permitted to acquire those for himself, he would reap a windfall from the insurance policy. It was to prevent such a situation that equity made it possible for the insurer to claim what the assured had received, subsequent to his being paid, and this equity did by creating the assured a trustee for the insurer.

75. *See* WILLIAMS, BANKRUPTCY 250-52 (17th ed. 1958).
76. 1 Ves. sen. 98, 27 Eng. Rep. 916 (1749).
77. *Id.*

The trust in *Randal* was one imposed by law, and therefore a constructive trust. The point that must not be overlooked, is that the constructive trust operated *ipso jure,* because it was created by the operation of the law. The practical result was that by making the insurer a beneficiary, he was placed in a position to make use,

> of every right of the assured, whether such right consist in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on, or already insisted on, or in any other right.[78]

A rationale based on the trust concept was easily the best[79] explanation that equity had so far tendered to justify contribution in a quasi-legal relationship where relationships created by contract or tort were inapplicable.

The justification that one finds stated in the decided cases appears to be attributed to an ill-defined basis of "justice" or "equity." It will be seen at a later stage of the present inquiry that cases subsequent to *Randal v. Cockran* make no mention of a basis upon which equity is said to act. They merely repeat the proposition that the plaintiff should succeed in equity.

Quite apart from the weight that is naturally attached to a statement by Hardwicke, the trust concept can also be theoretically justified. First, in English law, the insurer could not stand in the place of the assured, unless the latter had first been indemnified. The moment of payment was the moment of indemnification. And that moment marked the commencement of the trust. This is clear from the words of Lord Hardwicke.[80]

Once the moment of payment was considered as the commencement of the trust, then it was theoretically justifiable to regard every right, every security, or any money in the hands of the assured, as thereafter being held in trust for the insurer. The insurer, being the *Cestui que trust,* may therefore enforce the rights of the assured, even against the will of the latter.

This, of course, is a technique exclusively within the domain of equity, and it was within those precincts that it became operative until some time after the Chancellorship of Hardwicke.[81]

78. Castellain v. Preston, 11 Q.B.D. 380, 388 (C.A. 1883).

79. *See* 1 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 493 (1972).

80 *See* notes 73 and 74 *supra.*

81. Hardwicke's Chancellorship ended in 1756.

The first case in the common law courts where the insurer appears to have claimed the right to sue the assured's tortfeasor after paying the assured, was decided in 1782,[82] before Lord Chief Justice Mansfield. In that decision Mansfield wrote: "Every day the insurer is put in the place of the insured. The insurer uses the name of the insured."[83]

Since *Mason v. Sainsbury*,[84] the right of the insurer to stand in the place of the assured has been unquestionably accepted and applied in the common law courts, with the same ease as it has been in the courts of equity. Further, the doctrine of subrogation is in no way limited to insurance.[85] Indeed, the importance of this doctrine is that it applied in a variety of fields where one person has discharged an obligation of another, in circumstances in which there exists no legal relationship between the party paying, and the party benefitting from such a payment.*

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

83. *Id.* at 64, 99 Eng.Rep. at 540.

84. *Id.*

85. McCardie, J., John Edwards & Co. v. Motor Insurance Union, 2 K.B. 249, 252 (1922).

*The second and concluding part of this article will appear in volume 10, number 2 of the *Valparaiso University Law Review.*

Valparaiso University Law Review

Volume 10 Fall 1975 Number 1