THE LAW OF SUBROGATION

by

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ABSTRACT

The thesis gives an account of subrogation as a restitutio- 
ationary remedy, i.e., a remedy awarded to claimants in 
response to the unjust enrichment of other parties at their 
expense. The introductory chapter discusses the way sub-
rogation works, and considers in particular the nature of 
the enrichments in response to which the remedy is awarded. 
In the following chapters the case-law is categorised 
according to the factor underlying the circumstances of a 
claimant's payment which makes it unjust for another party 
to retain an enrichment gained at his expense. Hence, the 
cases are discussed in turn, in which the remedy has been 
awarded to payors under compulsion, by mistake, and for a 
consideration which subsequently fails. Finally, it is 
considered whether subrogation should ever be awarded to a 
volunteer, i.e., a claimant who has paid money under circum-
stances disclosing no "unjust factor". The issue is also 
addressed in the thesis, when a claimant should be allowed 
to acquire not only another party's personal rights of 
action via subrogation, but his secured rights as well.
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ABBREVIATIONS

The following abbreviated citations are used in the thesis. Where references are made to different editions of the same works this is indicated in the text.

Chalmers and Guest ... Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes, 14th ed. by A.G. Guest (London, 1992)
Derham ............... S.R. Derham, Subrogation in Insurance Law (Sydney, 1985)
Klippert ............. G.B. Klippert, Unjust Enrichment (Toronto, 1983)


CHAPTER 1: INTRODUCTION

1) The intention of the thesis

Subrogation is literally "substitution". The term is used in the context of English and Commonwealth law to describe a process by which one party is substituted for another, so that he may enforce that other's rights against a third party for his own benefit. The entitlement to be subrogated to another's rights of action against a third party may be expressly conferred by contract. Some examples of contractual subrogation are considered at the end of the thesis in Appendix 2. However, the primary intention


\[2\] Orakpo v Manson Investments Ltd. [1978] A.C. 95, at 112, per Lord Edmund-Davies, and at 119, per Lord Keith of Kinkel.


"[I]f the agreements between the parties provide an answer [to a dispute which subsequently arises between them] . . . there is no room for [subrogation] to step in and provide a different answer."

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of the thesis is to examine subrogation arising by operation of law as a remedy awarded by the legislature and the courts, to consider the way in which it works as a remedy and the circumstances in which it may be awarded.

It has been said by some authorities, and most notably by Lord Diplock, that subrogation arises in some situations because two parties have entered a contract, an implied term of which is that one party should be subrogated to the rights of the other. According to this analysis, for example, an insurer's right to be subrogated to its insured's rights against a third party derives from an implied term of the insurer's contract with its insured. However, in the writer's view this "implied contractual term" analysis is unhelpful and misleading. It lacks explanatory force, because it leaves open the question why a term conferring rights of subrogation should be implied into the parties' contract. Furthermore, the historical argument which has

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4 In the context of insurance contracts, Lord Diplock said that such a term should be implied to give "business efficacy" to the contract: Yorkshire Insurance Co. Ltd. v Nisbet Shipping Co. Ltd. [1962] 2 Q.B. 330, at 340. However, this statement rests upon an unspoken assumption that insurance premiums are reduced to take insurers' rights of subrogation into account and the available evidence suggests that in practice this is not so: R. Hasson, "Subrogation in Insurance Law - A Critical Evaluation", (1985) 5
been advanced in its support, that the origins of subrogation are to be found in insurance cases heard in the common law courts,\(^5\) is fundamentally flawed, for reasons which are fully discussed in Chapter 2.\(^6\) The view is therefore preferred here that although subrogation has certainly been awarded in many cases to a claimant against another party with whom he has a contractual relationship, where their contract contains no express term conferring subrogation rights, the award of subrogation is invariably best ex-

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\(^6\) As is discussed in Chapter 2, part (2)(b)(i), the courts have evolved three distinct remedies in the context of insurance law designed to enforce the principle of indemnity, all of which are commonly described as incidents of the insurer's "right of subrogation", but only one of which is subrogation properly speaking. By failing fully to distinguish between these remedies, Lord Diplock missed the significance of the fact that the remedy of subrogation, properly speaking, which entails placing an insurer in the position of the insured so that it may pursue its insured's subsisting rights of action against a third party for its own benefit, derives from the courts of equity which alone before the Supreme Court of Judicature Act 1873 had the jurisdiction to grant an order to an insurer compelling the insured to lend his name to a subrogated action: see cases cited infra, p. 96, n. 144. S.R. Derham, *Subrogation in Insurance Law* (Sydney, 1985), Chap. 1, argues that subrogation ultimately derives from the courts of equity, but his analysis is similarly flawed by a failure fully to distinguish between the different remedies commonly conflated as incidents of "the insurer's right of subrogation". Cf. A. McGee, Note, (1988) 9 Co. Law. 180, p. 182, who takes the point that these remedies are distinct, and that they ultimately derive from different jurisdictions.
plained as a remedy awarded at the courts’ discretion, rather than as a right arising out of an implied term of


However, whilst it would be wrong to deny that in some circumstances there may be overriding policy reasons for withholding subrogation, in the majority of cases it would be better to say that subrogation is a restitutionary remedy, and that the courts may therefore refuse to award it only where a case of unjust enrichment has not been made out. Cf. Lord Goff of Chieveley and G. Jones, The Law of Restitution, 3rd ed. (London, 1986), p. 539:

"Subrogation arises [in the context of Morris v Ford Motor Co. Ltd.] because the contract is a contract of indemnity and because it is necessary to prevent the indemnitee’s unjust enrichment; to limit that right by invoking a principle of equity . . . will conceal the real questions which were at issue [i]n the case and cause confusion in the future."

It has also been said, in Cochrane v Cochrane (1985) 3 N.S.W.L.R. 403, at 405, per Kearney, J., that:

"[T]here is no occasion for equity to intervene by way of subrogation where there is available to the [claimant seeking subrogation] a remedy at law or in equity sufficient to avoid an unconscionable result."

Kearney, J. stated this to be a corollary of the principle that subrogation is awarded to prevent an unconscionable result. With respect, though, the one does not follow from the other, and there is no reason in principle why subrogation should be withheld simply because another remedy, e.g. specific performance is alternatively available on the facts of a case (cf. the discussion in Chapter 4, part (1)(b)(i), infra).
the contract.®

There is judicial authority for the proposition that the courts can award subrogation as a remedy only in isolated situations, and that it should not be treated as a remedy of general application. The best-known statement of this view in the English case-law was made by Lord Diplock in *Orakpo v Manson Investments Ltd.*, where he said:®

"[T]here is no general doctrine of unjust enrichment in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law. There are some circumstances in which the remedy takes the form of "subrogation", but this expression embraces more than one concept in English law. It is a convenient way of describing the transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place in a whole var-

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® Cf. *Liverpool City Council v Irwin* [1976] 2 W.L.R. 562, at 580-581, *per* Lord Edmund-Davies. Here, the appellants had granted an easement to the respondents, the inhabitants of a block of flats, and were held to owe a general, *non-contractual*, duty to the respondents to ensure that their enjoyment of the easement was unimpaired.

iety of widely different circumstances . . .

"This makes particularly perilous any attempt to rely upon analogy to justify applying to one set of circumstances which would otherwise result in unjust enrichment a remedy of subrogation which has been held to be available for that purpose in another and different set of circumstances."

Lord Diplock was undoubtedly wise to sound a note of caution. Nonetheless, there is a pressing need to deduce from the case-law a coherent model of subrogation as a remedy of principled application which might be extended to cover new and different situations. Some judges have shown their willingness to award subrogation in new situations where this may seem appropriate, and the basis of this wider application must be made more certain. For example, in Orakpo v Manson Investments Ltd., Lord Edmund-Davies stated that:¹⁰

"Apart from specific agreement and certain well-established cases, it is conjectural how far the right of subrogation will be granted though in principle there is no reason why it should be confined to the hitherto-recognised categories."

¹⁰ Ibid., at 112.
And in the same case Lord Salmon thought that:

"The test as to whether the courts will apply the doctrine of subrogation to the facts of any particular case is entirely empirical. It is ... impossible to formulate any narrower principle than that the doctrine will be applied only when the courts are satisfied that reason and justice demand that it should be."

The very broad approach of Lord Salmon is really no more constructive than Lord Diplock’s reluctance to allow that subrogation might be awarded in situations outside the established categories. A more rigorous approach is needed, to account for the award of subrogation in the case-law to date. It is only on the basis of such an account that the issue can then properly be addressed, whether subrogation should be awarded in such further situations as may seem to invite its application.

In the writer’s view, subrogation arising by operation of law is best explained as a remedy for unjust enrichment. The intention of the thesis is to demonstrate that the cases in which subrogation has been awarded to date are

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susceptible to restitutionary analysis, and to suggest that the award of subrogation in the future should be guided by reference to restitutionary principles. It is intended in this introductory chapter to discuss the way in which subrogation works, and in particular to consider the nature of the enrichments in response to which the remedy is awarded. In the chapters which follow it is then intended to categorise the cases in which subrogation has been awarded according to the "unjust factor" which they disclose. The award of subrogation to payors under compulsion will be discussed in Chapter 2, to payors by mistake in Chapter 3, and to payors for a consideration which subsequently fails in Chapter 4. Finally, it will be considered in Chapter 5 whether it is ever appropriate to award subrogation to volunteers, i.e. parties who have made payments in circumstances which disclose no unjust factor.

2) The academic literature

Much of the academic discussion of subrogation in England and the Commonwealth is to be found in works concerned with certain specific areas, such as the law of insurance and the factor underlying the circumstances of a plaintiff's payment which makes it unjust for another party to retain an enrichment gained at the plaintiff's expense. See P. Birks, An Introduction to the Law of Restitution (Oxford, 1985), p. 99; A. Burrows, The Law of Restitution (London, 1993), p. 7, n. 17 and accompanying text.


the law of principal and surety,\textsuperscript{14} for example. It is commonly assumed in such works that subrogation has emerged and evolved independently in the particular fields with which they are concerned, and hence that it may safely be treated in isolation from similar but unidentical manifestations of the remedy. For this reason, these works are of little use to the reader seeking a set of general principles on the basis of which subrogation should be awarded.

Some English and Commonwealth writers have sought to analyse subrogation in wider terms, though. Whilst subrogation receives surprisingly meagre coverage in most of the equity textbooks, Meagher, Gummow and Lehane's account in \textit{Equity - Doctrines & Remedies}\textsuperscript{15} stands out as a notable exception.\textsuperscript{16} And a number of accounts of subrogation from a


A number of authors have written on the subject of subrogation and contribution from a restitutionary standpoint. The earliest of these is the first volume of Langan's unpublished PhD thesis, *The Principles of Subrogation and Contribution*. Langan gives a thorough and lucid account of the case-law as it stood in 1967, but although he states in his introduction that subrogation is "granted to prevent unjust enrichment", he never really attempts to analyse subrogation as a specifically restitutionary remedy, in the sense that it is awarded in order to reverse identifiable types of enrichment that are identifiably unjust. A year before his thesis was completed, the first edition of Goff and Jones' *The Law of Restitution* was published, successive editions of which have contained chapters on subrogation.

(London, 1966), Chaps. 27 and 28; 2nd ed. (London, 1978), Chap. 27; 3rd ed. (London, 1986), Chap. 27 (hereafter, "Goff and Jones" will be used to indicate the third edition). In the first edition of their book Goff and Jones concurred with Langan, pp. 5-6, in drawing a distinction between "subrogation" (which entailed placing a claimant in the position of a person on whom he had conferred a benefit in order to exercise that person's rights against a third party) and a "right akin to subrogation" (which entailed placing a claimant in the position of a third party in order to exercise the third party's rights against the person upon whom the claimant had conferred a
Goff and Jones were the first English writers to discuss subrogation from a specifically restitutionary viewpoint and their account of the English case-law must form the starting-point for any enquiry into the subject. However, in the writer's view their account leaves room for a more rigorous analysis and classification of the case-law. Maddaugh and McCamus' chapter on subrogation in their book, The Law of Restitution,²⁰ covers a great deal of the Canadian case-law, but adds little of analytical interest to Goff and Jones' work. Birks' An Introduction to the Law of Restitution takes matters further:²¹ of particular importance are his comments on the relationship between subrogation and tracing claims, and his approach to the problem of accounting for the award of subrogation to secured rights. Birks observes²² that the basis upon which a claimant is entitled to acquire secured rights via subrogation can be discovered only once the wider issue is satisfactorily res-


²² Birks, p. 390.
olved, of when it is that restitutionary claimants should be entitled to proprietary remedies generally. This difficult issue is discussed below in part (5).

Two more recent works must also be mentioned. In their Payment of Another's Debt, Friedmann and Cohen consider subrogation in the context of the law concerning third party payments of debt, expanding on the work done by Birks and Beatson in their 1976 article, "Unrequested Payment of Another's Debt", and by Friedmann in his article of 1983, "Payment of Another's Debt", and tying it in with valuable discussions of the French and German law in this area. Friedmann and Cohen focus on the question of when debts are discharged by third party payments, a question which must be addressed before the remedies to which a third party payor may be entitled can be made out. This question is considered in detail below, in part (4). Finally, Burrows' account of subrogation in his The Law of Restitution must be noted. Burrows observes that "one key to unlocking the mysteries of subrogation is to recognise that it is trigg-

ered by a range of unjust factors"\(^{27}\) and that in principle discussion of the remedy should therefore "be dispersed into the chapters on those unjust factors"\(^{28}\) into which his book is largely divided. In fact, he considers the remedy in a separate section of its own and divides his account according to various types of claimant to whom subrogation has been awarded in the past (e.g., insurers, sureties and bankers). However, within each section of his account he does seek to identify the unjust factor entitling claimants to the remedy, and he also addresses the difficult issue of the basis upon which claimants should be entitled to acquire secured rights via subrogation.

It should be added here that in addition to the English and Commonwealth legal literature on subrogation, there is a large body of American literature on the subject. Most of this is not directly concerned with the English case-law. However, to a great extent the restitutionary analytical framework adopted by many of the American writers on subrogation can be adopted to good purpose in a discussion of our own law. The American works consulted during the writing of the thesis are listed in a separate section of the bibliography.

\(^{27}\) Burrows, p. 77.
\(^{28}\) Ibid.
3) How subrogation works

Almost all the cases in which subrogation has been invoked fall into a distinctive fact-pattern which will be considered in section (a). However, one situation, which is governed by the terms of the Third Parties (Rights Against Insurers) Act, 1930, does not conform with this general pattern. This exceptional situation will be discussed in section (b).

a) Subrogation: the basic model

The great majority of the cases in which subrogation has been invoked fall into a distinctive fact-pattern which will shortly be described. Within these cases two different types of subrogation can be observed. The first type works to transfer subsisting rights of action from one party to another. This type of subrogation is called in the thesis "simple subrogation". This label is chosen to distinguish this first type from a second, more complicated type of subrogation. This second type works to revive extinguished rights of action and then to transfer them from one party to another. This type of subrogation is called in the thesis "reviving subrogation", a label chosen to indicate that it works to transfer extinguished rights of action that must be revived before they can be transferred. These two types of subrogation will be considered in turn.
ii) "Simple subrogation"

It is necessary to build up rather a careful picture of the basic situation in which "simple subrogation" may arise. It begins with one party under an obligation to another, for example because he is contractually bound to that other, or because he has committed a tort against him. This party will be called "PL". These letters are chosen to indicate that he is not only liable to the other but, by comparison with a third party who will shortly enter the picture, he is primarily liable in respect of the matter to which the obligation relates.\(^{29}\)

The party to whom PL is liable will be known as "RH". These letters are chosen to reflect the fact that this party is the right holder: he possesses rights against PL.

Now a third party enters the picture. In the simplest case, he makes a payment to RH with the effect of putting RH into the position he would have occupied, had PL performed his obligation. But in the eyes of the law this third party's payment does not have the effect of extinguishing RH's right and of discharging PL's corresponding obligation. As a result, the third party cannot recover his payment from PL directly, as money paid to his use, because PL has technically received no benefit from the payment: his

\(^{29}\) "PL" is primarily liable in the sense that he is "ultimately liable" for the obligation in question, rather than "directly liable" for it, i.e. the person against whom the right-holder may first turn: Re Downer Enterprises Ltd. [1974] 1 W.L.R. 1460, at 1470, per Pennycuik, V.-C.
liability to RH subsists. Furthermore, because the third party's payment has not had the effect of extinguishing RH's right, RH is left in the position that he may still pursue it against PL. In this situation the third party may seek to be "simply subrogated" to RH's position vis-à-vis PL. And if he satisfies whatever qualifying conditions the law requires, he may take over RH's rights against PL, and pursue them for his own benefit. To indicate the fact that he is entitled to be subrogated in these circumstances, this third party will be known as "S".

It should be noted at this stage that the system of labelling the parties set out here - PL, the party primarily liable; RH, the right-holder; and S, the party who seeks to be subrogated to RH's rights against PL - will be used throughout the thesis in discussion of the case-law. The purpose of using these labels is to achieve a stable analysis across differing fact situations.

One illustration of "simple subrogation" may be found in insurance law. When an insurer ("S") pays its insured ("RH") in respect of an insured loss under a contract of indemnity insurance, this payment does not extinguish the insured's right of action against a third-party tortfeasor ("PL"). The courts have held that under a contract of

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30 Discussed further in Chapter 2, part (2)(b)(i), infra.
31 An insurer paying its insured under a contract of insurance does not of course intend by its payment to discharge the obligations of a third party who is e.g. tort-
indemnity insurance, an insured must never be more than fully indemnified for his loss, which principle would be breached were the insured permitted to recover in respect of his loss from both his insurer and the third party. To prevent this, the insurer is entitled on indemnifying the insured to be subrogated to the insured's position vis-à-vis the third-party tortfeasor. It should be noted that an insurer cannot pursue the insured's rights in its own name after it has taken them over by "simple subrogation", but must bring any "simply subrogated" action in the name of the insured. This procedural requirement reflects the fact that the insured's rights continue to vest in him even after he has received a payment from the insurer in respect of the insured loss, and that the insurer may pursue them only by dint of being substituted to the insured's position.32

The rationale underlying the award of "simple subrogation" is twofold. First, where S pays RH and RH's rights against PL subsist, the possibility arises that RH may pur-

iously liable to the insured for the insured loss. Hence, the insurer’s position is rather different from that of an intervener who pays a right-holder with the express intention of discharging the obligations of a party liable to the right-holder. This is not to say, though, that the English courts could not in principle have adopted the rule that an insurer's payment operates to discharge a third party's liability to the insured. The reason they have not done so is that they have always assumed that third parties liable for insured losses are at fault, an assumption which is challenged at pp. 162-165, infra.

32 The question whether this procedural rule applies to all "simply subrogated" actions is discussed in part (7)(d), infra.
sue his rights against PL notwithstanding the fact that he has already received a payment in respect of them from S. If RH subsequently pursues his rights against PL and recovers from PL, he will have been paid twice over in respect of the same obligation. Provided that some unjust factor underlay S's payment to RH, then it may be observed that in this situation RH will have been doubly enriched and that one half of this double enrichment will have been unjustly gained at S's expense. The primary function of awarding S "simple subrogation" to RH's rights is to prevent RH from thus unjustly benefitting from S's payment.

The remedy also performs a secondary function, which in principle is less clear-cut, but which in practice has certainly influenced some judges to award the remedy. It may be observed that if RH decides not to pursue his rights once he has been paid, then although these rights subsist in principle, in practice PL will be enriched because RH will have effectively released him from the performance of his obligations. The secondary function performed by "simple subrogation" is to prevent PL's enrichment in the event that he would be thus effectively released from the performance of his obligations as a result of S's payment to RH.

It may be noted that both the primary and the secondary functions of "simple subrogation" are prophylactic: the remedy is awarded to prevent either the enrichment of RH, or

33 See the judicial dicta cited infra, p. 162, n. 108.
the enrichment of PL, at S's expense. Burrows\textsuperscript{34} has observed that for this reason ("simple") subrogation must therefore be taken to lie outside the mainstream of the law of restitution, if not outside the law of restitution altogether: the function of the remedy is not to reverse an enrichment already gained, but rather to prevent the possibility that an enrichment will be gained in the future, and the proper concern of the law of restitution is with the former, but not with the latter goal. In the writer's view, Burrows is right to emphasise the prophylactic nature of ("simple") subrogation, and his assertion that the law of restitution has no room for prophylactic measures must be semantically correct if the term "law of restitution" is taken to denote exclusively the law of reversing unjust enrichments once they have been conferred. However, given that the rationale underlying the award of "simple subrogation" is the prevention of unjust enrichment, and given also that the guiding principle of the law of restitution is the reversal of unjust enrichment, it may at least be said that the remedy's proper place is alongside the law of restitution, if not squarely within it.

It should be added here that in the writer's view where a third party S pays RH in respect of PL's obligations and his payment does not discharge those obligations, S should not be entitled to acquire RH's rights via "simple subrog-\textsuperscript{34} Burrows, pp. 81 and 92.
ation" if he is entitled to recover his payment from RH. In other words, in the writer's view it is an essential prerequisite for the award of "simple subrogation" that S should have paid RH in respect of PL's obligations in circumstances such that he is subsequently entitled neither to recover his payment from PL as money paid to PL's use, nor to recover his payment from RH, as money had and received. The reason for this is that where S is entitled to recover from RH, neither of the rationales underlying the award of "simple subrogation" will apply: there is no danger in this situation that RH will be paid twice over in respect of PL's obligation; nor is there any danger that PL will be effectively enriched at S's expense, as RH will not lack an incentive to sue PL in the same way that he would lack an incentive to sue PL, were he able to retain S's payment.

ii) "Reviving Subrogation"

"Reviving subrogation" arises in the following circumstances: as in the model for "simple subrogation" expounded above, a right-holder RH receives a payment in respect of the obligation owed to him by PL. In contrast to the situation giving rise to "simple subrogation", however, in this instance the payment which RH receives actually discharges

35 This situation may arise, for example, where S makes a payment to RH by mistake or under duress, and PL neither authorises nor subsequently ratifies S's payment: see the discussion in part (4), infra.
PL's obligations towards RH. Thus, RH both receives that to which he is entitled and, which is the difference, loses his entitlement to sue for it.

In this situation, S is the third party at whose expense PL's obligation is discharged. S may have discharged PL's obligation himself, by making a payment in respect of it directly to RH. Alternatively, S may have advanced money to PL, and in a separate transaction PL may have used this money to discharge the obligation he owes to RH; or S may have paid the money to some fourth party X, who in turn pays it to RH in respect of PL's obligation.

Insofar as PL's liability has been discharged at S's expense, it might be expected that S should be able to recover his money directly from PL. However, in some circumstances, the courts have thought it desirable to characterise S's right of recovery from PL not as a direct right of S's own, but rather as a right acquired by subrogating S to RH's position vis-à-vis PL. The fact that RH's right has been extinguished, and that there is therefore nothing left for S to take over, is overcome by the courts' saying that RH's right is fictionally revived for PL to take advantage of it.

One example of "reviving subrogation" arises in the law of principal and surety.\textsuperscript{36} When a surety pays a creditor

\textsuperscript{36} Discussed further in Chapter 2, part (2)(a)(i), infra.
in respect of a guaranteed debt, his payment discharges the creditor's personal right of action against the principal debtor, as well as many of the additional securities that the creditor may have held against the principal debtor. However, under the Mercantile Law Amendment Act, 1856, s. 5, the surety is entitled to take over all of the creditor's rights against the principal debtor and to pursue them for his own benefit, notwithstanding that they may technically have been extinguished by the surety's payment. It should be noted that in contrast to the general rule which prevails in the case of "simple subrogation", the surety may sue the principal debtor in his own name; he need not sue the principal debtor in the name of the discharged creditor, even though he may have acquired the discharged creditor's rights via "reviving subrogation" in order to enforce them for his own benefit.38

37 The full text of this section is given at pp. 124-125, infra.
38 Under the Mercantile Law Amendment Act, 1856, s. 5, the surety is given the right to bring a subrogated action in the creditor's name if he so chooses. However, he is not obliged to do so, and in practice it appears that sureties never exercise this right. This point is discussed further in part (7)(d), infra.

McGuinness, p. 213, describes the surety's entitlement to acquire the creditor's rights and to enforce them for his own benefit as "quasi-subrogatory", on the grounds that "the surety is entitled to sue the principal in his own name, whereas a person whose rights arise by subrogation may not". McGuinness is forced to describe the surety's rights as "quasi-subrogatory" because in his terms "subrogation" corresponds only to the "simple subrogation" described in the thesis. However, if the distinction drawn in the thesis between "simple" and "reviving" subrogation is acknowledged, the need to describe the surety’s right of

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In contrast to "simple subrogation", "reviving subrogation" is a remedy directed solely against PL's unjust enrichment at S's expense. The courts have on occasion used "reviving subrogation" to give S a disguised direct claim against PL where a direct claim appears prima facie to be barred for some policy reason. However, in the writer's view "reviving subrogation" should not be used in this way. If the courts wish to allow S to recover from PL notwithstanding a policy bar against his bringing a direct action, then they should allow him a direct claim against PL, at the same time setting out the countervailing policy which renders the prima facie policy bar inapplicable. The proper function of "reviving subrogation" is not to provide S with a disguised action for money paid to PL's use. Its proper function is rather to allow S in appropriate circumstances to acquire some secured right formerly held by RH, and to use this security to supplement S's own direct claim against PL. It is a difficult question when a claimant S should be entitled to acquire RH's extinguished secured rights via "reviving subrogation". This question is discussed below, in part (5).

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39 See e.g. the "invalid loan cases" and the cases concerning the business creditors of trustees, both of which are discussed in Chapter 4, part (2)(a), infra.

40 Cf. J.W. Wade, Cases and Materials on Restitution, 2nd ed. (Brooklyn, N.Y., 1966), p. 37: "[S]ubrogation in most cases is rather an additional remedy to an action for reimbursement than a mere incidental right."
iii) "Simple subrogation" and "reviving subrogation": a recapitulation

The Hon. Mr. Justice W.M.C. Gummow has remarked that:

"[U]nlike many equitable institutions, doctrines and remedies, a doctrine of unjust enrichment is not readily accommodated to the adjustment of tri-partite as distinct from bipartite relationships. Hence the difficulty of adjusting the doctrine of subrogation into the framework of a general scheme of unjust enrichment."

In the writer’s view, this difficulty may be overcome, and the cases in which subrogation has been awarded satisfactorily accounted for, once the key question is considered, whether or not the rights to which a claimant seeks to be subrogated have been previously extinguished by payment. The significance of this question lies in the fact that it serves to clarify exactly which enrichment or enrichments the remedy is directed against in each case. If RH's rights have been extinguished by payment, then the "reviving subrogation" to which a claimant S may be entitled should be seen as a remedy directed solely against the en-

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41 The Hon. Mr. Justice W.M.C. Gummow, "Unjust Enrichment, Restitution and Proprietary Remedies", Chap. 3 in Essays in Restitution, ed. P.D. Finn (Sydney, 1990), pp. 69-70.
richment of PL, the party to whose obligations RH's extinguished rights used to correspond. PL alone will have been enriched at S's expense, to the extent that he is released from his obligations to RH by S's payment. In contrast, if RH's rights have not been extinguished, then the "simple subrogation" to which S may be entitled should be seen as a prophylactic measure directed at preventing either the enrichment of RH or the effective enrichment of PL at S's expense which must alternatively follow where S cannot recover his payment from RH.

b) An exceptional case:* The Third Parties (Rights Against Insurers) Act 1930

It is not intended to discuss the situation which is covered by the terms of this Act in detail in the thesis, but a brief account of it must be given here.\textsuperscript{43} The Act app-

\textsuperscript{42} Cf. Langan, p. 92, n. 15, who categorises the remedy of subrogation provided by the Third Parties (Rights Against Insurers) Act 1930 as: "..."inverted", rather than true, subrogation."


In the same year that the Third Parties (Rights Against Insurers) Act was enacted, Parliament also enacted the Road Traffic Act 1930. The purpose of this Act and of subsequent legislation in the same area (currently contained in the Road Traffic Act 1972, ss. 143-151) has been to protect third party subrogation rights against insurers where, in particular, insured drivers responsible for causing injury to third parties have breached conditions of their motor insurance policies, with the result that the drivers' ins-
lies where a person who is insured against particular liabilities to third parties incurs such liabilities, and then subsequently becomes bankrupt. In these circumstances, the bankrupt insured's rights against the insurer are deemed by s. 1 of the Act to be transferred to, and to vest in the third party to whom the liability was incurred. In other words, the third party in these circumstances is entitled to acquire the bankrupt insured's rights against his insurer via "simple subrogation".

Putting this situation into the language of the basic model for subrogation propounded above, the character of "S", the party seeking to be subrogated, is here taken by the third party who has suffered some loss for which the bankrupt insured is liable. The characters of "PL" and "RH" are united and taken together by the bankrupt insured: he is primarily liable to S for the loss which S has suffered, but he also holds a right in respect of the obligators are not legally bound to pay. Thus, for example, under the Road Traffic Act 1972, s. 148(1), various policy conditions which seek to restrict the liability of insurers (e.g. the driver's age, the number of people in an insured vehicle, etc.) are deemed to be ineffective against third parties exercising their right to be subrogated to a bankrupt insured's claim against the insurers. For discussion, see C. Berry and E. Bailey, Bankruptcy: Law and Practice (London, 1987), pp. 353-356.

Or makes a composition or arrangement with his creditors. In the case of an insured company, the Act applies in the event of a winding-up order being made, or of a resolution for a voluntary winding-up being passed, or of a receiver or manager being appointed.

Note that the insurer is not directly liable under the terms of the policy to compensate the third party for his loss: the insurer is liable only to pay the insured.
ion that he owes to S, against his insurer. For this reason he may be dubbed "PL/RH".46

The purpose of allowing S to be "simply" subrogated to PL/RH's rights in this situation is to correct the injustice which would otherwise arise out of the rules concerning the distribution of PL/RH's assets in the event of his bankruptcy. It was held in Re Harrington Motor Co., Ltd.47 and Hood's Trustees v Southern Union General Insurance Co. of Australasia, Ltd.,48 that on PL/RH's bankruptcy his right to recover an indemnity from his insurer in respect of his liability towards S became vested in the trustee in bankruptcy, whose duty it was to recover on the policy for

46 There is some resemblance between the bankrupt insured in this situation and a trustee running the business of a trust, to whose rights of indemnity against the trust a creditor of the trust business may be "simply subrogated". However, although the trustee in such a situation is personally liable to the creditor, and also holds a right of indemnity in respect of his liability against the trust estate, it seems very artificial to characterise the trustee as primarily liable to the business creditor. In reality, it is the trust estate which takes the benefit of the business, and so it ought to be the trust estate which is primarily liable for whatever obligations are incurred in running the business. The reason that the business creditor cannot recover directly from the trust estate is that the trust estate is an entity which cannot be sued directly at law. But subrogating the business creditor to the trustee's right of indemnity achieves the same effect. The proper place of the cases concerned with business creditors of trustees therefore seems to be alongside the cases in which the courts have used subrogation to give a claimant a disguised direct claim against a defendant where there exists some policy reason why the claimant is prima facie barred from bringing a direct right of action against a defendant: see the discussion infra, at pp. 313-316.

47 [1928] Ch. 105.
48 [1928] Ch. 793.

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the benefit of PL/RH’s estate as a whole. S was held to have no special right to claim the fruits of any action brought against PL/RH’s insurer, even though it was his loss on which this action was founded, and he had instead to take his place alongside PL/RH’s other creditors when seeking to be compensated for his loss out of PL/RH’s assets. The 1930 Act was passed in response to these judgments: the rule they laid down was thought to put S into an unfairly weak position, and to give PL/RH’s other creditors a windfall they had done nothing to deserve.

4) Where RH is paid in respect of PL’s obligations, in what circumstances will PL’s obligations to RH be discharged and RH’s corresponding rights against PL extinguished?

As has been discussed in part (3)(a) above, two types of subrogation can be identified in the majority of the cases in which subrogation has been awarded:\textsuperscript{49} "simple subrogation", which operates to transfer subsisting rights of action, and "reviving subrogation", which operates to revive and then to transfer rights of action which have been extinguished by payment. It may be observed that before it can properly be determined whether a claimant should be entitled either to "simple" or to "reviving subrogation", it is essential to know whether the rights to which he

\textsuperscript{49} I.e., in all of the cases that do not fall within the ambit of the Third Parties (Rights Against Insurers) Act 1930.
seeks to be subrogated have been extinguished. Hence, the rules concerning the discharge of PL's obligations and the extinction of RH's corresponding rights must be made clear. These rules will be considered here in part (4). Following this discussion, in part (5) the basis on which a claimant S can be subrogated to RH's secured rights will be considered. In part (6) a commonly recurring misstatement of the principles upon which subrogation is awarded will be exposed and condemned. Finally, in part (7) four basic rules of general application to the law of subrogation will be set out and discussed.

In essence there are three different routes by which S's money can come to be paid to RH in respect of PL's obligations: S can pay money to PL, which PL then pays to RH; S can himself pay RH directly; S can pay money to some fourth party X, which X then pays to RH. Where S pays money to PL, which PL then pays to RH, it is trite law that PL's payment to RH will generally operate to discharge his obligations to RH. The only situation in which it appears that this rule does not hold good arises where the circumstances of S's initial payment to PL are such that he is entitled to recover his money from PL via a restitutionary action, and RH is aware of this fact at the time when he receives this money from PL. Where S is entitled to bring a restitutionary claim against PL, but RH is unaware of this and acts in good faith at the time when PL pays him, then in
principle RH should be entitled to raise in defence to any claim brought against him by S the fact that he has bona fide given value for his receipt of the money, the value he has given being the discharge of PL's obligations. This is suggested by analogy with Aiken v Short, where the plaintiff bankers paid money to the defendant under a mistake of fact, at the request of a third party, Carter, who owed a debt to the defendant. The plaintiffs were not allowed to recover their payment, notwithstanding their mistake, for the reason that:

"[T]he defendant had a perfect right to receive the money from Carter, and the bankers paid for him . . . ."

In contrast, where RH knows at the time of receiving PL's payment that the money he receives is money which PL is liable to repay to S, it appears that RH will himself be

50 It is not entirely clear whether RH's defence in these circumstances constitutes the defence of change of position or the defence of bona fide purchase for value. That these defences are distinct from one another, and that the latter should in principle be available to RH in the circumstances described in the text, is suggested by Lipkin Gorman v Karpnale Ltd. [1991] 2 A.C. 548, at 580-581, per Lord Goff of Chieveley. But cf. P. Birks, "Misdirected Funds: Restitution from the Recipient", [1989] L.M.C.L.Q. 296, pp. 301-302, and "The English Recognition of Unjust Enrichment", [1991] L.M.C.L.Q. 473, pp. 490-491, querying whether the defence of bona fide purchase for value can be raised against a personal restitutionary claim.

51 (1856) 1 H. & N. 210.

52 Ibid., at 214, per Pollock, C.B. See too ibid., at 215, per Platt, B. And see Friedmann and Cohen, pp. 58-59; Goff and Jones, pp. 108-110.
liable to repay this money to S, and that he will be unable to raise his transaction with PL in defence to S's claim. This is because S is entitled to have PL and RH's transaction set aside on the grounds that it is tainted by their shared knowledge of the circumstances of S's initial payment to PL. It appears to follow from this that where PL pays money to RH which PL is liable to repay to S, and RH knows of this at the time of receiving PL's payment, PL's obligations are not thereby discharged.

Turning to the situation where RH is paid not by PL, but by S or by some fourth party X, the cases can be divided according to whether or not PL has requested S or X to pay RH on his behalf. Where PL has requested another party to pay RH, it is clear that PL's obligations to RH will be discharged by this party's payment, provided that the payor has acted within the scope of his authority, and provided also that RH has bona fide given value for his receipt of the money without notice of any unjust factor entitling S to bring a restitutionary claim against him. Where PL has not expressly requested another party to pay RH on his behalf, however, matters are less straightforward. Consider-

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54 Disputes over the scope of the payor's authority might arise if PL's request that he pay RH is expressed in an ambiguous way: cf. Breed v Green (1816) Holt N.P. 204; Horlor v Carpenter (1857) 3 C.B.(N.S.) 172.
55 See the discussion in the above paragraph.
ered purely as a matter of principle, there is much to be said for the view that wherever a third party makes an unrequested payment to RH in respect of PL's obligations the effect of his payment should be to discharge PL's obligations automatically (i.e. regardless of whether PL subsequently ratifies his payment). Furthermore, it is clearly arguable that because the case-law is in a confused

56 Burrows, pp. 222-227, sets out a number of powerful arguments why an automatic discharge rule should be adopted as a matter of principle. These include the following: (i) The courts' rejection of a rule in favour of automatic discharge where an intervener pays voluntarily, under duress or by mistake originally derived from the courts' wish to protect PL's right to prevent the transfer of his obligations from RH to a third party, a right which has been rendered worthless by the fact that debts are now freely assignable (this point is also made by Birks and Beatson, p. 206, now Beatson, p. 194; and cf. J.W. Wade, "Restitution for Benefits Conferred Without Request", (1968) 19 Vanderbilt L.R. 1183, pp. 1206-1208). (ii) A rule against automatic discharge is not needed to protect RH's interest in shielding PL from a hostile intervener (cf. Norton v Haggrett 85 A. 2d. 571 (1952), discussed by Birks, pp. 311-312; Birks and Beatson, p. 206, now Beatson, pp. 194-195) because this job could be done equally well by denying a hostile intervener a remedy on the grounds that it is not unjust for PL to retain the benefit conferred on him by the intervener's discharge of his obligations; i.e. the intervener could be barred from bringing a claim on the ground that he had established no unjust factor, rather than on the ground that he had failed to confer a benefit on PL. (iii) The courts' adoption of a rule against automatic discharge by e.g. a mistaken payor cannot be reconciled with the law concerning the mistaken performance of another's duty to perform an irreversible and unrepeatable act, e.g. to repair a damaged bridge (as in Macclesfield Corporation v Great Central Railway [1911] 2 K.B. 528) or to clear a blocked drain (as in Gebhardt v Saunders [1892] 2 Q.B. 452). Once a damaged bridge is repaired, the damage cannot be repaired again. Hence, where an intervener performs an act of this kind, PL's obligation to perform the act will be discharged regardless of whether PL has authorised or ratified the intervener's performance (cf. Birks, p. 191).
state, and because support for an automatic discharge rule in the context of voluntary and mistaken payments can be found in some of the cases (though the opposite rule is set down in others), the House of Lords at least would be justified in holding that a rule in favour of automatic discharge should be generally adopted in the future.\(^5\) Having said this, however, in the writer's opinion the English authorities cannot sustain the view that a general rule in favour of automatic discharge has been adopted by the courts to date. The present position in English law is rather as follows:

(i) Where an intervener voluntarily makes an unrequested payment to RH in respect of PL's obligations, the general rule has prevailed in English law that such an intervener's payment will not discharge PL's obligations unless PL subsequently ratifies it. Thus, for example, it has recently been held in *Esso Petroleum Co, Ltd. v Hall Russell & Co, Ltd.*\(^6\) that where an intervener makes a voluntary payment to RH in respect of PL's tortious liability towards RH, PL's obligations will not be discharged in the absence of PL's subsequent ratification. And it has also been held in a series of cases that where a voluntary intervener pays a creditor RH in respect of his debtor PL's debt, the debt will not be discharged unless the debtor subsequently rati-


ifies the voluntary intervener’s payment. In the words of Parke, B.: 

"The general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise . . . appears to be, that it is not suffic-


Friedmann, pp. 541-542, argued that on the authority of **Walter v James** (cited supra) the rule in English law is rather that when a volunteer pays another’s debt the debt is automatically discharged, but that so long as the debtor does not ratify the intervener’s payment the creditor can revive the debt by repaying the intervener. In the writer’s view, though, this case establishes simply that a debtor cannot ratify a voluntary intervener’s payment made on his behalf to his creditor after the creditor has repaid the intervener; it does not hold that the debt is automatically discharged up until the creditor’s repayment. In any case, Friedmann now appears to have changed his mind: Friedmann and Cohen, p. 5, state that:

"[T]he prevailing view in English law seems to be that an unauthorised payment does not discharge the debt, even if accepted by the creditor (unless the debtor subsequently ratifies the payment or assents to it)."

60 **Simpson v Eggington** (1855) 10 Ex. 845, at 847.
lent to discharge a debtor unless it is made by the third person, as agent, for and on account of the debtor and with his prior authority or subsequent ratification."

It is true that several cases to the contrary effect may be cited, in which the courts have taken the view either expressly or impliedly that where a voluntary intervener pays a creditor RH in respect of PL's debt the debt is discharged automatically. However, the cases in which the opposite rule has been adopted are much the stronger line of authority.

61 Welby v Drake (1825) 1 C. & P. 557; Re Barnes (1861) 4 L.T.N.S. 60; Pellatt v Bookey (1862) 31 L.J.C.P. 281, at 284, per Willes, J.; Cook v Lister (1863) 13 C.B. (N.S.) 543, at 594-595, per Willes, J.; Hirachand Punam-chand v Temple [1911] 2 K.B. 330, at 339, per Fletcher Moulton, L.J.

62 Re National Motor Mail-Coach Co. Ltd. [1908] 2 Ch. 228; Re Cleadon Trust Ltd. [1939] Ch. 286 (discussed infra, Chapter 5, part (1)).

63 According to some authorities, if a voluntary intervener makes an unrequested payment to RH on the basis that PL's obligations will thereby be discharged, but PL does not ratify his payment with the result that PL's obligations are not discharged, the intervener is entitled to recover his payment from RH on the ground that consideration for his payment has totally failed: Walter v James (1871) L.R. 6 Exch. 124, at 127, per Kelly, C.B. See too Birks, p. 190; Birks and Beatson, p. 205, now Beatson, pp. 193-194; Goff and Jones, p. 17, n. 90. Against this proposition are Higgs v Scott (1849) 7 C.B. 63; Finck v Tranter [1905] 1 K.B. 427, at 429-430, per Lord Alverstone, C.J. (both cited by R. Sutton, "Payment of Debts Charged Upon Property", Chap. 4 in Essays on the Law of Restitution, ed. A. Burrows (Oxford, 1991), p. 77, n. 29).

In the writer's view, a voluntary intervener should in principle be entitled to recover from RH in the circumstances described. Friedmann and Cohen, p. 10, restating the
Two exceptions to the general rule against automatic discharge by a voluntary payment can be made out in the cases. A voluntary intervener has the capacity to discharge PL's obligations automatically notwithstanding his status as a volunteer, where he pays RH because he has an interest of his own in PL's property which he wishes to protect.64 And view taken in Friedmann, p. 539, argue that "if the creditor or abstains from suing the debtor or collecting the debt, he does all that the payor might have expected of him." Hence, they argue, consideration for S's payment cannot have totally failed in such circumstances, even though S's payment has not technically discharged PL's obligations. From this it follows that S should be unable as a matter of principle to recover his payment from RH on the ground of total failure of consideration. However, Beatson, p. 202, effectively counters that this argument: "... takes a performance based view of payment rather than an effect based view. There is no compelling reason for this. It is surely arguable that a payment made to discharge or settle the debt of another is made on the basis that the debt is in fact discharged and is conditional on such discharge being achieved."

To be absolutely sure of his right of recovery from RH in the event of PL failing to ratify his payment, however, a voluntary intervener would be well advised to specify at the time of paying RH that his payment is conditional on PL's obligations actually being discharged, rather than on RH's forbearance from suing on the debt.

64 The law in this area has recently been discussed in R. Sutton, "Payment of Debts Charged Upon Property", Chap. 4 in Essays on the Law of Restitution, ed. A. Burrows (Oxford, 1991) (hereafter, "Sutton"). Sutton, p. 79, gives the following summary of the cases:

"The part-owner of land may properly pay off debts charged against that land, and in doing so will effectively release the debtor's liability to the secured creditor, whether or not the debtor concurs."

It is common to find statements in the cases to the effect that where a part-owner S pays off RH's charge on PL's property, the charge is "kept alive for S's benefit": see e.g. Morley v Morley (1855) 5 De G.M. & G. 610, at 620, per Lord Cranworth, L.C. (quoted at p. 345, n. 42, infra). However, this is a metaphor which should be avoided, as there is a danger that it may obscure the true nature of the relationship between the parties. By specifying that
again, where a voluntary intervener pays out of necessity, in circumstances where the courts wish as a matter of general policy to encourage intervention by giving interveners a right of recovery, the effect of his payment is often deemed by the courts to be the automatic discharge of PL's obligations. The best explanation of these cases seems to be that where a volunteer pays RH either out of a form of self-protection that the courts are willing to foster, or in circumstances where the courts wish to encourage necessitous intervention, the courts enable him to discharge PL's debt regardless of whether or not PL subsequently ratifies his payment, as a matter of general policy.

S's payment to RH extinguishes RH's charge and that S is entitled to acquire it via "reviving subrogation", it is made clear that the remedy awarded to S is directed exclusively against PL. In contrast, the imagery of "keeping the charge alive" for S is ambiguous: it might lead the reader to suppose, wrongly, that S's payment has failed to discharge PL's obligations, and that S is awarded "simple subrogation" as a means of preventing RH from recovering twice over in respect of PL's debt.

For further discussion of the law in this area, see Chapter 5, part (2)(a)(i), infra.

65 See e.g. Jenkins v Tucker (1788) 1 H. Bl. 90; Green v Salmon (1838) 8 A. & E. 348; Ambrose v Kerrison (1851) 10 C.B. 776; Bradshaw v Beard (1862) 12 C.B. (N.S.) 344. See too Birks and Beatson, pp. 201 and 207, n. 9, now Beatson, pp. 190 and 196, n. 108; Burrows, p. 222; Goff & Jones, p. 344. For further discussion, see Chapter 5, part (2)(a) (ii), infra.

66 It might be argued that in some cases where an intervener pays through necessity, it is incorrect to classify him as a volunteer because the unjust factor of moral compulsion underlies his payment. And again, it might be argued that an intervener who pays off a charge over property to protect his own interest in the property is legally compelled to do so, in the sense that he pays to prevent the charge-holder from exercising his legal rights against the property. However, moral compulsion cannot be advanced
There are two exceptions to the general observation that a necessitous intervener's payment will automatically discharge PL's obligations. Where the intervener is the payor for honour supra protest of a bill of exchange, his payment will not operate to extinguish the bill.67 And where an insurer is not obliged to pay its insured RH under the terms of a policy, but it pays him nonetheless, its payment will not operate to extinguish whatever rights of action RH may have against a third party PL in respect of his loss.68

(ii) Turning to the cases in which some unjust factor underlies an intervener's payment to RH, it may be seen that as a matter of authority the position of a payor under leg-

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67 See the discussion infra, in Chapter 5, part (2)(b).

68 In this respect the insurer's position is obviously the same as that of an insurer that pays because it is legally obliged to do so under the terms of the policy: cf. the comment at p. 43, n. 31, supra.

The position of an insurer which pays its insured even though it is not legally obliged to do so is also discussed in Chapter 5, part (2)(b), infra. It is argued there that insurers have been awarded "simple subrogation" in such circumstances because the courts wish as a matter of general policy to encourage insurers to pay their insureds even though they are legally entitled to refuse payment on the grounds that the insured is in breach of some term of the policy.
al compulsion differs from that of other payors. Where a third party has contracted with PL to expose himself to secondary legal liability for PL's obligation to RH, e.g. by agreeing to become PL's surety, it follows that any payment which the third party may subsequently make to RH in respect of PL's obligation will have been expressly authorised by PL, with the result that this payment operates to discharge the obligation. However, the legal compulsion cases do not end there. In a series of cases a third party has successfully brought an action for money paid against a debtor PL, where he has paid RH in respect of PL's debt under legal compulsion, but where PL has neither previously requested him to pay, nor subsequently ratified his payment. The success of the third party's claim for reimbursement from PL in these cases suggests that he must have succeeded in conferring a benefit on PL by his payment to RH (viz., the discharge of PL's debt), regardless of the

69 On the distinction between the legal compulsion cases where PL has expressly requested a third party to pay, and those in which he has not, see: Re a Debtor (No. 627 of 1936) [1937] Ch. 156, at 166, per Greene, L.J.; Anson v Anson [1953] 1 Q.B. 636, at 641-643, per Pearson, J.
70 Sapsford v Fletcher (1792) 4 T.R. 511, at 514, per Grose, J.; Exall v Partridge (1799) 8 T.R. 308; Taylor v Zamira (1816) 6 Taunt. 524; Moule v Garrett (1872) L.R. 7 Exch. 101; Edmunds v Wallingford (1885) 14 Q.B.D. 811. Cf. Regional Municipality of Peel v Ontario (1988) 49 D.L.R. (4th) 759. And cf. Johnson v Royal Mail Steam Packet Co. (1867) L.R. 3 C.P. 38, which may be alternatively explained as a case where the third party who paid PL's debt did so in order to protect his own interest in PL's property.
fact that PL neither authorised nor ratified his payment.\textsuperscript{71}

There are two exceptions to the automatic discharge rule in the context of payments under legal compulsion: where an insurer pays its insured, this payment does not extinguish any rights of action the insured may have against a third party in respect of the insured loss; and where the drawer or indorser of a bill of exchange pays the holder, his payment does not extinguish the bill.\textsuperscript{72}

(iii) In contrast to the legal compulsion cases, where some other unjust factor underlies an intervener's unrequested payment, e.g., mistake or duress, the weight of authority favours the view that in the absence of PL's subsequent ratification, this payment will not discharge PL's obligations. The view that a payor under duress cannot succeed in discharging PL's obligations automatically is arguably borne out by Walker v Duncombe,\textsuperscript{73} a case which is discussed in Chapter 2, part (1), below. And authority for the view that a mistaken payor cannot automatically discharge PL's obligations by making an unrequested payment is to be found in Barclays Bank Ltd. v W.J. Simms Son & Cooke (Southern) Ltd.\textsuperscript{74} Here, Robert Goff, J. held that a bank which paid

\textsuperscript{71} Cf. Birks and Beatson, p. 200, now Beatson, pp. 188-189.
\textsuperscript{72} These situations are considered in Chapter 2, part (2)(b)(i) and (ii) respectively.
\textsuperscript{73} (1824) L.J. (O.S.) K.B. 80.
\textsuperscript{74} [1980] Q.B. 677. See too the cases cited infra, p. 260, n. 72. And cf. The Gore Bank v The Municipal Council of the County of Middlesex (1859) 16 U.C.Q.B. 595; Martell v Whitten (1867) 5 Nfld. L.R. 200 (discussed infra, p. 333,
its customer PL's creditor RH in the mistaken belief that PL had requested it to do so did not thereby discharge PL's obligations to RH, and he allowed the bank to recover its payment from RH. It is true that a number of cases to the opposite effect can be cited, in which an intervener has made an unrequested payment to RH under a mistake, and the courts have assumed that PL's obligations are thereby automatically discharged.\(^7\) However, in the writer's opinion the Court of Appeal's decision in *Re Cleadon Trust Ltd.*\(^7\) casts serious doubts on this second line of cases, and for this reason Robert Goff, J.'s judgment in *Barclays v Simms* must be taken to constitute the stronger authority. These mistake cases are discussed in Chapter 3, part (2)(b)(i).

5) On what basis should a claimant S be entitled to acquire RH's secured rights via subrogation?

There is no reason in principle why a claimant S should not acquire RH's subsisting secured rights against PL via "simple subrogation" in appropriate circumstances,\(^7\) but in

\(^7\) See *B. Liggett (Liverpool) Ltd. v Barclays Bank Ltd.* [1928] 1 K.B. 48, and the cases cited at p. 256, n. 65, *infra.* And cf. *County of Carleton v City of Ottawa* (1965) 52 D.L.R. (2d) 220 (but *quaere* whether this case might not be reclassified as one of necessitous rather than of mistaken intervention?).

\(^7\) [1939] Ch. 286.

\(^7\) The drawer or indorser of a bill of exchange who pays the holder is entitled to be "simply subrogated" to the holder's securities against the acceptor, for example. See the cases cited at p. 210, n. 214, *infra.*
practice it happens more often that a claimant S seeks to acquire RH's extinguished secured rights via "reviving subrogation". For this reason it is intended in this part to make some preliminary observations on the nature of "reviving subrogation" and then to relate these to the current academic debate on the basis of proprietary restitutionary claims in general. It should be noted here, though, that the general question of when proprietary restitutionary remedies should be awarded is as pertinent to the issue of when a claimant should be "simply subrogated" to RH's subsisting secured rights as it is to the issue of when "reviving subrogation" to RH's extinguished secured rights should be awarded.

a) The nature of "reviving subrogation"

Birks\textsuperscript{78} has pointed out that allowing S to take over RH's extinguished rights via ("reviving") subrogation is equivalent to allowing S to trace his money into a negative asset which survives in PL's hands: the discharge of his obligation towards RH. If S pays money which can be traced into the discharge of PL's obligations to RH, S will generally be unable to recover his money from RH because RH can raise in defence to S's claim the fact that he has \textit{bona fide} given value for his receipt of the money, the value he has

given being the discharge of PL's obligations. However, for so long as PL would have been liable to RH, had his obligation not been discharged, it is possible to say that an enrichment gained at S's expense survives in PL's hands, its quantum fixed by reference to RH's extinguished rights. Birks concludes that ("reviving") subrogation is thus "only semantically different from the imposition of direct restitutio

79 See discussion at pp. 56-58, supra.
80 Birks, p. 191.

Contra, Beatson, p. 204:
"[S]ubrogation . . . puts the intervener [S] in the creditor's [RH's] shoes for the purpose of taking over claims previously maintainable by the creditor. This means that, like the assignee, the intervener will be in no better position than the creditor . . . It is for this reason that it is not possible to regard restitutionary subrogation as only semantically different from the imposition of direct restitutionary obligations."

However, the fact that S can be put into no better position than that formerly occupied by RH, i.e. that his subrogated claim against PL will be subject to whatever defences and counter-claims PL can raise against RH, does not disprove Birks' contention that subrogating S to RH's former claims amounts to allowing S to trace his payment into the discharge of PL's obligations. All it does is to complicate the issue of quantum: PL is enriched at S's expense to the extent that his obligations are discharged, i.e. by the amount of his debt, less an amount representing whatever defences and counter-claims he may have had against RH. This is the measure of his surviving enrichment, and this is the amount which S should therefore be entitled to recover from him via "reviving subrogation" to RH's rights, in what amounts to no more than a direct restitutionary claim. The balance S should be able to recover from RH, since it corresponds to the amount which RH was not entitled to claim from PL, and RH should therefore be unable to raise in defence to S's claim the fact that he has given the discharge of PL's obligations as value for his receipt of S's money.
viving subrogation" is only another way of expressing the idea that S can trace his money into the discharge of that security, and that the security has become impressed with S's rights of ownership in the same way that, for example, a car which PL had bought with S's money would have become impressed with S's rights of ownership once S had traced his money into the purchase of the car.

It is true that there is Court of Appeal authority which casts doubt on this analysis. In Re Diplock, certain charities which had been paid money by the executors of a will in the mistaken belief that such payments were authorised under the terms of the will used this money to pay off their secured debts. The Court of Appeal held that the testator's next-of-kin properly entitled to the money could not trace the money into the discharge of the charities' former creditors' securities, on the grounds that once these securities had been extinguished they could not be revived for the next-of-kin's benefit. However, it is submitted that the Court of Appeal was incorrect to assume that no mechanism exists in English law to revive extinguished rights of action for the benefit of claimants whose money has been paid to the former right-holders: the numerous cases discussed in the thesis in which "reviving subrogation" has been awarded are clear evidence that this

81 [1948] Ch. 465.
82 Ibid., at 549, per Lord Greene M.R., Wrottesley and Evershed L.JJ.
assumption was mistaken. By analogy with these cases, the next-of-kin in Re Diplock should have been allowed to acquire the securities formerly held by the charities' creditors by means of "reviving subrogation". 83

b) The basis upon which a claimant S should be entitled to acquire RH's security via "reviving subrogation"

Given that allowing a claimant S to acquire RH's old security via "reviving subrogation" is equivalent to allowing him to trace his payment into the negative asset of the discharged security which survives in PL's hands, then it follows that the basis upon which S should be allowed to acquire RH's discharged security must be identical with the basis upon which a restitutionary claimant should be allow-

83 Re Byfield [1982] 1 Ch. 267, at 272, per Goulding, J. See too Birks, pp. 372-375; Goff & Jones, p. 531; Hanbury and Maudsley's Modern Equity, 13th ed. by J.E. Martin (London, 1989), pp. 642-643; Maddaugh & McCamus, p. 181; Snell's Principles of Equity, 29th ed. by P.V. Baker and P. St.J. Langan, (London, 1990), p. 302, n. 206. Contra, Burrows, p. 83, who restates the Court of Appeal's position in Re Diplock, that "as with any other dissipation, the discharge of another's debt ends the tracing claim." And cf. D.J. Hayton, "Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?", Chap. 9 in Equity, Fiduciaries & Trusts, ed. T.G. Youdan (Toronto, 1989), p. 218, who suggests that ("reviving") subrogation should not have been awarded to the next-of-kin, on the ground that it would have been inequitable to order a sale of the charities' property.

Cf. McCullough v Marsden (1919) 45 D.L.R. 645, where a trustee misappropriated trust money and used it to pay off a mortgage on his land, and the cestuis que trust were held to be entitled to be subrogated to the position of the discharged mortgagees to the extent of the fraudulent trustee's payments.
ed to bring a tracing claim against a positive asset like a

car. In Birks' words, "[t]here is a different kind of asset

involved, [but] not a different mode of effecting resti-
tution."84 And in Friedmann and Cohen's words:85

"[I]t is possible to generalise that under Anglo-

American law whenever a person is entitled to trace

property in the hands of another and that property was

used by the other to discharge a debt, the person en-
titled to tracing will be subrogated to the rights of

the creditor whose debt has, thus, been discharged."

From this it follows that once the basis upon which a

claimant should be allowed to bring a tracing claim is made

out, the basis upon which a claimant should be entitled to

"reviving subrogation" will also have been discovered.

Unfortunately, the law in this area is confused and con-
troversial. In the first place, as the law stands at pres-
ent a restitutionary claimant who wishes to have the equit-
able tracing rules applied for his benefit to enable him to

bring a proprietary claim must first demonstrate that a

fiduciary relationship existed at the time of his payment,

between himself and his initial payee. This requirement

84 Birks, p. 96.
85 Friedmann and Cohen, p. 22.
was set down by the Court of Appeal in *Re Diplock*, and although it was recently said by Millett, J. to depend upon "authority rather than principle", in *Agip (Africa) Ltd. v Jackson*, when this latter case was appealed, the Court of Appeal disappointingly failed to take up his suggestion that the "fiduciary requirement" be reconsidered, and indeed restated that:

"[I]t is a . . . prerequisite to the operation of the remedy [i.e. tracing] in equity that there must be a fiduciary relationship which calls the equitable remedy into being."

The "fiduciary requirement" has been widely criticised by academic commentators. The Court of Appeal's stipulation in *Re Diplock* that a fiduciary relationship is required before an equitable tracing claim can be brought derived from its interpretation of *Sinclair v Brougham*. Yet the

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86 [1948] Ch. 465, at 540, *per* Lord Greene, M.R., Wrottesley and Evershed, L.JJ.
87 [1990] Ch. 265, at 290.
facts of *Sinclair v Brougham* do not sustain the view that a fiduciary relationship was present in the case,\(^9^1\) and the House of Lords' *dicta* in the case on this issue are inconsistent\(^9^2\) (a fact of which the Court of Appeal in *Re Diplock* were well aware\(^9^3\)). Goff and Jones have commented that the courts' continuing insistence on a fiduciary relationship as a prerequisite of tracing in equity is related to two phenomena:\(^9^4\)

"[T]he class of fiduciaries has always been a very wide one. And the courts have always been ready "to discover" a fiduciary relationship in order to enable a plaintiff to trace."

This latter tendency may be illustrated by reference to *Chase Manhattan Bank N.A. v Israel-British Bank* (London)

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\(^9^1\) As Goff and Jones, pp. 70-71, point out, the directors of a building society, like the directors of a company, owe a fiduciary duty to the society; they do not owe a fiduciary duty to the shareholders, and still less do they owe a fiduciary duty to the depositors. Cf. *Farrar's Company Law*, 3rd ed. by J.H. Farrar, N.E. Furey, B.M. Hannigan and P. Wylie (London, 1991), pp. 380 *et seq.*


\(^9^3\) [1948] Ch. 465, at 518, *per* Lord Greene, M.R., Wrotesley and Evershed, L.JJ.:

"[Their Lordships' speeches in *Sinclair v Brougham* are] . . . not only difficult to follow but difficult to reconcile with one another."

\(^9^4\) Goff and Jones, p. 71.
Here, Goulding, J. found a "fiduciary relationship" to exist between a mistaken payor and payee, a finding that was clearly prompted by his desire to allow Chase Manhattan to bring a tracing claim in respect of its mistaken payment rather than by reference to the realities of Chase Manhattan’s relationship with Israel-British, commercial competitors who in truth owed one another no fiduciary duty at all. The effect of this verbal contortionism is to rob the term "fiduciary relationship" of its proper meaning. Instead of "discovering" fiduciary relationships to have existed wherever it seems desirable to allow an equitable tracing claim to be brought, the courts would do better to abandon the "fiduciary requirement" altogether.

Setting the issue of the "fiduciary requirement" to one side, there remains to be considered the more fundamental question of the basis upon which restitutionary claimants should be allowed to assert proprietary claims. There is a growing body of academic literature on this subject. See particularly: Birks, pp. 375-401; Burrows, pp. 40-45, 369-375; Goff and Jones, pp. 77-81, 114-116, 247, 439, 571, 622-623, 635, 656, 673-674; Maddaugh and McCamus, pp. 78-100. See too: R.H. Maudsley, "Proprietary Remedies for the Recovery of Money", (1959) 75 L.Q.R. 234; J.L. Dewar, "The Development of the Remedial Constructive Trust", (1982) 60 Can. B.R. 265; R.M. Goode, "Ownership and Obligation in Commercial Transactions", (1987) 103
are two main schools of thought. In Birks' view, a claimant should be permitted to bring an equitable tracing claim only where he can show that he has a "proprietary base", i.e. where he can show that he began by owning, and that he retained some legal or equitable proprietary right in the property which he seeks to recover. Put another way, in Birks' view a claimant can assert a proprietary claim to property only where he can show that substitutions and mixings aside, he had a proprietary interest in the property at the moment before the substitutions began. In contrast, Goff & Jones contend that it is open to the


Goff and Jones, p. 63.
courts to allow a claimant to bring a proprietary claim wherever the circumstances of a case are such that it would be just and equitable to do so.  

Both of these approaches present difficulties. The writer agrees with Birks' criticism of Goff & Jones' discretionary approach, that the issue of when a claimant should be entitled to bring a proprietary claim ought not to be tackled "as though it were something to be decided from case to case on the basis of abstract reasonableness or justice". In response to this criticism, Goff & Jones have stated that they do not believe that allowing the

99 Goff and Jones also appear to favour as a subsidiary analysis the view that a claimant should be allowed a proprietary remedy wherever it can be shown that he has not voluntarily taken the risk of the defendant's insolvency: Goff and Jones, pp. 114-116, 247, 635 and 673-674. Cf. Maddaugh and McCamus, pp. 95-96; E.L. Sherwin, "Constructive Trusts in Bankruptcy", [1989] Univ. of Illinois L.R. 297, esp. pp. 335-337. And see too Space Investments Ltd. v Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd. [1986] 1 W.L.R. 1072, at 1074, per Lord Templeman; Lord Napier and Ettrick v Hunter [1993] 1 A.E.R. 385, at 396, per Lord Templeman (quoted at pp. 180-181, infra). However, it is far from clear that this approach is satisfactory, and at the very least it is in need of qualification. Even if it is accepted that e.g. a mistaken payor's claim is inherently worthier than that of the victim of a breach of contract (which is flatly denied by Burrows, p. 42, and by A. Tettenborn, Note, [1980] 39 C.L.J. 272, pp. 274-275), it cannot invariably be said the defendant's other creditors will have consciously taken the risk of his insolvency, not least because some of them will never have had the opportunity to do so, e.g. the victims of the defendant's torts and the defendant's employees (who have only limited protection as secured creditors under the Insolvency Act 1986, s. 386 and Sched. 6). Cf. D.M. Pacciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors", (1989) 68 Can. B.R. 315, pp. 324-325.  

100 Birks, p. 378.
courts the discretion to grant a restitutionary proprietary claim would produce an "unacceptable measure of uncertainty into the law."\textsuperscript{101} Notwithstanding this disclaimer, though, in the writer's view, Birks' approach is to be preferred because it sets out to explain the award of restitutionary proprietary claims on a more rigorous basis, and would render the award of proprietary claims more predictable if it were generally adopted.

Having said this, however, it must be conceded that not all of the "reviving subrogation" cases concerning real security can be satisfactorily explained in accordance with Birks' "proprietary base" theory. In particular, Birks' theory can account neither for the legal compulsion cases of this kind discussed in Chapter 2, part (2) nor for the failure of consideration cases of this kind discussed in Chapter 4, part (1). In both sets of cases claimants have been allowed to acquire extinguished secured rights via "reviving subrogation", even though property in their money unequivocally passed away from them at the time when they made their payments, with the result that they cannot be said to have had a "proprietary base" to their claim. It does not follow from this that Birks' "proprietary base" analysis should be jettisoned altogether. In the writer's view, where a claimant can show that he has a surviving "proprietary base", this remains the best possible explan-

\textsuperscript{101} Goff & Jones, p. 78, n. 11a.
ation of why he should be entitled to revive an extinguished real security into which his payment can be traced. It is submitted that this is the best explanation why some payors under mistake, for example, are entitled to such a remedy.\textsuperscript{102} However, it is apparent that some alternative explanation is required of the cases in which a claimant who cannot have had a "proprietary base" has been allowed to revive a real security, if the view is taken that these cases are correctly decided, and an attempt will be made to provide such alternative explanations as are needed in the relevant sections below.

6) An influential misstatement of the law: the "presumption in S's favour that RH's security be kept alive for S's benefit"

It is often said in cases concerning subrogation to be a general rule that wherever S's money is used to discharge RH's secured rights against PL, S is entitled to a presumption in his favour that he intended to have RH's security kept alive for his own benefit.\textsuperscript{103} The origins of this

\textsuperscript{102} For further discussion, see Chapter 3, infra.
supposed rule can be identified in a late nineteenth century case, *Patten v Bond*.\(^{104}\) Here, a piece of property which was held on trust for the defendants was mortgaged to secure a debt of £1,000. The mortgagee later demanded that £600 be repaid to him, but no trust funds were available to pay him off. The defendants' trustees therefore requested the plaintiffs to pay this money to the mortgagee, and the plaintiffs paid the mortgagee as requested. Subsequent to the plaintiffs' payment, the defendants obtained a transfer to themselves of the balance of the mortgage debt from the mortgagee.\(^{105}\) The plaintiffs then brought an action alleging that they were entitled to acquire the discharged mortgage to the extent of their payment (via "reviving subrogation"), and Kay, J. held in their favour.

In retrospect, it can be seen that on the facts of the case the plaintiffs might have been entitled to succeed on one of two grounds. It is at least arguable that they should have been entitled to succeed on the ground that

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\(^{104}\) (1889) 60 L.T. 583.

\(^{105}\) Hence, no difficulties of the kind outlined in part (7)(c), *infra*, arose from the fact that the plaintiffs had paid only part of the mortgage debt.
their payment was made under necessity:106 at one point in
his judgment, Kay, J. commented that "it is a clear salvage
case".107 Alternatively, since it appears that the money
which the plaintiffs paid was improperly taken from a sec­
ond trust of which the plaintiffs were both trustees,108 it
seems arguable that the cestui que trust of this second
trust should have been entitled to trace this misapprop­
riated money into the discharge of the mortgage.109 For
the purposes of this discussion, however, the significant
part of Kay, J.'s judgment occurs at the point at which he
considered the nature of the plaintiffs' advance, and held
that one ground upon which they should be entitled to succ­
eed was that:110

"[T]here can be no doubt that transactions of this
kind are within the well-known rule of equity laid down
in Forbes v Moffatt111 and Burrell v Lord Egremont112
that, where a person not interested in the equity of
redemption pays off part of the mortgage, that is not a
discharge; it is not the intention that that should be
a complete discharge. The court always looks at the

106 Cf. the discussion in Chapter 5, part (2)(a)(ii),
infra.
107 (1889) 60 L.T. 583, at 585.
108 Ibid., at 586, per Kay, J.
109 Cf. McCullough v Marsden (1919) 45 D.L.R. 645,
discussed infra, pp. 229-230.
110 (1889) 60 L.T. 583, at 584-585.
112 Burrell v The Earl of Egremont (1844) 7 Beav. 205.
intention of the parties, and presumes an intention to do that which is most for the benefit of the party who pays the money. The court will assume that the mortgage is not discharged, even though the whole of the debt was paid off to the mortgagee, but considers it to be kept on foot in equity for the benefit of the person who paid."

Burrell v Lord Egremont was cited to Kay, J. in Patten v Bond by counsel for the plaintiffs,\(^\text{113}\) from whose submission, it therefore seems reasonable to suppose, he derived the statement of law quoted above. Unfortunately, this statement of the law comprises a misapprehension of the decisions in Forbes v Moffat and Burrell v Lord Egremont. The true significance of these cases was and is that they provide an equitable exception to the doctrine of merger\(^\text{114}\) for the benefit of part-owners of property who pay off a charge secured on the property. As is discussed below, in Chapter 5, part (2)(a)(i), a part-owner who pays off a charge over a piece of property in which he has a present

\(^{113}\) (1889) 60 L.T. 583, at 584, arguendo.

interest is entitled to acquire the charge via "reviving subrogation" for his own benefit, in order to defeat the claims of intermediate incumbrancers. The rule established in these cases is predicated upon the assumption that the party in whose favour it is invoked has some present interest in the property in question. The position in Patten v Bond was fundamentally different. The plaintiffs in the case had no present interest of their own in the property held on trust for the defendants, and Kay, J.'s assertion that the rule in Forbes v Moffatt and Burrell v Lord Egremont extended to encompass claimants with no present interest in the property in question was entirely unjustified, both as a matter of authority and as a point of principle.

In retrospect it can be seen that in this part of Kay, J.'s decision the law of subrogation took a wrong turning. His statement of the law was followed in Chetwynd v Allen\footnote{[1899] 1 Ch. 353, at 356, \textit{arguendo}, and at 357, \textit{per} Romer, J. This case is discussed at p. 249, n. 57, \textit{infra}.} and Butler v Rice\footnote{[1910] 2 Ch. 277, at 280, \textit{arguendo}, and at 283, \textit{per} Warrington, J. This case is discussed at pp. 273-275, \textit{infra}.}, and its influence through the medium of these two cases is discernible in many cases to this day.\footnote{See the cases cited \textit{supra}, at p. 80, n. 103.} Yet as a matter of principle, where \( S \) is a party with no present interest in a piece of property it cannot be correct to say that he should be entitled to acquire a security over that property simply on the grounds that...
money has been used to pay off the security. For all this goes to show is that some other party or parties have been enriched at S’s expense. It does not demonstrate that their enrichment is in any way unjust, and unless S is able to demonstrate some reason why their enrichment at his expense is unjust he cannot be entitled to subrogation. By using the language of a fictional intent to keep securities alive, the courts have obscured the most important question which arises wherever a security is paid off, namely whether there is a legally recognised reason why the party who pays the security-holder should be allowed restitution. If there is none, then he can be no more entitled to acquire the extinguished security via "reviving subrogation" than he is to recover his payment by means of any other restitutionary remedy.

To an extent this has been acknowledged in certain cases where it is said that if a claimant S has acted voluntarily, or has contracted to make an unsecured loan, this constitutes an "exception" to the "general rule" in S’s favour and that S is therefore not entitled to subrogation.\textsuperscript{118} But this acknowledgement by the courts that the "rule" in question tends to produce indefensible results unless "ex-

ceptions" to it can be made out only confirms the view that the "rule" is insupportable as a matter of principle and should be jettisoned. Before "simple" or "reviving subrogation" can be awarded, a claimant must first be able to establish a reason why PL and/or RH's enrichment at his expense is unjust. No species of restitutionary claim can succeed until it clears this hurdle.

7) Four basic rules of general application to the law of subrogation

a) The rules of tracing

Before a claimant S can be awarded either "simple" or "reviving" subrogation, he must be able to demonstrate that it is his money which has been used to pay RH; if he cannot do this, then he will have failed to demonstrate that PL and/or RH have been or may be enriched at his expense, and for this reason he cannot be awarded subrogation as a restitutionary remedy. Where S has made a direct payment to RH it should be a simple evidential matter for him to establish that his money has been paid to RH. However, where S's money has passed through PL's hands, or through the hands of some fourth party, before it is paid to RH, then evidential problems may arise for S in establishing that it was identifiably his money which was paid to RH.

One case in which a claimant S failed to win its claim to acquire RH's security via "reviving subrogation" because it
was unable to establish that RH was paid with its money is Parkash v Irani Finance Ltd.\textsuperscript{119} Here, a building society S advanced money to the purchaser of a piece of property. The purchaser paid the money to the vendor, PL, who then simultaneously conveyed the property to the vendor and paid off RH, the holder of a charge over the property. S's claim\textsuperscript{120} to acquire this charge by "reviving subrogation" failed, on the ground that S had failed to show that the money which the vendor PL had used to pay RH could be identified as the same money which S had advanced to the purchaser and which the purchaser had paid to PL.\textsuperscript{121}

With regard to the question of whether the courts will strictly apply the technical rules of tracing in the context of subrogation cases, Klippert has suggested that "a trend away from the formalism of the old equity rules will be seen in the subrogation cases."\textsuperscript{122} It is difficult to assess the accuracy of this prediction for the law of subrogation as a whole, for the reason that the courts have not generally acknowledged the relationship between subrog-

\textsuperscript{119} [1970] Ch. 101.
\textsuperscript{120} Although this was not stated in the case, the ground on which S might have been entitled to "reviving subrogation" was that its money was paid under a mistake of fact. It mistakenly believed at the time of advancing its money to the purchaser that RH's charge was the only charge over the property. In fact, a second charge was created before the property was conveyed by PL to the purchaser. For further discussion of claims of this sort, see Chapter 3, part (2)(a)(i) and (ii), infra.
\textsuperscript{121} [1970] Ch. 101, at 111, per Plowman, J. See too the exchange at 107, between Plowman, J. and S's counsel.
\textsuperscript{122} Klippert, pp. 212-213.
ation and tracing, and so do not often explicitly address themselves to this issue. However, a number of cases may be noted here, that have arisen in the context of what is now the Insolvency Act 1986, s. 386 and Schedule 6, para. 11, in which the courts have strictly applied the rule in Clayton's case to determine the position of banks who have lent money to employers for employees' wages, and who have then sought to be subrogated to the employees' preferential status in the employers' insolvency. In contrast to these cases, though, it may be noted that the Court of Appeal adopted a much more flexible approach in a recent case which also concerned a subrogated claim, Barlow Clowes International Ltd. (in liq.) v Vaughan. Here, the Secretary of State for Trade and Industry indemnified many of the investors with the Barlow Clowes investment group for their losses following the collapse of the group after investors' money was misappropriated by the group's directors. In exchange for the Secretary of State's payment the investors assigned their claims in the group's insolvency to him, and authorised him to pursue their claims in their

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123 Formerly the Companies Act 1948, s. 319(4).
124 (1817) 1 Mer. 572.
125 Re E.J. Morel (1934) Ltd. [1962] Ch. 21; Re Ramp-gill Mill Ltd. [1967] Ch. 1138; Re William Hall (Contract- ors), Ltd. [1967] 2 A.E.R. 1150; Re Unit 2 Windows Ltd. [1985] 3 A.E.R. 647. These cases are discussed further at pp. 299-301, infra.
names but for his own benefit. In effect, the Secretary of State was "simply subrogated" to the investors' claims under a term of his contract with the investors.\(^ {127} \) In contrast to the cases already discussed, the issue raised by the case was not whether the Secretary of State could identify the money he had paid to the investors. The issue raised by the case was rather which of the investors could identify their money in the insolvent company's remaining assets. The Court of Appeal overruled Peter Gibson, J.'s decision at first instance, that the rule in Clayton's case should be applied and the group's remaining assets distributed to a small number of the most recent investors. The Court of Appeal held instead that all the investors should be given a claim in the group's liquidation, assessed rateably according to what Woolf, L.J. described as a pari passu ex post facto formula.\(^ {128} \) The effect of this decision was to give the Secretary of State a proportionately larger share of the group's remaining assets via his "simply subrogated" claims than he would have acquired if

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\(^ {127} \) Cf. the discussion in Appendix 2, infra. Even if the Secretary of State had not stipulated for "simple subrogation" in his contract with the investors, it seems arguable that he should have been entitled to "simple subrogation" in any case, following his payment to the investors in necessitous circumstances: cf. the discussion in Chapter 5, part (2)(b), infra.

\(^ {128} \) Ibid., at 36. At 41, Woolf, L.J. claimed that the court had the discretion to distribute the group's remaining assets by the most "equitable" formula available, a claim that is attacked by Birks, cited supra, n. 126, p. 235, as a "recipe for uncertainty and more litigation".
the Court of Appeal had strictly applied the rule in Clayton's case.

b) S cannot recover more than he has actually paid

As a general rule the courts have held that a claimant S cannot be allowed to use subrogation, "simple" or "reviving", to recover from PL a greater amount than the sum which S himself has paid. Thus, for example, an insurer S which has paid its insured RH is not entitled to acquire more than the amount paid by bringing a subrogated action against a third-party tortfeasor PL and the same prin-

130 Glen Line Ltd. v Attorney-General (1930) 36 Com. Cas. 1, at 14, per Lord Atkin. Cf. The Livingstone 130 F. 746 (1904), at 751, per Coxe, C.J.:

"[E]quity and good conscience do not require the court to go further and permit [an insurer S] to realize an enormous profit from the transaction . . . By limiting [S's] recovery within the bounds of indemnity we are on safe and logical ground, where exact justice is done to both parties and where injustice to either is impossible."

It is for this reason that (pace Goff and Jones, p. 546, who view abandonment as "part of the doctrine of subrogation") abandonment must be distinguished from subrogation. When an insured abandons his rights over the subject-matter of an insurance contract to his insurer, i.e. where he tenders notice of abandonment to the insurer and the insurer accepts it, all property rights in the res will thenceforth vest in the insurer, and the insurer will be entitled to whatever profits it can make on the res, even if they exceed the amount of the insured loss: Page v Scottish Insurance Corp. (1929) 140 L.T. 571, at 575, per Scrutton, L.J.; Glen Line Ltd. v Attorney-General (1930) 36 Com. Cas. 1, at 14, per Lord Atkin; Compania Columbiana de Seguros v Pacific Steam Navigation Co. [1965] 1 Q.B. 101, at 121, per Roskill, J.; L. Lucas Ltd. v Export Credit Guarantee Dept. [1973] 1 W.L.R. 914, at 924, per Megaw, L.J. For discussion of the distinction between abandonment and subrogation,
c) Part payments

As a general rule, neither "simple" nor "reviving" subrogation will be made available to a claimant $S$ until $R$ has been fully paid in respect of $P$'s obligation. The reason for the rule is that as between $S$ and $R$, $R$ has the primary right to recover from $P$, and his right of recovery must not be prejudiced by allowing $S$ to interfere with $R$'s efforts to come against $P$. If $S$ has part-paid $R$ in respect of $P$'s obligation, and $R$ then recovers the full amount of $P$'s obligation from $P$, $R$ will be obliged to account to $S$ for a proportion of the amount he recovers from $P$.

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131 Butcher v Churchill (1808) 14 Ves. Jun. 567, at 575-576, per Sir W. Grant, M.R.; Reed v Norris (1837) 2 M. & C. 361, at 375-376, per Lord Cottenham, L.C.; Jamieson v Trustees of the Property of Hotel Renfrew [1941] 4 D.L.R. 470, at 479, per Roach, J. Similarly, a surety who pays a principal debt at a discount can claim only a rateable contribution from his co-sureties: Ex parte Snowdon (1881) 17 Ch. D. 44, at 47, per James, L.J.

PL corresponding to S's prior part-payment. But it is clear that as a general rule until RH has been paid in full, S cannot claim to be subrogated to RH's position.

To give some examples of the rule in operation: an insurer S cannot claim to be "simply subrogated" to its insured RH's rights to sue a third party tortfeasor PL until the insured is fully indemnified for his loss; hence, if there is an excess clause in the policy, for example, even if the insurer pays the insured the full amount owing under the policy, the best view seems to be that the insured will nonetheless be entitled to remain dominus litis of any action brought against a third party, because he will not have been fully indemnified for his loss. Again, if a surety S pays only part of a guaranteed debt to the creditor RH, the surety cannot as a general rule claim to acquire RH's rights against the principal debtor PL via "reviving subrogation" because PL's obligation to RH will not have been

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133 This rule applies to e.g. insureds (see Lord Napier and Ettrick v Hunter [1993] 1 A.E.R. 385, discussed infra, pp. 177-187) and to holders of bills of exchange (see discussion infra, pp. 203-205).

134 In addition to the examples given here, see the discussion of part payments made by drawers and indorsers to holders of bills of exchange, infra, in Chapter 2, part (2)(b)(ii).

135 Commercial Union Assurance Co. v Lister (1874) L.R. 9 Ch. App. 483. Cf. G.R. Veal, "Subrogation: The Duties and Obligations of the Insured and Rights of the Insurer Revisited", (1992) 28 Tort & Ins. L.J. 69, pp. 82-84. The question of whether it is a full indemnity or an indemnity to the extent of the policy which must be paid before the insurer can claim to be "simply subrogated" to the insured's rights is controversial: see Derham, Chap. 6, esp. pp. 53-55.
discharged. And again, where a debtor PL executes two successive charges over his property, and the second chargee S voluntarily pays part of the debt owed by PL to the prior chargee RH, with a view to protecting his own interest, the second chargee S cannot claim to acquire a proportionate share in RH’s charge via "reviving subrogation" until after RH has been paid in full.

There are some exceptions to the general rule: if a creditor RH has agreed that he will accept less than full payment from a surety S in full discharge of his rights, then S will become entitled to acquire RH’s rights against PL via "reviving subrogation" on paying RH the agreed sum; though as has been said already, S may not recover from PL more than he has actually paid. And again, where a surety S has agreed to guarantee a limited but distinct portion of a debt, and he then pays the creditor RH in respect of that part of the debt, it appears that he will thereupon be entitled to be subrogated to any securities given by the principal debtor PL in respect of that portion of the debt, though not to securities given in respect of another port-

136 Ewart v Latta (1865) 4 Macq. 983, at 989, per Lord Westbury; Ex parte Turquand (1876) 3 Ch. D. 445; Ex parte Brett (1871) L.R. 6 Ch. App. 838, at 841, per Sir G. Mellish, L.J.; Re Dalziel (a debtor) [1987] 2 N.Z.L.R. 696, at 699, per Grieg, J.
137 See discussion infra, Chap. 5, part (2)(a)(i).
139 See the cases cited at p. 91, n. 131, supra.
ion of the same debt, or to securities given for a different debt altogether.\textsuperscript{140} In contrast, where the surety has agreed to guarantee the whole debt, but has limited the amount of his liability to a fixed amount, after paying to the extent of his liability he will be entitled to share pro rata in securities held by the creditor for the whole debt, but he will be unable to exercise this right until the creditor has been paid in full.\textsuperscript{141} Whether a surety has agreed to guarantee a limited portion of a debt, or the whole of a debt to a limited extent is a matter of construction for the courts.\textsuperscript{142}

d) Procedural considerations: in whose name must a subrogated action be brought?

Subject to two exceptions which will be described below, it may be said that as a general rule the distinction which is drawn in the thesis between "simple" and "reviving subrogation" is reflected in the procedural rules to which a claimant $S$ must conform when bringing a subrogated action

\textsuperscript{140} Langan, pp. 28-29, citing Wade v Coope (1827) 2 Sim. 155; Hobson v Bass (1871) L.R. 6 Ch. App. 792; Gray v Seckham (1872) L.R. 7 Ch. App. 680; Wilkinson v The London & County Banking Co. (1884) 1 T.L.R. 63.

\textsuperscript{141} Langan, p. 30, citing Bardwell v Lydall (1831) 7 Bing. 489; Thornton v M'Kewan (1862) 1 H. & M. 525; Hobson v Bass (1871) L.R. 6 Ch. App. 792; Goodwin v Gray (1874) 22 W.R. 312; Re Sass [1896] 2 Q.B. 12, at 15-16, per Vaughan Williams, J.; Re Fenton [1931] Ch. 85, at 115, per P.O. Lawrence, L.J.

\textsuperscript{142} For the principles of construction that will be applied in the context of limited guarantees, see Rowlatt, pp. 67-68.
against PL. Thus, as a general rule where S is entitled to acquire RH's subsisting rights against PL via "simple subrogation", he must bring his subrogated action against PL in RH's name, a requirement which reflects the fact that RH's rights against PL are not extinguished by S's payment, that S therefore has no direct action of his own against PL, but that S is entitled to be substituted for RH as a means of preventing RH or PL's alternative enrichment at his expense. And in contrast, where S is entitled to acquire RH's extinguished rights against PL via "reviving subrogation", he is not required to sue PL in RH's name, but may sue PL in his own name, reflecting the fact that his payment has extinguished RH's rights, that he is entitled to bring his own direct action against PL, but that he is also entitled to supplement this direct right of action by enforcing for his own benefit the extinguished securities formerly held by RH against PL.

The locus classicus of "simple subrogation" arises in the context of insurance law.\(^{143}\) The rule has been clearly established that an insurer which claims to be "simply subrogated" to its insured's rights of action against a third party must bring its "simply subrogated" action in the insured's name,\(^{144}\) and the insurer does not appear on

\(^{143}\) Discussed further in Chapter 2, part (2)(b)(i), infra.  
\(^{144}\) London Assurance Co. v Sainsbury (1783) 3 Doug. K.B. 245; Simpson & Co. v Thomson (1877) 3 App. Cas. 279, at 284, per Lord Cairns, L.C., and at 293, per Lord Black-
the record as a party to the action. That this rule extends generally to all cases where a claimant brings a "simply subrogated" action is suggested by the House of Lords' decision in Esso Petroleum Co. Ltd. v Hall Russell & Co. Ltd. This case concerned the claim of a voluntary payor of another's tortious liability to be "simply subrogated" to the victim's subsisting right of action against the tortfeasor, and it is argued below, in Chapter 5, part (1) that the plaintiff should not have been entitled to "simple subrogation" in the case because of its status as a


145 Wilson v Raffalovich (1881) 7 Q.B.D. 553, at 558, per Brett, L.J.; Dawson v Bankers and Traders Insurance Co. Ltd. [1957] V.R. 491, at 506, per Sholl, J.

volunteer. For present purposes, however, the significance of the case lies in the fact that the House of Lords held that the plaintiff's action failed on the procedural ground that it was brought in the plaintiff's name, rather than in the name of the parties to whose rights against the tortfeasor the plaintiff claimed to be "simply subrogated".\textsuperscript{147}

One exceptional case spoils this picture: when the drawer or indorser of a bill of exchange pays the bill to the holder, the effect of his payment is not to extinguish the bill, and he is entitled to demand that the holder deliver it up to him so that he can then either sue the acceptor or some other prior party to the instrument on the bill or renegotiate it as he sees fit.\textsuperscript{148} In the writer's view these rules constitute an example of "simple subrogation", yet it is clear that the drawer or indorser, after stepping into the position formerly occupied by the holder, is not required to sue the acceptor or some other prior party on the bill in the holder's name.

Turning to the case of "reviving subrogation", it is quite clear from all the cases of "reviving subrogation" discussed in the thesis that a party who has acquired extinguished rights via "reviving subrogation" need not purs-

\textsuperscript{147} Ibid., at 662-663, \textit{per} Lord Goff of Chieveley, and at 674, \textit{per} Lord Jauncey of Tullichettle.

\textsuperscript{148} For further discussion, see Chapter 2, part (2)(b)(ii), \textit{infra}.
ue these rights in the name of the former right-holder.\textsuperscript{149} It is true that under the terms of the Mercantile Law Amendment Act 1856, s. 5,\textsuperscript{150} payors of another's debt under legal compulsion are entitled "if need be and upon a proper indemnity, to use the name of the creditor in any action, or other proceeding" to recover an indemnity from the debtor. However, it should be noted that they are not obliged under the section to use the creditor's name, that they no longer\textsuperscript{151} derive any obvious advantage from doing so, and that in practice it appears that they never exercise this right.\textsuperscript{152}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{150} The full text of this section is given at pp. 124-125, infra.
\item \textsuperscript{151} Cf. G. Williams, Joint Obligations (London, 1949), p. 125, quoted at p. 119, infra.
\item \textsuperscript{152} Cf. Swire v Redman (1876) 1 Q.B.D. 536, at 541, per Lord Cockburn, C.J., quoted at p. 120, infra.
\end{enumerate}
\end{footnotesize}
CHAPTER 2: COMPULSION

The cases discussed in this chapter all concern the situation where S makes a payment under compulsion, and his money is paid to RH in respect of the obligations owed to RH by PL. In part (1) the situation will first be briefly considered, where S is illegitimately compelled to pay, either by duress or by undue influence. In part (2) the situation will then be examined at much greater length, where S pays because he is legally obliged to do so. It should be noted that this chapter does not contain an account of every situation in which subrogation has been awarded to a payor under compulsion. The now obsolete rules concerning the award of subrogation to a sheriff legally compelled to pay the creditor of an escaped debtor will be considered in Appendix 3: because the award of subrogation to the sheriff must be set in the context of the complex rules which governed the creditor's initial action against the sheriff, it is desirable for the sake of clarity to examine the sheriff's position separately from the other legal compulsion cases. The situation where S makes a payment under moral compulsion is discussed in Chapter 5, the chapter on voluntary payments, in part (2)(a)(ii) and (2)(b): this category of compulsion at present enjoys only a limited degree of acceptance in English law, and claimants who might arguably have been categorised as payors under moral
compulsion have often been denied recovery in the past on the grounds that they have acted voluntarily.\(^1\) Payments of ultra vires public demands have been excluded from discussion altogether. Besides the fact that these have recently been held in the House of Lords to be sui generis and so outside the scope of analysis as payments under compulsion,\(^2\) no cases have been found in which the payor of an ultra vires public demand has sought to be subrogated to the rights of the public authority's discharged former creditors.\(^3\) This is unsurprising, given the evidential diffic-

\(^1\) It should be added here that not all of the cases discussed in Chapter 5, part (2)(a)(ii) and (b), can be explained by reference to the unjust factor of moral compulsion. It is apparent in some of them that recovery has been allowed to claimants who have acted not been motivated by moral compulsion at all, but who have paid in circumstances where the courts have a general policy of encouraging intervention by allowing interveners to recover. Since there is a significant degree of overlap between these two kinds of case, i.e., since claimants often feel morally compelled to pay in situations where the courts wish to encourage intervention as a matter of general policy, it seems desirable to consider all of these cases together, in Chapter 5.


ulties that would stand in the way of such a claim: in the great majority of cases, it would be impossible for the payor of an *ultra vires* public demand to demonstrate that the public authority subsequently used what was identifiably his money to discharge the claims of its creditors.

1) Duress and Undue Influence

No cases have been found in which a payor under duress or undue influence has brought an action claiming subrogation. However, some general remarks can be made on the possibility that such a claim might be brought in the future.

It should be stated first that in the writer's view a payor under illegitimate compulsion retains a proprietary interest in the money he pays because his intention to transfer his ownership of the money to his payee is vitiated by the element of illegitimate compulsion underlying his payment.\(^4\) In this respect the position of a payor under illegitimate compulsion may be likened to that of a payor under an induced mistake. In both cases, the payor is en-

\(^4\) Cf. Phoenix Assurance Co. of Canada v Corporation of the City of Toronto and Zaidan Group Ltd. v City of London, both cited supra, n. 3, which could arguably be explained on this basis.

And cf. Goff and Jones, p. 247:

"There is no authority on the question whether a person who pays money or confers some other benefit under duress has, in addition to a personal claim, a restitutionary proprietary claim. In our view the courts should grant the coerced person such a claim and should not be inhibited from doing so by the absence of any fiduciary relationship."
titled to rescind the contract under which he agreed to pay
*ab initio*, and in both cases the payor therefore has a
"proprietary base" to his claim to recover his money suffi­
cient to allow him to trace his money into the discharge
of secured rights, and to acquire these via "reviving
subrogation" in appropriate circumstances.

Having said this, it remains to be considered when such
circumstances might arise. Two issues in particular must
be addressed when considering the remedies which are avail­
able to S, a payor under illegitimate compulsion, whose mo­
ney is paid to RH in respect of the obligations owed to RH
by PL. First, it must be asked whether PL has authorised
or ratified the payment to RH. If it is found that PL has
done neither, then it must follow from this that his oblig­
ations to RH are not discharged,5 that S may be entitled to
recover his money from RH, but that he can be entitled nei­
ther to bring a direct restitutionary action against PL nor
to acquire RH’s rights against PL via "reviving subrogat­
ion". Only one authority has been found to support this
proposition,6 and the report of the case in question is un­
fortunately rather perfunctory. *Walker v Duncombe*7 con­

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5 Cf. Birks and Beatson, pp. 201 and 207, now Beatson, pp. 189-190 and 195.
6 But cf. Goff and Jones, p. 320, contending that if a
party S’s goods are wrongfully taken in distress for anoth­
er party PL’s rent, S’s payment to recover the goods "would
not of itself discharge the liability of the party primar­
ily liable to pay".
7 (1824) L.J. (O.S.) K.B. 80.
ned a dispute between S, the purchaser, and PL, the vendor of two houses. Ownership of the houses brought with it the right to occupy two pews in the parish church, but at the time of the sale the church was being renovated, and the pews were about to be rebuilt at the expense of their owners. S and PL agreed that PL would pay the churchwardens for the cost of rebuilding the pews. However, PL failed to do this. As a result, when S sought to occupy the rebuilt pews, he was obstructed by various other parishioners who claimed that since the pews were not paid for, S had no right to occupy them. After a year, S himself paid the churchwardens the cost of rebuilding the pews and then sought to recover this amount from PL as money paid for PL's use. According to the scanty report of the case, the court held against S on the grounds that he had not been denied the right to occupy the pews by anyone with proper authority to do so. However, it is notable that the report also states\(^8\) that the day before S's action was commenced, PL himself paid the churchwardens the cost of rebuilding the pews, suggesting that he was entitled in this way to repudiate S's payment on his behalf.

A second issue must be addressed: even where PL has authorised or ratified the payment to RH, this in itself may be insufficient to determine the question of whether PL's obligations are discharged, for the reason that RH will not

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\(^8\) Ibid., at 81.
be entitled to retain the money paid to him if he has been a party to the illegitimate pressure brought to bear on S. As a general rule, it is clear that where third parties have received money which has been paid under illegitimate compulsion they must return the money, whether or not they have notice of the pressure which has been brought to bear on the payor. A third party who has no notice of the illegitimate pressure brought to bear on the payor and who has bona fide given value for his receipt of the money should have a defence to the payor's claim. However, where RH has notice of the pressure brought to bear on S this defence will not be available to him, and he will be obliged to repay S notwithstanding the fact that he has purported to give value for his receipt of the money in the form of the discharge of PL's obligations. Because PL and RH are both

9 Bridgeman v Green (1757) Wilm. 58; Huguenin v Baseley (1807) 14 Ves. Jun. 273; Morley v Loughnan [1893] 1 Ch. 736, at 757, per Wright, J.

10 This is suggested by analogy with a series of cases in which the bona fide purchaser of property that was conveyed to the vendor by the original owner under duress was held to have a defence against the original owner's claim: Greenslade v Dare (1855) 20 Beav. 284; Cobbett v Brock (1855) 20 Beav. 524, at 531, per Sir J. Romilly, M.R.; Bainbrigge v Browne (1881) 18 Ch. D. 188, at 197, per Fry, J.; Treadwell v Martin (1976) 67 D.L.R. (3d) 493.

11 Cf. the position where a party S is unduly influenced by PL to act as PL's guarantor. S cannot be legally compelled to pay PL's creditor RH on the guarantee where RH had notice of the undue influence, or left it to PL to arrange for S to act as PL's surety in circumstances where RH knew that PL was able to influence S unduly: Barclays Bank plc v O'Brien [1992] 3 W.L.R. 593, and cases cited therein. See too Burrows, p. 197, n. 4; E.A. Dunbill, Note, (1990) 54 Conv. 226; E. Macdonald, "Undue Influence and Third Parties", (1989) J.B.L. 469.

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aware of S's claim at the time when they enter into their transaction, the transaction must be set aside as tainted, suggesting that PL's obligations cannot have been discharged, nor RH's corresponding rights extinguished.

Thus, it appears that two requirements must be fulfilled before it can be said that PL's obligations to RH are discharged, leaving S with the right to recover his payment in a direct action for money paid against PL and in appropriate circumstances to supplement this right by acquiring RH's extinguished rights against PL via "reviving subrogation". First, PL must have authorised or ratified the payment to RH. Secondly, RH must have been ignorant of the illegitimate pressure brought to bear on PL. A case in which both of these requirements seem to have been met, and in which "reviving subrogation" could therefore arguably have been awarded to S if the facts of the case had varied slightly was Re Hooper and Grass' Contract.12 Here, again, S was the purchaser and PL the vendor of a piece of property. A dispute arose over which of them should be obliged to pay an irrigation charge owed to the water authority RH in respect of a period before the property was conveyed to S. In fact, PL paid the charge and then improperly threatened to refuse to proceed with the contract of sale unless S paid him in respect of his payment, and Fullagar, J. therefore

held\textsuperscript{13} that S was entitled to recover his payment to PL in an action for money had and received. However, it is submitted that if the facts of the case had differed slightly, and PL had refused to proceed with the contract unless S himself paid RH, and RH was unaware that PL had illegitimately pressurised S in this way, then S should still have been able to recover his money from PL, this time as money paid to PL's use. Varying the facts of the case still further, if the water authority RH had had a lien over the property with priority over a second charge over the property executed by PL in favour of a fourth party X, then on paying the water authority S would in principle have been entitled to acquire its lien via "reviving subrogation" so as to acquire priority over X's charge to the extent of S's payment.

2) Legal Compulsion

The following account of the award of subrogation to payors under legal compulsion will be divided into two sections. In section (a) will be considered those cases in which S is legally compelled to pay RH in respect of PL's obligations, and the effect of S's payment is to extinguish RH's rights against PL. In some of the cases discussed in section (a), PL expressly authorises S to pay on his behalf; for example, in the sureties cases discussed in sect-

\textsuperscript{13} Ibid., at 272-273.
ion (a)(i), the principal debtor PL agrees with his surety S that S will assume secondary liability for PL's obligations, with the result that when S pays the creditor RH, this payment is ipso facto authorised by PL. In contrast to this situation, though, in certain other cases discussed in section (a), PL does not expressly authorise S's payment and S's payment is taken to discharge PL's obligations nonetheless; for example, in the cases concerning the assignees of leases, discussed in section (a)(iii), where an initial lessee S is legally compelled to pay the lessor RH in respect of the obligation owed to RH by PL, an assignee of S's own assignee, S's payment is taken to discharge PL's obligation notwithstanding the fact that S and PL have no direct contractual relationship, and that PL has not expressly requested S to pay. It follows that the cases discussed in section (a) cannot all be explained by reference to the fact that PL has expressly requested S to pay on his behalf, and that in some of them another explanation is required for the fact that S's payment discharges PL's obligations. The best explanation, which is in fact equally applicable to all the cases discussed in section (a), is that S and PL are subject to RH's common demand. S and PL are both legally liable to pay RH even though as between S and PL it is PL on whom the burden of paying RH should primarily rest. Hence, when it is S rather than PL to whom RH looks for payment, S is legally liable to pay, but because
his liability is only secondary to PL's liability, his payment is deemed by law to discharge PL's obligations and he is entitled to recover from PL in an action for money paid. In Goff and Jones' words, "the law compels [S] to make the payment and therefore enables him, although a stranger, to discharge the liability of [PL]."

The cases discussed in section (b) are of a different type. In these cases, a party S is legally compelled to pay RH in respect of an obligation owed to RH by PL, but, for reasons which will be discussed, S's payment leaves RH's rights against PL intact. They are not extinguished by S's payment. In section (b)(i) will be considered the position of an insurer S which is legally compelled to pay its insured RH in respect of an insured loss for which a third party PL is liable, and in section (b)(ii) will be considered the position of a drawer or indorser of a bill of exchange (other than an accommodation bill), who is legally compelled to pay the bill's holder RH.

Before entering into further discussion of payments under legal compulsion, it must be said here that it is impossible to account for the award of subrogation to secured rights to payors under legal compulsion on the basis of "proprietary base" reasoning. This is because when a party S pays a right-holder RH in respect of the obligations primarily owed to RH by PL, but for which S is himself also

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14 Goff and Jones, p. 320.
legally liable, property in S's money unequivocally passes to RH, with the result that S cannot subsequently claim to have retained a proprietary interest in the money. This follows from the fact that S is legally obliged to pay RH. Hence, some alternative explanation is required for all of the cases discussed in this part in which a payor under legal compulsion S is allowed to acquire RH's securities via subrogation. The best available alternative explanation seems to be that whilst S and PL are subject to RH's common demand, it is PL on whom the burden of paying RH should primarily lie, and hence that PL's property should not be exonerated from the burden of paying RH where PL has previously given RH a security over his property in respect of his debt, but RH has chosen nonetheless to enforce his rights against S.

a) Where S's payment discharges RH's rights, and S is entitled to acquire RH's rights via "reviving subrogation"

There are a number of different parties who have been awarded "reviving subrogation" in the past because they have made payments under legal compulsion in respect of obligations for which they are only secondarily liable. Their claims will be discussed in turn in the following subsections: (i) sureties; (ii) drawers and indorsers of accommodation bills of exchange; (iii) assignees of leases; (iv) payors of another's tax. In sub-section (v), certain auth-
orities will be set out, which stand for the proposition that further payors under legal compulsion should be similarly entitled to "reviving subrogation" in the future.

i) Sureties

It is clearly established in English law that a surety S who pays a creditor RH is thereupon entitled to acquire by "reviving subrogation" RH's rights, personal and proprietary, against the principal debtor PL. The following account will consider (a) the surety S's right to acquire RH's personal rights against PL, and (b) S's right to acquire RH's secured rights against PL via "reviving subrogation".

a) The surety S's right to acquire RH's personal rights against PL via "reviving subrogation"

A contract of guarantee may contain an express provision entitling the surety who has paid a guaranteed debt to be indemnified by the principal debtor. And at least since the fifteenth century, where a principal debtor has expressly promised to "save the surety harmless", the surety


has been entitled to enforce that promise by bringing an action in contract to recover from the principal debtor whatever sums he has been obliged to pay the creditor.\textsuperscript{17} In the absence of a counter-bond or an express promise to save harmless, though, sureties seem to have had no remedy to recover their payments before the seventeenth century, when the Chancery courts began for the first time to allow them to bring a direct non-contractual action to recover their payments from their principal debtors.\textsuperscript{18} The first clear case of the courts allowing a surety without a counter-bond to recover his payment as money paid to the principal debtor's use, in an action of indebitatus assumpsit at common law, seems to have been brought about one hundred years later, in 1731.\textsuperscript{19}


If the surety decides to bring an action for indemnity against the principal debtor founded on the express terms of the contract of guarantee, he cannot also claim to take the benefit of his restitutionary rights against the principal debtor: Toussaint v Martinant (1787) 2 T.R. 100; Cooper v Jenkins (1863) 32 Beav. 337, at 339-340, per Sir J. Romilly, M.R.

\textsuperscript{18} J.B. Ames, Lectures on Legal History (Cambridge, Ma., 1913), p. 156. Early cases were Ford v Stobridge (1632) Nels. 24; Layer v Nelson (1687) 1 Vern. 456 (where it was stated to be the custom of the city of London that "where a surety pays a debt, and has no counter-bond... he shall maintain an action against the principal"); Hungerford v Hungerford (1708) Gilb. Eq. Rep. 67, at 69, per Lord Cowper, L.C.

\textsuperscript{19} Morrice v Redwyn (1731) 2 Barn. K.B. 26. In Bosden v Thinne (1603) Yelv. 40, it was expressly held that no action for assumpsit would lie in the absence of an express promise to repay, and in Scot v Stephenson (1662) 1 Lev. 71, it was conceded by counsel that no remedy at law was

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The count for money paid recited that the surety had paid the money at the request of the principal debtor who was taken impliedly to have agreed to repay the money expended on his behalf by the surety. This has led some judges and academic commentators to conclude that the surety's available. However, it was suggested obiter in Butcher v Andrews (1698) Carth. 446, at 446, per Holt, C.J. that an indebitatus for money paid might lie.


21 Decker v Pope, cited supra, n. 19, per Lord Mansfield:

"[W]here a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise at law, and to charge the principal in an action for money paid to his use."

See too Batard v Hawes (1853) 2 E. & B. 287, at 296, per Lord Campbell, C.J.; Re_a Debtor (No. 627 of 1936) [1937] Ch. 156, at 160, per Slessor, L.J., and at 163, per Greene, L.J.; Anson v Anson [1953] 1 Q.B. 636, at 641-642, per Pearson, J.

right of indemnity is best characterised as arising out of an implied term of the contract of guarantee. In contrast, others have sought to avoid this characterisation because it raises the spectre of the quasi-contractual language which until recently has hindered a clear understanding of restitutionary principles in English law, and they have sought instead to characterise the surety’s right of indemnity as an incident of the general restitutionary principle, that a party discharging another’s liability under legal compulsion is entitled to recover his payment from the other, to prevent the other’s unjust enrichment at his expense. The difficulty with this latter analysis is that it fails to account adequately for the surety’s right to recover certain types of incidental expenditure he incurs in meeting his liability under the guarantee, which cannot be said to have benefitted the principal debtor:


23 See Birks, pp. 29-39; Goff and Jones, pp. 5-12.


25 Brittain v Lloyd (1845) 14 M. & W. 762, at 773, per Pollock, C.B.; Badeley v Consolidated Bank (1886) 34 Ch. D. 536, at 556, per Stirling, J., affirmed in part (1888) 38 Ch. D. 238.

Sureties have been permitted to recover e.g. (i) reasonable expenses incurred when taking a principal debtor into custody in order to surrender him (where the surety had stood as bail for the principal debtor, who then absconded): Fisher v Fallowes (1804) 5 Esp. 171; (ii) legal costs reasonably incurred in defending an action brought against him by the creditor, or in contesting the existence of the
the surety's expenditure does not benefit the principal debtor, the principal debtor cannot be said to have been unjustly enriched at the surety's expense. To account for the surety's entitlement to recover incidental expenditure, some writers have adopted another approach again, and have sought to characterise the surety's payment as an unjust sacrifice on the principal debtor's behalf, on the basis of which the surety is entitled to recover his expenditure even though this cannot be measured in terms of benefit conferred on the principal debtor. This may well be the best explanation of the surety's right of recovery, though it is controversial whether in principle the concept of unjust sacrifice has a place in the law of restitution. If it

principal debt: Duffield v Scott (1789) 3 T.R. 374; Beech v Jones (1848) 5 C.B. 696; Baxendale v London, Chatham & Dover Railway Co. (1874) L.R. 10 Exch. 35; Hornby v Cardwell (1881) 8 Q.B.D. 329; though the surety may not claim the costs of a defence brought purely for his own benefit (e.g. that he was not liable as a surety: South v Bloxham (1865) 2 H. & M. 457; Re International Contract Co. (1872) L.R. 13 Eq. 623, at 624, per Sir J. Wickens, V.-C.), nor may he claim costs attributable to his own neglect or default (e.g. the costs of execution against him: Pierce v Williams (1854) 23 L.J. Exch. 322).


27 Burrows, pp. 4-6, attacks the concept of unjust sacrifice, principally on the grounds that it lacks moral force to justify legal intervention on a claimant's behalf. At p. 5, he asks: "Why should a defendant be made to pay for loss suffered by the plaintiff unless he is causally responsible for it or has benefitted from it?" Yet in the context of the sureties cases, it surely can be said that
does not, then it is necessary to fall back on the implied contractual term analysis, adherents of which can certainly point to the fact that it meets the difficulty of the surety's right to recover incidental expenditure.\[28\]

Whatever the correct explanation of its basis, it is clear that at least since the middle of the eighteenth century a surety S has had the right to recover his payment to the creditor RH from the principal debtor PL by bringing a direct claim at common law against PL for money paid to PL's use.\[29\] It is with this fact in mind that S's right to acquire RH's personal rights against PL via "reviving sub-

the principal debtor is causally responsible for the incidental expenditure incurred by the surety in the course of paying under the guarantee, since this expenditure would never have been incurred but for the debtor's default.\[28\] Cf. Goff and Jones, pp. 324-5, and Maddaugh and Mc-Camus, p. 202, who ground their common conclusion that the surety's right to be indemnified derives from an implied term of his contract with the principal debtor precisely on the observation that his right of recovery is not limited to the benefit actually conferred on the principal debtor.\[29\]

The surety's right of indemnity comes into operation only after he has made a payment to the creditor; the mere fact he has incurred a liability to pay in itself gives him no right of recovery: Re Richardson [1911] 2 K.B. 705, at 709, per Cozens-Hardy, M.R.; Re Mitchell [1913] 1 Ch. 201. When first requested by the creditor to pay, though, the surety can bring quia timet proceedings to obtain an order directing the principal debtor to pay the creditor: Rowlatt, pp. 136-138.

The surety need not have paid the whole of the debt for his right of indemnity to arise; whenever he pays any part of the guaranteed debt, he may there and then bring a claim against the principal debtor for the amount paid: Davies v Humphreys (1840) 6 M. & W. 153, at 167, per Parke, B. It should be borne in mind, though, that the surety's right to acquire the creditor's securities via "reviving subrogation" does not arise until the creditor is paid in full: see cases cited at p. 93, n. 136, supra.
rogation" must now be considered. There is some authority that sureties were entitled to do this at common law before 1856: in Walker v Preswick,\(^{30}\) Lord Hardwicke, L.C. laid down that:\(^{31}\)

"The rule of the court is, if the plaintiff is intit­led [sic] to relief against both defendants, and one ought to indemnify the other defendant, who is decreed to pay the plaintiff, the court often gives liberty to that defendant to prosecute the decree against the oth­er. As where a surety pays money, the principal must undoubtedly indemnify the surety and the court will make that decree [i.e. the creditor's action against the principal debtor] over."

Subsequent to this case, though, the view prevailed that a surety could not take over those of the creditor's rights as were technically extinguished ipso facto by his pay­ment,\(^{32}\) and the creditor's personal right of action cer­tainly must have fallen into that category.\(^{33}\) Hence, it was

\(^{30}\) (1755) 2 Ves. Sen. 622.  
\(^{31}\) Ibid., at 622.  
\(^{32}\) See the cases cited infra, at p. 122, n. 39.  
\(^{33}\) This is suggested not only by analogy with the cases cited infra, at n. 39, but also by an examination of the pre-1856 rules concerning the surety's right to prove in the principal debtor's bankruptcy:

(1) Where a principal debtor PL defaulted, and the surety S paid the whole debt to the creditor RH before PL's bank­ruptcy was declared, then S could prove for his payment in PL's bankruptcy. If S paid only part of the debt, RH could
still prove for the whole debt in PL's bankruptcy, and if RH proved for the whole debt, the rule against double proof prevented S from proving for the amount he had paid. However, S was entitled to a proportion of RH's dividends, calculated according to the amount of his prior part-payment: Ex parte Turner (1796) 3 Ves. Jun. 243; Ex parte Rushforth (1805) 10 Ves. Jun. 409; Paley v Field (1806) 12 Ves. Jun. 435.

(2) Where PL defaulted and was declared bankrupt before S paid RH, if RH proved in PL's bankruptcy and S subsequently paid him, then S was entitled to take RH's dividends: Ex parte Rushforth, ibid., at 417 and 419, per Lord Eldon, L.C.; Wright v Morley (1805) 11 Ves. Jun. 12, at 23, per Sir W. Grant, M.R.

(3) However, where PL defaulted and was declared bankrupt before S paid RH, and RH did not prove against PL's estate, but simply came against S to recover his money, then S was placed in a difficult position: if he paid RH, he could not then prove in PL's bankruptcy in his own name, because at the time that PL was declared bankrupt, PL had owed him no obligation: Ex parte Marshal (1752) 1 Atk. 129; Taylor v Mills (1777) 2 Cowp. 525; Paul v Jones (1787) 1 T.R. 599; and see Ex parte Ryswicke (1722) 2 P. Wms. 89, at 92, n. (2). Furthermore, if he paid RH, then RH could not prove either, since PL's obligation to him was discharged by S's payment: Cooper v Pepys (1741) 1 Atk. 106; Ex parte Leers (1802) 6 Ves. Jun. 644; Ex parte Royal Bank of Scotland (1815) 2 Rose 197. S was thus prima facie unable to recover his payment from PL's estate either directly, or via subrogation to RH's rights against PL. To get around this problem, S was therefore forced to resort to the device of depositing the amount of the debt with RH, without actually paying him off; on promising to indemnify RH for costs, S could then compel RH to prove in PL's bankruptcy on his behalf: Beardmore v Cruttenden (1791), noted in W. Cooke, The Bankrupt Laws, 5th ed. (London, 1804), pp. 210-211; Wright v Simpson (1802) 6 Ves. Jun. 714, at 734, per Lord Eldon, L.C.; Ex parte Leers, ibid., at 646, per Lord Eldon, L.C.; Ex parte Rushforth, ibid., at 414, per Lord Eldon, L.C. To rescue sureties from this elaborate procedure, the product of the courts' inability to escape from the thinking that denied sureties the right to take over creditors' extinguished rights by "reviving subrogation", the legislature had to intervene: under the Bankruptcy Law Amendment Act 1809, s. 8, S was given the right to prove in PL's bankruptcy in his own name even though he had paid RH after PL's bankruptcy was declared (this section also gave statutory force to S's right described supra, to take RH's dividends where RH had proved in PL's bankruptcy before S paid
not until the Mercantile Law Amendment Act 1856, s. 5 was
enacted that the surety's right to take over the creditor's
personal right against the principal debtor was definitely
established. The relevant part of this section reads as
follows:34

"Every person who, being a surety for the debt or
duty of another, or being liable with another for any
debt or duty, shall pay such debt or perform such duty
. . . shall be entitled to stand in the place of the
creditor, and to use all the remedies, and, if need be,
and upon a proper indemnity, to use the name of the
creditor, in any action or other proceeding, at law or
in equity, in order to obtain from the principal debt-
or, or any co-surety, co-contractor, or co-debtor, as
the case may be, indemnification for the advances made
and loss sustained by the person who shall have so paid
such debt or performed such duty, and such payment or
performance so made by such surety shall not be plead-
able in bar of any such action or other proceeding by
him . . . ."

34 The genesis of the 1856 Act is described infra, at
pp. 122-124, and the complete text of s. 5 is given infra,
at pp. 124-125.
The curious feature of this part of s. 5 is that it was already the case by 1856 that no obvious benefit was conferred on the surety by allowing him to take over the creditor's personal right of action against the principal debtor. As has been explained above, sureties were able to bring direct actions for money paid against their principal debtors in the common law courts by the early eighteenth century. By 1856 it would certainly have been untrue to say that a surety needed to acquire the creditor's rights at common law because his own action was merely equitable. In Williams' words:35

"Originally the surety's right to indemnity was merely equitable . . . whereas the creditor's right was usually at law. Hence originally there would have been an advantage to the surety in being able to call upon the creditor to sue the debtor. But the right of indemnity has long since become a legal one, and this advantage has therefore disappeared. It looks as though the rule under consideration has survived in defiance of the wholesome principle, Cessante ratione legis cessat lex ipsa."

That a surety S has no need of RH's personal action is

further borne out by Lord Cockburn, C.J.'s observation in Swire v Redman, that:36

"[T]he surety has a right at any time to apply to the creditor and pay him off, and then (on giving proper indemnity for costs) to sue the principal in the creditor's name. We are not aware of any instance in which a surety ever in practice exercised this right; certainly the cases in which a surety uses it must be very rare."

b) The surety S's right to acquire RH's secured rights against PL via "reviving subrogation"

The courts have long considered it to be inequitable for a creditor RH to have the power, where he holds rights in respect of PL's debt in addition to his right to come against a surety S, to cast the burden of paying PL's debt solely onto S.37 This consideration forms the basis of S's right to demand contribution from his co-sureties, a right which seems very close to his right of subrogation insofar as it puts S in the same position as that which he would occupy, were he subrogated to a proportionate share of the

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36 (1876) 1 Q.B.D. 536, at 541.
creditor RH's rights against S's co-sureties. It also forms the basis of S's right to acquire by subrogation whatever securities PL may have given RH in respect of his

38 For discussion of a surety's right of contribution against his co-sureties, see Langan, Vol. II, Chap. 8; Goff and Jones, pp. 274-284; O'Donovan and Phillips, pp. 471-502; McGuinness, pp. 225-242; Rowlatt, pp. 152-161.

It is an interesting question whether a surety S may have the right to be subrogated to the creditor RH's rights of action in respect of the guaranteed debt, against some fourth party F who is not a co-surety, but who is liable to RH for some other reason, e.g., because F is a financial professional employed by RH to monitor PL's performance in repaying his debt, who has performed his duties negligently and so is liable to RH in tort. McGuinness, p. 199, suggests that in such circumstances S should be entitled to be subrogated to RH's right of action against F, though in the case he cites in support of this proposition, City of Prince Albert v Underwood McLellan & Associates Ltd. (1968) 3 D.L.R. (3d) 385, S was in fact subrogated to RH's rights against F under a contractual term, and no question arose of S's acquiring them via subrogation by operation of law. The issue could have arisen on the facts of a recent English case: Huxford v Stoy Hayward & Co. (1989) 5 B.C.C. 421, where a firm of accountants were employed by a bank to examine the accounts of a company which later went into receivership. The company directors and shareholders had personally guaranteed the company's debts to the bank, and they paid the bank under the guarantee. In their capacity as guarantors, they then sued the accountants for negligence. Popplewell, J. held inter alia that the accountants owed no duty of care to the directors and shareholders qua guarantors, so that their action failed (cf. Trustee of the Property of P.A.F. Foster and others (bankrupts) v Crusts [1986] B.C.L.C. 307, in which a firm of solicitors acting for a company were held to owe a duty of care to the company's guarantors directly). It is at least arguable that the directors and shareholders could have avoided this conclusion had they not brought an action in their own names, but had rather brought a "simply subrogated" action in the name of the creditor bank to whom the accountants certainly owed a duty of care. However, it seems most likely that as a matter of policy the courts would refuse to allow "simple subrogation" to be used in this way to extend the scope of e.g., auditors' tortious liability: cf. the House of Lords' approach in Caparo Industries PLC v Dickman [1990] 2 A.C. 605.
debt. Where PL has given securities in respect of his debt, and S is then obliged to pay PL’s debt when called upon by RH, the courts and the legislature have taken the view that PL (and the people claiming under him) would be unjustly enriched at S’s expense if those securities were exonerated from the burden of meeting PL’s liability to RH; to prevent this, they have permitted S to acquire these securities by "reviving subrogation".

This right is conferred on S by the Mercantile Law Amendment Act 1856, s. 5, the full text of which is given below. It should be noted first, though, that prior to the enactment of this statute S was not entitled to take over RH’s extinguished securities via "reviving subrogation". The courts took the view that where RH’s securities were technically extinguished by S’s payment, S could not then claim to take them for himself; he could only lay claim to such securities as were not extinguished ipso facto by his payment, e.g. mortgages, which had to be reconveyed to PL be-

fore they were extinguished in the eyes of the law.\textsuperscript{40} Hence, in the terminology adopted in this thesis, S had the right to be "simply subrogated" to whichever of RH's securities had not been technically extinguished by his payment, but he had no right to acquire via "reviving subrogation" those securities which had been technically extinguished.

In contrast, under Scots law, which drew upon the rules of Roman law in this area, the rule prevailed after some initial controversy that a cautioner (i.e., a surety) on payment of the guaranteed debt was entitled to demand an assignation (i.e., an assignment) of all the creditor's rights against the principal debtor.\textsuperscript{41} The cautioner's payment was considered not to discharge the creditor's rights, but rather to represent the price of their sale to the cautioner. The advantages to the cautioner of the Scots rule were drawn to the attention of a Parliamentary Commission issued in 1855 to consider the assimilation of the mercantile law of different parts of the United Kingdom, and the commissioners recommended that the Scots rule be adopted in England.\textsuperscript{42} In response to this recommendat-

\textsuperscript{40} Copis v Middleton (1823) T. & R. 224, at 231, per Lord Eldon, L.C.:
"[A]s the mortgagor cannot get back his estate again without a reconveyance, . . . [the mortgage] remains a valid and effectual security, notwithstanding the bond debt is paid."

\textsuperscript{41} Both the Roman and the Scots authorities are cited at p. 367, n. 10, infra.

\textsuperscript{42} Parliamentary Papers, Vol. XVIII: Reports from Commissioners (4) (London, 1854-5), pp. 664-5. At 665, the commissioners concluded that:
ion, it was enacted under the Mercantile Law Amendment Act, 1856, s. 5, that:

"Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him or a trustee for him, every judgment,\(^3\) specialty,\(^4\) or other security.

"The equity and the propriety of the Scottish rule are obvious, inasmuch as the surety obtains much aid in operating his relief from the hardship of having been compelled to pay another party's debt; and yet no detriment is thereby inflicted on any other party. The theory on which in England and Ireland a surety is prevented from obtaining a similar privilege is a subtlety which ought not to prevent the adoption of the Scottish equitable rule into the laws of those countries . . ."

\(^3\) Under R.S.C. Ord. 46, r. 2(1):

"A writ of execution to enforce a judgment or order may not issue without the leave of the Court . . .

(b) Where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order . . ."

Before a surety can issue execution to enforce a judgment of which he has obtained an assignment under s. 5, he must obtain leave to issue execution from the court under this rule: Kayley v Hothersall [1925] 1 K.B. 607.

\(^4\) Specialties are contracts under seal, e.g. bonds, legal mortgages, and debts secured by writing under seal. They formerly ranked in the administration of the estates of the dead in priority to simple contract debts. However, this distinction was abolished by the Administration of Estates Act 1869, s. 1 (replaced by the Administration of Estates Act 1925, ss. 32(1)). The distinction between specialty debts and simple contract debts may still be significant, though, because different limitation periods arise in respect of actions founded on each: under the Limitation Act 1980, s. 8, an action upon a specialty must be brought within twelve years from the date when the cause of action accrued; under s. 5, the equivalent period for an action on a contract not under seal is six years. See T. Prime and G. Scanlan, The Modern Law of Limitations (London, 1993), pp. 77-78. And cf. Badeley v Consolidated Bank (1886) 34
ity which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such persons shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be and upon a proper indemnity, to use the name of the creditor in any action, or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: provided always that no co-surety, co-contractor or co-debtor shall be entitled to recover from any other co-surety, co-contractor or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

The effect of this statutory provision is to give the surety S the right to acquire many of RH's proprietary

Ch. D. 536, at 556, per Stirling, J.
rights against PL, whether or not these are technically extinguished by his payment. It is open to him to take advantage of the priority enjoyed by RH's securities over the charges held by subsequent incumbrancers on PL's property, subject possibly to a subsequent incumbrancer's right to marshal his securities against S, and he is en-

45 S can lay claim to a wide variety of securities under s. 5: for detailed discussion, see Rowlatt, pp. 147-148; O'Donovan and Phillips, pp. 512-513. A right to distress on PL's property for rent in arrear does not constitute a "security" within the meaning of s. 5, though: Re Russell (1885) 29 Ch. D. 254, followed in Boone v Martin (1920) 47 O.L.R. 205. For detailed discussion of the types of security which fall outside the ambit of s. 5, see O'Donovan and Phillips, pp. 515-517.


47 Aylwin v Witty (1861) 30 L.J. Ch. 860; Drew v Lockett (1863) 32 Beav. 499; Dawson v Bank of Whitehaven (1877) 4 Ch. D. 639 (reversed on another ground (1877) 6 Ch. D. 218); Gray v Coughlin (1890) Can. S.C.R. 553, at 570, per Strong, J.

48 As in South v Bloxham (1865) 2 H. & M. 457.

The surety S's right to have securities marshalled in his favour is discussed by Langan, pp. 78-81. He concludes that S can marshal securities in two situations: (i) where the creditor RH has the right to resort to two funds or securities of the debtor PL in respect of the guaranteed debt, and S has a right to resort to one only of these funds or securities, S may compel RH to satisfy himself, so far as possible, out of the other; if RH fails to do this, and chooses instead to resort to the fund on which S has a claim, S is entitled to be subrogated to RH's claim against the other fund: Ex parte Kendall (1811) 17 Ves. Jun. 514; (ii) where RH has a security for a different debt which he can consolidate with a security he holds in respect of the guaranteed debt, S is entitled on paying RH to recoup himself out of the first security: Praed v Gardiner (1788) 2 Cox 86; Heyman v Dubois (1871) L.R. 13 Eq. 158.
titled to take over RH’s securities even if he was unaware of their existence at the time of entering into the contract of guarantee,\(^4^9\) and even if they only came into existence after his assumption of liability as a surety.\(^5^0\)

As has been remarked above,\(^5^1\) S’s right to acquire RH’s securities cannot be explained on the basis of "proprietary base" reasoning, since property in S’s money unequivocally passes to RH at the time that S pays him. The best alternative explanation\(^5^2\) of S’s entitlement seems to be that because PL is primarily liable to RH, his property should not be exonerated at S’s expense from the charges which PL has created in RH’s favour to secure his debt.\(^5^3\) However, it is certainly arguable that in some situations the very wide


\(^5^1\) See discussion at pp. 108-109, supra.

\(^5^2\) Burrows, p. 83, suggests that an alternative explanation may be that the courts wish to give effect to the surety and principal debtor’s mutual intent that the surety should have a secured claim. However, as Burrows himself adds, this reasoning is weakened by the fact that "it is fictional to say that all sureties intend to be secured".

\(^5^3\) Cf. Craythorne v Skinburne (1807) 14 Ves. Jun. 160, at 162, arguendo, per Sir S. Romilly, approved at 169, per Lord Eldon, L.C.; Yonge v Reynell (1852) 9 Hare 809, at 818-819, per Turner, V.-C.
scope of S's remedy puts him into too strong a position with regard to PL's other creditors. Where S has never expressed any intention that his advance on PL's behalf should be secured it is far from clear that he should be put into such a favourable position, particularly when his position is compared with that of a lender who makes an unsecured loan to a debtor PL, and who is not permitted to acquire via "reviving subrogation" the secured rights of a creditor RH whom PL has then paid off with money borrowed from the lender.®®

Four general points remain to be made about the surety S's rights of subrogation. First, it should be noted that S need not bring a subrogated claim against the principal debtor PL in the creditor RH's name. Under the Mercantile Law Amendment Act 1856, s. 5, he is empowered to use RH's name in litigation if he so chooses, but he is not obliged to do so. This point has already been discussed in Chapter 1, part (7)(d).

Secondly, it should be noted that s. 5 is worded in such a wide way that it can be construed as conferring on S two distinct means of acquiring RH's rights: in the words of the statute, he is entitled to have RH's rights "assigned to him or a trustee for him"; and he is also entitled to "stand in the place of the creditor". This has created

®® Cf. Goff and Jones, p. 536.
®®® See discussion infra, in Chapter 4, part (1)(c).
some confusion in the case-law as to the procedure which S must follow in order to exercise his rights under s. 5. According to some authorities, S must expressly ask RH to assign his rights, and if RH fails to do so, he must then sue RH either for specific performance of his statutory obligation to assign,\(^5\) or alternatively for tortious damages for RH's breach of statutory duty.\(^5\) However, the better view seems to be that it is strictly unnecessary for S to do this, as s. 5 operates to assign RH's securities, rights and remedies to S by operation of law in any case, and no express assignment is therefore needed.\(^5\)

Thirdly, it should be noted that S cannot acquire RH's rights against PL via "reviving subrogation" until after RH has been paid in full.\(^5\) This rule prevents S from paying part of the guaranteed debt and then interfering with RH's right to use his securities over PL's property to enforce payment of the outstanding balance.

The fourth, rather minor point is this: if the money which S uses to pay RH is money which S has misappropriated


See too The Englishman and the Australia [1895] P. 212; Dale v Powell (1911) 105 L.T. 291.

\(^5\) Oddv v Hallett (1885) 1 Cab. & El. 532; Dale v Powell (1911) 105 L.T. 291, at 293, per Parker, J.

\(^5\) Re M'Myn (1886) 33 Ch. D. 575; Re Lord Churchill (1888) 39 Ch. D. 175; Re Lamplugh Iron Ore Co. [1927] 1 Ch. 308.

\(^5\) See cases cited supra, p. 93, n. 136.
from PL, then S will neither be given a direct right to recover his payment from PL, nor will he be permitted to take over RH's rights via "reviving subrogation", because the substance of the transaction is that PL has discharged his obligations to RH himself. Thus, in Derek Randall Enterprises Ltd. (in liq.) v Randall, a company director S personally guaranteed the debts owed by the company to a secured creditor RH. S misappropriated assets rightfully belonging to the company in order to pay RH on the guarantee, and when the company went into liquidation S's claim to acquire RH's extinguished securities via "reviving subrogation" was refused for the reason stated above.

ii) Accommodation bills of exchange

As will be discussed below in section (b)(ii), special policy considerations arise in relation to most bills of exchange, in consequence of which as a general rule they are deemed not to be extinguished when paid by a drawer or indorser. However, this general rule does not apply to accommodation bills. Accommodation bills are bills of exchange which are accepted on another party's behalf by an accommodation party, who receives no valuable consideration for his acceptance. The relationship between an accommodation party and the drawer, acceptor, or indorser of the bill is governed by the Bills of Exchange Act 1882, s. 28(1), which defines an "accommodation party" as a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for
odation acceptor and a party accommodated is more like that between a surety and a principal debtor than the relationship between the acceptor and the drawer or indorser of an ordinary bill: although the party accommodated does not sign the bill as the acceptor, he is nonetheless taken to be the party primarily liable on the bill and the liability of the accommodation acceptor of the bill is only secondary.

The rule has been established in the context of accommodation bills that when the accommodation party pays the bill, the bill is extinguished, and the accommodation party is given his own direct right of action against the

the purpose of lending his name to some other person." Where an accommodation party signs a bill as acceptor, the bill may be described as an "accommodation bill": Chalmers and Guest on Bills of Exchange, 14th ed. by A.G. Guest (London, 1992) (hereafter, "Chalmers and Guest"), p. 262.

The question has arisen, whether a bill drawn on a bank by its customer under an acceptance credit constitutes an accommodation bill. Since banks invariably charge a fee or commission for accepting such bills, it is arguable that they should not be construed as accommodation bills. However, the better view seems to be that the bank should be classed as an accommodation party in such circumstances, notwithstanding its receipt of a fee or commission, because it is generally the intention of the bank and its customer that the customer, rather than the bank, should be the party primarily liable on the bill: Chalmers and Guest, pp. 262-263; E.P. Ellinger, Modern Banking Law (Oxford, 1987), pp. 522-525.

Pooley v Harradine (1857) 7 E. & B. 431; Oriental Financial Corp. v Overend, Gurney & Co. (1874) L.R. 7 H.L. 348, affirming (1871) L.R. 7 Ch. App. 142.


Coats v The Union Bank of Scotland Ltd. (1929) S.C. (H.L.) 114, at 127, per Lord Atkin.
party accommodated to recover his payment. It follows from this that an accommodation party seeking to recover his payment of a bill from the party accommodated does not need to acquire the holder's personal rights against the party accommodated via "reviving subrogation", as he has an action of his own already. However, he may well wish to acquire such securities as the party accommodated may have given to the holder in respect of his liability on the bill, and it appears that he will be entitled to acquire these via "reviving subrogation" in the same way that a surety is entitled to acquire the securities given by the principal debtor to the creditor.

By an extension of

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65 Reynolds v Doyle (1840) 1 Man. & G. 753; Hawley v Beverley (1843) 6 M. & G. 221, at 227, per Maule, J.; Asparagus v Levy (1847) 16 M. & W. 851.

Just as a surety is entitled to recover from his principal debtor the costs of defending certain types of action brought against him by the creditor (see p. 113, n. 25, supra, and accompanying text), the accommodation acceptor of a bill is entitled to recover from the party accommodated the costs of defending an action brought against him by the holder of the bill: Howes v Martin (1794) 1 Esp. 162.


Where the drawer of an accommodation bill has given securities to the accommodation acceptor, and both drawer and acceptor then become insolvent, the holder of the bill is entitled to be paid in full out of the securities given by the drawer to the acceptor: Ex parte Waring (1815) 19 Ves. Jun. 345; Powles v Hargreaves (1853) 3 De G.M. & G. 430. This rule is criticised in E.P. Ellinger, "Securitibank's Collapse and the Commercial Bills Market of New Zealand", (1978) 20 Mal. L.R. 84, pp. 92-101. Ellinger writes at p. 101 that:

"The rule in ex parte Waring . . . [produces an unjust result]. It gives all bill holders, regardless of whether they have or have not been informed about the
this principle, where an accommodation bill is drawn, and an accommodation indorser who has put his name to the bill is obliged to pay it, although vis-à-vis the drawer (the party accommodated) the accommodation indorser and the accommodation acceptor are co-sureties, they are not co-sureties in equal degree. Between themselves, they rather stand in the relation of surety and principal debtor. Thus, no right of contribution arises between them, but the accommodation indorser should be entitled to be subrogated to such securities as the drawer may have given the accommodation acceptor.\textsuperscript{67}

iii) Assignees of leases

It was held in Moule v Garrett\textsuperscript{68} that the ultimate assignee of a lease was liable to the original lessee, after the original lessee had been forced to pay the lessor for breaches of covenant in the lease to keep the property in a good state of repair. The original lessee's remedy against the ultimate assignee was not founded in contract, but in security, a right to be paid in full out of the proceeds of securities given by the drawer to the acceptor. Why should they be given such a right? Quite apart from the rule, they are in a position superior to that of other general creditors by being able to prove in both bankruptcies. . . . To give them additional rights means that they make an improper profit at the expense of the general creditors."


\textsuperscript{68} (1872) L.R. 7 Exch. 101.
restitution: because there had been intermediate assign­
ments of the leases, there was no contractual relationship
between the two parties. The original lessee’s remedy was
to recover his money as money paid to the assignee's use,
because he had been legally compelled to pay the lessor in
respect of an obligation for which, as between the original
lessee and the ultimate assignee, the original lessee was
only secondarily liable.

On the basis of exactly the same reasoning, where a less­
ee S has been obliged to pay the lessor RH in respect of
breaches of covenant by an assignee PL, and RH possessed
some secured right against PL in respect of PL’s liability,
S has been held in a number of cases to be entitled to be
acquire this secured right via "reviving subrogation". 69
Thus, for example, in Re Downer Enterprises Ltd., 70 S was
the assignee of a lease from the original tenant, and its­
elf then assigned the lease to PL Co., a company which fell
into arrears with the rent and then went into liquidation.
The liquidator retained PL Co.'s lease, with a view to
finding a purchaser for the leasehold interest, and a year
later the leasehold interest was successfully sold. As a

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69 This reasoning also underlies a sub-lessee’s right
to contribution from other sub-lessees where he has been
obliged to pay the lessor: Anon (?1557) Cary 2; Webber v
Smith (1689) 2 Vern. 103. Cf. Hunter v Hunt (1845) 1 C.B.
300. And see Langan, Chap. 16, now P. St.J. Langan, "Is
There An Equitable Right of Contribution Between Sub­
Lessees?", (1967) 31 Conv. 38.
result of the liquidator's decision to retain the lease, PL Co.'s estate was liable to the freeholder RH under two separate heads of liability: (i) for the rent arrears owed to RH at the time that PL Co.'s liquidation commenced; (ii) for the rent owed to RH between the time that PL Co.'s liquidation commenced, and the time that the leasehold interest was sold. Under the relevant insolvency rules, the freeholder RH possessed no special rights in respect of its claim for the amount due under the first head; so far as this sum was concerned, it had to take its place alongside PL Co.'s other creditors. However, because the amount due under the second head constituted an expense of the liquidation, RH was entitled to rank above the general body of creditors to recover this sum. In fact, though, instead of proving against PL Co.'s estate for the amounts due, RH chose to exercise its right to recover the whole amount due in respect of rent before and after the commencement of liquidation from S. S therefore brought an action seeking to be subrogated to RH's preferential rights in PL's insolvency in respect of the rent due under the second head, and Pennycuik, V.-C. held that they were entitled to succeed in this claim.

Again, on exactly the same basis, where PL is the assignee of a lease whose performance of the terms of the lease

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71 Following Re Lundy Granite Co. (1871) L.R. 6 Ch. App. 462; Re Oak Pits Colliery Co. (1882) 21 Ch. D. 322.
has been guaranteed by a surety, and the original lessee S has been obliged to pay the lessor RH in respect of PL's breaches of covenant, it has been held in several recent cases that S is entitled to be subrogated to RH's rights against the surety.\textsuperscript{72}

\textit{iv) Payors of another's taxes}

If S has been legally compelled to pay taxes owed by PL


If RH assigns his rights as lessor to some fourth party F, the right to sue the sureties of the lessee S and/or his subsequent assignees PL will not pass to F under the Law of Property Act 1925, s. 62(1), nor will it pass at common law: Pinemain v Welbeck (1984) 272 E.G. 1166, noted by S. Murdoch (1986) 50 Conv. 50; cf. Sacher Investments Pty. Ltd. v Forma Stereo Consultants Pty. Ltd. [1976] 1 N.S.W.L.R. 5. RH must expressly assign his rights against his lessees' surety if they are to pass to F. Furthermore, once RH has assigned the reversion of the lease to F, he will lose his right to sue S and/or PL's sureties, as the sureties' liability is co-extensive with the liability of their principals, and S and PL's liability will henceforth be owed exclusively to F, under the Law of Property Act 1925, s. 141: Re King, deceased [1963] Ch. 459. This means that where RH assigns the reversion of a lease to F, and F subsequently forces S to pay him in respect of breaches of covenant by PL, S cannot acquire the right to sue PL's surety via subrogation to F's position unless RH's right to sue PL's surety was expressly assigned to F along with the reversion of the lease.
to a governmental authority, RH, the question arises whether S can be subrogated to RH's rights against PL, on the ground that he has made his payment under legal compulsion. It is submitted that by analogy with the other legal compulsion cases discussed in this section the courts would be likely to hold that a claimant S is entitled to acquire RH's rights against PL via "reviving subrogation" in such circumstances. Although no English authority directly touching on the point has been found, this view is borne out rather obliquely in a case from Singapore which came to be heard by the Judicial Committee of the Privy Council, Kaolim Private Ltd. v United Overseas Land Ltd.\[1983\] 1 W.L.R. 472. Here, the appellant PL bought a property which it then mortgaged to a bank. PL defaulted on its repayments to the bank, which therefore exercised its power of sale over the property and offered it up for sale by tender. The respondent offered to buy the property and the bank accepted its offer, toge-

\[73\] In two Canadian cases the payor of another's tax has been subrogated to the position of a governmental authority: Riddell v MacRae (1917) 34 D.L.R. 102 and Traders Realty Ltd. v Huron Heights Shopping Plaza Ltd. [1967] 2 O.R. 522. However, in neither of these cases did the payor S pay the taxes in question because he was legally compelled to do so. In the first case S paid land taxes on a piece of property in the mistaken belief that he owned the property. In the second, the money paid by a mortgagee S in respect of land taxes on a piece of property was construed by the court to have been advanced under the terms of S's contract with the mortgagor PL. Hence, the explanation for S's right to be subrogated to the local authority's position vis-à-vis PL would seem to be that consideration for his payment on PL's behalf had failed.
ther with a 20% deposit. At this stage, the Comptroller of Property Tax S notified the bank of his claim to arrears of property tax owing on the property. The bank claimed that the tax was the respondent's responsibility; the respondent thought the bank should pay it. The respondent therefore brought an action seeking alternative declarations: either that the property was contracted to be sold free from the Comptroller's charge for arrears of property tax; or that if under the contract of sale the respondent was liable as between itself and the bank to discharge the arrears of tax, it could claim to recover the amount so paid from PL via subrogation to the Comptroller's rights against PL. The Judicial Committee decided the case on the basis that the property had been contracted to be sold free of the Comptroller's charge, and held that the subrogation point therefore did not have to be considered. However, for want of any English authority on the point, it may be noted that in the Court of Appeal in Singapore, Wee Chong Jin, C.J. had held that the respondent should pay the tax, following which it would have been entitled to be subrogated to the Comptroller's rights against PL to the extent of its payment.

v) Open-ended categories?

Various judges have expressed the opinion that as a matter of principle all payors under legal compulsion who pay
in respect of obligations for which they are only secondarily liable should be entitled to acquire any securities given in respect of those obligations via "reviving subrogation". Thus, in Duncan, Fox & Co. v North & South Wales Bank, Lord Selborne, L.C. said that payors should be entitled to acquire such securities via ("reviving") subrogation in:

"... cases in which there is, strictly speaking, no contract of suretyship, but in which there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not primarily liable, he has a right to re-imbursement [sic] or indemnity from the other..."

These remarks were cited with approval by Pennycuik, V.-C. in Re Downer Enterprises Ltd., who similarly took the law to be that:

"[I]f A and B are liable to a creditor for the same debt in such circumstances that the ultimate liability falls on A, and if B in fact pays the debt to the creditor, then B is entitled to be reimbursed by A, and

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74 (1880) 6 App. Cas. 1.
75 Ibid., at 13.
likewise is entitled to take over by subrogation any securities or rights which the creditor may have against A."

Taken alongside the Mercantile Law Amendment Act 1856, s. 5, the wide wording of which provides that "reviving subrogation" to securities should be made available to "[e]very person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty", these dicta constitute strong authority for the proposition that further payors under legal compulsion of another's liability should in the future be entitled not only to bring a claim against that other for money paid to his use, but also to acquire any securities previously held by the other's creditor, via "reviving subrogation". As has been said, the award of such a proprietary remedy cannot be justified by reference to "proprietary base" reasoning, and can be explained only on the basis that where a debtor creates a charge over his property to secure his primary liability to a creditor, it would be inequitable for his property to be exonerated from this debt at the expense of a third party who is only secondarily liable to pay it.
b) Where S's payment does not extinguish RH's rights, and S is entitled to acquire them via "simple subrogation"

In this section, the law concerning the award of "simple subrogation" to indemnity insurers will be discussed in sub-section (i), and the law concerning the award of "simple subrogation" to drawers and indorsers of bills of exchange in sub-section (ii).

i) Indemnity insurers

The indemnity insurance cases are considered here in this chapter on compulsion, because an indemnity insurer S may seek to be "simply subrogated" to its insured RH's rights of action against a third party tortfeasor PL only after it has paid its insured on the policy. Hence, it may be said that its right to be "simply subrogated" arises only after it has made a payment under legal compulsion. However, an indemnity insurer's entitlement to "simple subrogation" does not rest upon this ground alone. It is also founded upon the general policy laid down by the courts, that an insured whose loss is covered by an indemnity policy must never be more than fully indemnified for his loss.77

Demnity insurance policies are policies taken out to indemnify the insured for specific heads of loss, rather than those under which an insurer promises to pay a certain sum of money on the happening of a specified event, regardless of the actual measure of the loss suffered by the insured.\textsuperscript{78} The principle which states that an insured cannot

\textsuperscript{78}The main types of indemnity policy are policies of marine insurance, fire insurance, motor insurance, property insurance, liability insurance and insurance against theft: MacGillivray and Parkington, para. 1175; J. Birds, \textit{Modern Insurance Law}, 2nd ed. (London, 1988), pp. 236-237. The principal types of non-indemnity policies are life policies (Dalby \textit{v} The India & London Life Assurance Co. (1854) 15 C.B. 365; The Solicitors' & General Life Assurance Society \textit{v} Lamb (1864) 2 De G. J. & S. 251) and personal accident policies (Bradburn \textit{v} Great Western Railway Co. (1874) L.R. 10 Exch. 1; Theobald \textit{v} The Railway Passengers Assurance Co. (1854) 10 Ex. 45, at 53, \textit{per} Alderson, B.).

The distinction drawn by the courts between indemnity and non-indemnity policies is not always a compelling one. Some "borderline" examples may be given, of traditionally "non-indemnity policies" which are demonstrably intended to indemnify the insured for a specific loss, \textit{e.g.}, certain accident policies which provide for payments to be made on an indemnity basis; "keyman" policies taken out by employers on the lives of their employees; life policies taken out by creditors on the lives of their debtors (as in Godsall \textit{v} Boldero (1807) 9 East. 72). M.A. Clarke, \textit{The Law of Insurance Contracts} (London, 1989), p. 623, has therefore proposed that insurance contracts should be reclassified according to whether or not payments made under them are "reasonably intended to compensate the insured."

More fundamentally, it is open to question whether it is a sensible principle which gives an insured the right to accumulate recoveries from his insurer and third parties where he has lost \textit{e.g.}, an arm, but denies it to him where he has lost a piece of personal property, even though the loss of both results in economic loss to the insured. For discussion of this issue, see: S. Kimball & D. Davis, "The Extension of Insurance Subrogation", (1962) 60 Michigan L.R. 841; J.G. Fleming, "The Collateral Source Rule and Loss Allocation in Tort Law", (1966) 54 California L.R. 1478, pp. 1499-1501; P.S. Atiyah, "Collateral Benefits Again", (1969) 32 M.L.R. 387, pp. 403-406; G.S. Swan, "Subrogation in Life Insurance: Now is the Time", (1981) I.C.J.
recover more than the amount of his loss where he is covered by an indemnity policy is often described as "the principle of indemnity".

When an insured who has suffered an insured loss is entitled not only to recover in respect of the loss from his insurer, but also to receive some benefit from a third party in reduction or extinction of the insured loss, the principle of indemnity is potentially threatened if the combined total of the amounts which the insured is entitled to receive from the insurer and the third party exceeds the amount of his loss. To prevent the insured from being more than fully indemnified for his loss in such circumstances, the courts have developed three different remedies which are variously available to the insurer, according to the relationship which exists between the three parties at the time of the court's intervention. It is common to find statements in the case-law and in academic works to the effect that all of these remedies are awarded in order to


79 The courts seem always to have sought to adjust the relationship between the three parties so as to cast the burden of paying for the insured loss onto the third party rather than onto the insurer. They need not have done so: they could have chosen to relieve the third party, and cast the burden of compensating the insured onto the insurer. However, this alternative approach has generally been rejected on the ground that the third party is at "fault" and so should be made primarily liable for the loss. This characterisation of the third party as the party "at fault" is not always easy to accept: see the discussion infra, at pp. 162-165.
enforce the insurer's "right of subrogation", or as incidents of the "doctrine of subrogation". However, this usage of the word "subrogation" is misleading. It derives from the Court of Appeal's judgments in two nineteenth century cases, Darrell v Tibbits and Castellain v Preston, which are discussed in (a) below. The remedies in question are awarded in order to enforce the principle of

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One exceptional book specifically exposes and condemns the common misuse of the term "subrogation" in the context of insurance law: J.P. van Nieckirk, Subrogasie in die Verskeringsreg ("Subrogation in Insurance Law") (Pretoria, 1979) (English summary at pp. xii-xv). Van Nieckirk is primarily concerned with subrogation in the South African law of insurance, but he discusses the English law from which the South African law is drawn in some detail. He draws a distinction between the insurer's right of subrogation stricto sensu, which corresponds to the remedy of "simple subrogation" described in the thesis, and the insurer's right of subrogation lato sensu, which corresponds to the insurer's right under the principle of indemnity to what he calls the indemnitas aliunde, the proceeds of the insured's claim against a third party, along with any other benefit received by the insured in reduction or extinction of his damage or loss from a third party. Van Nieckirk rightly sees as lying outside the scope of subrogation stricto sensu the insurer's recovery of all or part of the indemnitas aliunde either via an action for money had and received or via a claim that the insured owes the insurer a duty to account for such monies, remedies which are considered below in (b)(ii) and (iii) respectively.

Cf. J. Birds, Modern Insurance Law, 2nd ed. (London, 1988), p. 238, who points out that subrogation in its "literal meaning" is used to describe the process whereby an insurer who has indemnified his insured is allowed to pursue his insured's subsisting rights of action.

§1 (1880) 5 Q.B.D. 560.

§2 (1883) 11 Q.B.D. 380.
indemnity for the insurer’s benefit. One of them is the remedy of "simple subrogation". The other two are not. They are distinct remedies, used in response to different situations, and they work in different ways. To conflate them with "simple subrogation" leads to confusion and misunderstanding of the way in which they and the remedy of "simple subrogation" actually work.

The three remedies developed by the courts to enforce the principle of indemnity arise in the following three situations:

i) An insured suffers an insured loss. The insurer pays the insured for his loss. The insured has a subsisting right of action against a third party in respect of the insured loss. In these circumstances, provided that it has fully indemnified the insured for his loss, the insurer is entitled to take over the insured’s right of action via "simple subrogation"; that is, the insurer can pursue the insured’s subsisting right of action against the third party in the insured’s name for its own benefit.

ii) An insured suffers an insured loss. Unknown to the insurer he then receives a payment in respect of that loss from a third party. The insurer then pays the insured for his loss. In these circumstances, the insurer is entitled to recover back from the insured so much of its payment as brought the total of the amounts received by the insured from the third party and the insurer above the amount of

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the insured loss, as money had and received, paid by mistake of fact. The insurer's mistake was to think that the insured had suffered a greater loss than was in fact the case, once the insured had received the third party's payment in respect of the loss.

iii) An insured suffers an insured loss. The insurer pays him on the policy. The insured then receives a payment in respect of the same loss from a third party, which brings the total of the amounts that the insured has received in respect of his loss above the amount of his loss. In these circumstances, the insurer is entitled to bring a claim against the insured for so much of the money paid by the third party to the insured as more than fully indemnifies the insured for his loss. It has recently been held by the House of Lords in Lord Napier and Ettrick v Hunter\(^8\) that the insurer may claim in these circumstances that the insured holds such amounts on constructive trust for the insurer's benefit, a decision which is considered in (b)(iii) below.

In the following discussion, the two cases which lie at the heart of much of the terminological confusion in this area, Darrell v Tibbitts and Castellain v Preston, will be considered first. Then, each of the three remedies potent-


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ially available to an insurer to prevent its insured's unjust enrichment will be discussed in turn.

a) Darrell v Tibbitts and Castellain v Preston

The significance of these two cases is that they were decided by the Court of Appeal on the basis of flawed reasoning which has been tacitly or expressly adopted in the case-law ever since, with evil consequences for the clarity of the law in this area.

In Darrell v Tibbitts, the earlier of the two, the defendant was the owner of a house let to a tenant. Under the terms of the lease the tenant was obliged to repair the house in the event that it was damaged. The defendant insured the house with the plaintiff insurers against damage caused, inter alia, by gas explosions. An employee of the local authority negligently caused a gas explosion which damaged the house. The local authority paid compensation in respect of this damage to the tenant who used the money to repair the house, as he was bound to do by the terms of the lease. The plaintiff insurers, unaware that the tenant had effected these repairs, then paid the defendant insured for the loss.

When all the facts subsequently came to light, the insurers brought an action against the defendant seeking to recover their payment. The grounds upon which the insurers

84 (1880) 5 Q.B.D. 560.
should have been entitled to recover were that they had made the insured a payment to which he was not entitled under a mistake of fact, which payment they should have been able to recover as money had and received to the defendant's use. This emerges quite clearly in Thesiger, L.J.'s judgment, where he states that:

"[T]his suit may be supported upon one of two grounds: [the insurer's "right of subrogation", and] . . . an action at common law for money had and received, to recover the sum which they paid upon the ground that that money was paid upon the conditions, that the person to whom it was paid had sustained a loss, that in point of fact no loss had been sustained, and therefore that the money paid by the company ought in justice be returned to them."

Brett and Cotton, L.JJ., however, sought to put more emphasis upon the first ground referred to in Thesiger, L.J.'s judgment: in their view, the insurers were entitled to be subrogated to the defendant insured's rights against the tenant, and therefore to claim from the insured the value of the reinstatement of the property effected by the

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85 See the discussion in (b)(ii), infra.
86 (1880) 5 Q.B.D. 560, at 567-568. See too ibid., at 562-563, per Brett, L.J.
87 Ibid., at 563 and 564-565, respectively.

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tenant. Brett and Cotton, LJJ. were guilty of a confusion here: on the facts of the case, subrogation was an inappropriate technique to give effect to the insurers' right of recovery against the insured. The tenant had performed his obligations to the insured, leaving nothing to which the insurers could have claimed to be "simply subrogated". Furthermore, it would have been equally inappropriate to award the insurers "reviving subrogation" in the case. "Reviving subrogation" is a remedy which should be awarded to a claimant S only where RH's rights have been extinguished by S's payment, with the result that PL is enriched at S's expense. In Darrell v Tibbitts the position was fundamentally different: S paid RH, it is true, but it was not S's payment that operated to extinguish RH's rights against PL. Rather, RH's rights were extinguished because PL had himself performed his obligations to RH. Hence, no question arose in the case of PL being enriched at S's expense and "reviving subrogation" could not have been an appropriate remedy to use in the case.

Three years after Darrell v Tibbitts, Castellain v Preston came before the Court of Appeal, and Brett and Cotton, L.JJ. had the chance to elaborate their views of subrogation. In Castellain v Preston, the vendors and purchasers of a house entered into a contract for its sale. The vend-

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88 (1883) 11 Q.B.D. 380. The case was heard at first instance by Chitty, J.: (1882) 8 Q.B.D. 613.
ors had insured the house against loss by fire with an insurance company but the contract of sale contained no reference to the insurance. After the date of the contract of sale, but before completion, the house was damaged by fire. The vendors then claimed and received a payment from the insurance company in respect of the loss caused by the fire. The purchase was subsequently completed, and the vendors were paid the agreed purchase price by the purchasers, without any abatement on account of the fire-damage.\textsuperscript{89} The plaintiff insurance company then brought an

\textsuperscript{89} The purchasers in fact brought an action against the vendors, claiming that following the contract of sale, the vendors held both the land and the insurance contract on trust for them. However, the Court of Appeal held against them on the grounds that the insurance contract was merely collateral to the main contract, and that in the absence of an express assignment of the insurance policy or moneys, there was no reason to say that the vendors held the money for the purchasers: \textit{Rayner v Preston} (1881) 18 Ch. D. 1 (followed in \textit{Budhia v Wellington City Corporation} [1976] 1 N.Z.L.R. 766). The practical effect of this decision is to require both the vendor and the purchaser of a piece of property to insure it, a result which is criticised for its wastefulness in M. Thompson, "Must the Purchaser Buy a Charred Ruin?", (1984) 48 Conv. 43, pp. 50-52.

Cf. \textit{Lonsdale & Thompson Ltd. v Black Arrow Group PLC} [1993] 2 W.L.R. 815, where an insured landlord covenanted in its lease with the tenant to reinstate the insured property in the event of damage by fire. The landlord later contracted to sell the property, the property was then destroyed by fire, but the landlord was able to recover the full purchase price under the contract of sale without regard to the fire damage. The insurers sought to avoid paying on the policy, on the grounds that the landlord had been indemnified for its loss when it was paid the purchase price, but Jonathan Sumption, Q.C., sitting as a deputy High Court judge, held that the insurers must pay: even though the landlord had been paid by the purchaser of the property, it remained liable to reinstate the property under the terms of the lease, and for this reason it could not be said that its receipt of the purchase price had
action against the vendors, claiming to be entitled to recover from the vendors the amount they had received from the purchasers.

In retrospect, it can be seen that the insurers should have brought a claim of the type discussed in (b)(iii) below, alleging that the defendant insured owed a duty to account to them for sums received from a third party in respect of the insured loss. And indeed, it appears that this was one of the two alternative ways in which counsel for the insurers framed their claim\(^90\) (the insurers' claim was alternatively framed as an action for money had and received, a form of action that was inappropriate on the facts of the case because the insurers' payment was made before rather than after the defendants' receipt of money from the purchasers\(^91\)). It must be said therefore that the insurer's case was presented to the courts in a distinctly confused manner. However, counsel for the insurers at least did not frame their claim as one of "simple subrogation", to which the insurers could clearly not have been entitled either, since at the time the insurers' action was brought, the defendants had already exercised their rights against the purchasers of the house; as in Darrell v Tibbitts, there were no subsisting rights of action to which the insurers could have claimed to be "simply subrog-

\(^{90}\) (1882) 8 Q.B.D. 613, at 614.

\(^{91}\) See discussion infra, (b)(ii).
Chitty, J., who heard the case at first instance, made this point very clearly during the course of his judgment. The main ratio of his decision in favour of the defendant insureds concerned the nature of the contract of sale, which he did not consider to be a contract relating to the subject-matter of the insurance in such a way that the insurers should be entitled to take the benefit of it. On this particular point, Chitty, J. seems to have been mistaken in principle, since the effect of the defendants' receipt of payments from both purchasers and insurers was undeniably to enrich the defendants twice over in respect of the same loss. More pertinent to the present discussion, though, is the fact that Chitty, J. described subrogation in the following way:

"On payment the insurers are entitled to enforce all the remedies whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against."

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92 As in Darrell v Tibbits, "reviving subrogation" could not have been invoked in the case either, for the reasons set out at p. 149, supra.
93 (1882) 8 Q.B.D. 613, at 621: "The contract of sale was not a contract, either directly or indirectly, for the preservation of the buildings insured."
94 Ibid., at 617.
And he went on to hold that a prerequisite of the award of "subrogation" to an insured's rights against a third party under a contract should be that:

"[T]he contract [is] one which subsists at the time when the claim under the policy of insurance has been matured."

In other words, Chitty, J. took the view that "subrogation" could only be used to transfer subsisting rights of action from the insured to the insurer: he assumed that the term "subrogation" used in the context of insurance law denotes the remedy of "simple subrogation" described in the thesis. His judgment on this point seems absolutely sound. He was wrong not to allow the insurers to recover the money received by the defendants in respect of the insured loss from the purchasers, but he was quite correct to hold that the insurers could not use the remedy of "simple subrogation" to effect their recovery. It was a technique inappropriate to the facts of the case.

The Court of Appeal reversed Chitty, J.'s judgment, and found in favour of the insurers. In so doing, they reached the right result, but the reasoning they used to get there was fundamentally flawed. The main judgment in the Court

95 Ibid., at 625.

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of Appeal was delivered by Brett, L.J., who took as his starting point the following statement:96

"The very foundation . . . of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a 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."

In a well-known passage, he then went on to say that the "doctrine of subrogation", "another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned", should be expressed in the following way:97

"[A]s 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, legal or equitable, which can be,

96 (1883) 11 Q.B.D. 380, at 386.
97 Ibid., at 388.
or has been exercised or has accrued . . ." (Emphasis added)

And he expanded upon this statement:98

"This enlargement, or this explanation, of what I consider to be the real meaning of the doctrine of subrogation, shews that in my opinion it goes much further than a mere transfer of those rights which may at any time give a cause of action either in contract or tort . . . [I]f a right of action in the assured has been satisfied, and the loss has been thereby diminished, then, although there never was nor could be a right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and the insurer by reason of the satisfaction of that right."

It may be seen in this last passage that Brett, L.J. used the term "doctrine of subrogation", to describe something much wider than the remedy of "simple subrogation", by which an insurer is substituted to the position of the insured in order to take over the insured's subsisting rights of action. He used it in fact to denote the principle of

98 Ibid., at 389-390.
indemnity, which underlies the award not only of the remedy of "simple subrogation", but also of the other two remedies described below in (b)(ii) and (iii). Brett, L.J’s conflation in this passage of the remedy of ("simple") subrogation with the principle underlying the remedy’s award has been aptly described by James:

"[Brett, L.J. managed to vindicate the insurers in *Castellain v Preston*] . . . in a judgment which has by mischance become a classic . . . by distorting the definition of subrogation so as to cover the case. He defined it so as to include "every right of the assured, whether the right consists in contract fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on." This is putting the cart of subrogation before the horse of the equity which motivates it: the cart has swallowed the horse. What Brett, L.J. was really defining was the equity, and not, as he purported to do, subrogation . . . ."

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"Castellain v Preston of course was not a case of subrogation in respect of an outstanding right of action and one might almost wish that some other word had been used as the label of a right which exists when it is too late for subrogation in its ordinary sense."
It is unfortunate that Brett, L.J. should have misused the term "subrogation" in this way. Following Castellain v Preston, his misuse of the term "subrogation" has been echoed in many of the cases and in much of the academic commentary on this area of the law. Thus, its long-term effect has been to introduce a confusion into the heart of the law in this area which has rendered its workings obscure, and which must be stripped away before the remedies made available by the courts to an insurer with a view to enforcing the principle of indemnity can be properly understood.

b) The remedies used to enforce the principle of indemnity

Each of the three remedies potentially available to an insurer to prevent its insured being more than fully indemnified will now be considered in turn.

i) "Simple subrogation": the insurer substituted to the position of the insured, to pursue the insured's subsisting rights of action against third parties

It is a clear principle of insurance law that payment by an insurer S to its insured RH in respect of an insured loss does not operate to extinguish the insured's right to recover damages from a third party tortfeasor PL.\textsuperscript{100} 

\textsuperscript{100} Mason v Sainsbury (1782) 3 Doug. K.B. 61, at 64, \textit{per} Lord Mansfield; Yates v Whyte (1838) 4 Bing. (N.C.) 272, at 283, \textit{per} Tindal, C.J.; Morgan v Price (1849) 4 Ex. 615, at 620, \textit{per} Parke, B.; Bradburn v Great Western Railway Co. (1874) L.R. 10 Exch. 1; Lister v Romford Ice & Cold
ce, these rights subsist notwithstanding the insurer's payment, and the possibility arises that the insured may enforce his claim against the third party after receiving the insurer's payment and thus recover twice in respect of the same loss. In order to prevent the insured from thus recovering more than a full indemnity for his insured loss, and secondarily in order to prevent the burden of paying for the insured loss from falling on the insurer rather than on the third party, the insurer is entitled in these circumstances to be "simply subrogated" to the insured's right.


101 Cf. Fidelity & Casualty Co. of New York v First National Bank in Fort Lee 397 F. Supp. 587 (1975), at 589, per Whipple, C.J.:

"[I]t is only equitable that the insurer should be reimbursed for his payment to the insured, since otherwise either the insured would be unjustly enriched by virtue of a recovery from both the insurer and the third party, or, in the absence of such double recovery by the insured, the third party would go free despite his legal obligation in connection with the damages."

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of action.\textsuperscript{102}


It should be added here that various U.K. and Commonwealth governmental bodies have been required by statute to indemnify members of the public under certain circumstances in respect of losses for which third parties are primarily liable. On paying them as required, the governmental bodies are then entitled to be "simply subrogated" to their rights against the third parties. See e.g. The Guardian Assurance Co. \textit{v} The Town of Chicoutimi (1915) 25 D.L.R. 322, applying the Town Corporations' General Clauses Act 1888 (Quebec), art. 4426; Weir \textit{v} Lohr (1967) 65 D.L.R. (2d) 717, applying the Saskatchewan Hospitalization Act 1965, s. 22; Criminal Injuries Compensation Board \textit{v} Ditroi (1975) 57 D.L.R. (3d) 325, applying the Law Enforcement Compensation Act 1970 (Ontario), s. 7(2) (In the U.K., the Criminal Injuries Compensation Board cannot require the victims of crime to bring civil actions against the criminals responsible for their injury, so it cannot be said that it has the right to be "simply subrogated" to the victims' rights of action; however, if the victims opt to bring a civil action, and recover damages, they must reimburse the Board to the extent of its payment to them: D. Greer, \textit{Compensation for Criminal Injuries} (London, 1991), pp. 145-146. The Board's claim against a victim in these circumstances ought in principle to be of the kind described in (b)(iii), infra.); Gaspar \textit{v} Gaspar [1972] N.Z.L.R. 174, followed in Caron \textit{v} Caruana [1975] 2 N.Z.L.R. 372, applying the Social Security Act 1964 (N.Z.), s. 25; Re Gordon (1985) 59 A.L.R. 596, applying the Workers' Compensation Act 1971-1979 (South Australia), s. 118d(12) (now the Workers Compensation (Insurance) Act 1980 (S.A.), s. 5(12)); Re Urethane Engineering Products Ltd. (1988) 4 B.C.C. 23, applying the Employment Protection (Consolidation) Act 1978, ss. 122 and 125 (since amended by the Employment Act 1989, ss. 19(1) and 30(3)), discussed in: I.F. Fletcher, \textit{The Law of Insolvency} (London, 1990), pp. 275-276; Pennington's \textit{Corporate Insolvency Law} (London, 1991), pp. 276-280. Cf. J. Stiglitz, "Government Subrogation Rights in Tort Judgments and Settlements", (1985) 32 Fed. Bar News \& Journal 420.

And cf. Re Vassis (1986) 64 A.L.R. 407, applying the Legal Profession Practice Act 1958 (Vict.), s. 104GA(8), under which the Law Institute of Victoria is required to maintain
The insurer's right to claim "simple subrogation" is subject to certain limitations which are discussed below. First, though, the twin rationales which underlie the award of the remedy to the insurer must be considered. Derham has pointed out that where an insured who has been paid by his insurer would not have sued a third party liable for causing the insured loss, e.g., because the third party was a member of his family, or a member of his workforce, then it cannot be said that it is necessary to award ("simple") subrogation to the insurer in order to prevent the insured from being paid twice over. For this reason he argues that ("simple") subrogation should not be awarded to the insurer in such circumstances. He remarks that:

"[T]he courts . . . have never looked at the likelihood that proceedings would have been instituted as a factor to be considered in determining whether a subrogation action should be permitted at the instance of an insurer."

a compensation scheme for the victims of negligent or criminal solicitors, and is entitled upon indemnifying such victims to be ("simply") subrogated to their rights of action against the defalcating lawyers. Similar New Zealand legislation is the Law Practitioners Act 1982 (N.Z.), s. 173. And cf. the Motor Vehicle Dealers Act 1975 (N.Z.), s. 42(1), which confers a similar right of "simple subrogation" on a statutory motor dealers' fidelity guarantee fund.

103 Derham, pp. 29-30.
105 Derham, p. 30.
And he concludes that although:

"... the doctrine [sic] originally was developed in order to prevent the insured obtaining more than a full indemnity for his loss, the courts have lost sight of this . . ."

Similarly, where an insured has released the third party from liability, and thereby exposed himself to liability in damages to the insurer for prejudicing the insurer's "right" to be "simply subrogated" to the insured's right of action against the third party, the award of damages to the insurer cannot always be justified by reference to the unjust enrichment of the insured as the ground underlying the insurer's prejudiced "right" of subrogation. If the insured has agreed not to pursue his rights of action against a third party in exchange for payment (i.e., if he settles his claim against the third party), then to the extent that he is paid under the terms of the settlement, the insured's unjust enrichment might still be advanced in

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106 Ibid.
justification of the award of "simple subrogation" to the insurer. Where no consideration moves from the third party to the insured, however, Derham's argument has some force. An insured may choose not to pursue his action against a third party simply because even if he had not been insured, he would have preferred to bear the loss himself rather than put himself to the trouble and the cost of litigation. In such circumstances, it cannot be right to say that the insurer is entitled to succeed to the insured's rights against the third party on the grounds that the insured would otherwise be unjustly enriched.

In these circumstances, the only surviving justification for the award of "simple subrogation" to the insurer is that its award prevents the third party from escaping his primary liability for the insured loss at the insurer's expense. Yet even this subsidiary justification cannot

108 This secondary justification for the award of "simple subrogation" is advanced in: Mason v Sainsbury (1782) 3 Doug. K.B. 61, at 64, per Lord Mansfield; The Sickness & Accident Assurance Assoc., Ltd. v The General Accident Assurance Corp., Ltd. (1892) 19 S.C. 977, at 980, per Lord Low; H. Cousins & Co. Ltd. v D. & C. Carriers Ltd. [1971] 2 Q.B. 230, at 243, per Davies, L.J.

Under French law, insurers have in the past been permitted to bring direct actions against third party tortfeasors, under the Civil Code, art. 1382:

"Any act by which a person causes damage to another binds the person by whose fault the damage occurred to repair the damage."

However, the award to insurers of a direct action against third parties under this article is controversial: F.E. Khoury, Subrogation in Marine Insurance - A Comparative Study in English & French Law ..., (unpublished Diploma thesis, London, 1961), pp. 104 et seq.
be advanced in every case, for the reason that it is not invariably evident that the insured should be characterised as the party primarily liable for the insured loss. Where an insured loss is caused by a wrong (e.g., a tort or breach of contract) committed by a third party against the insured, then it is intuitively easy to cast him as the party primarily liable for the loss, who should not be allowed to "go quit" of his wrong simply because his victim happens to be insured: it would certainly be difficult to feel sympathy for a third-party tortfeasor seeking to escape liability for his actions by arguing that his victim can look to his insurer for compensation (though the notion that allowing insurers to bring subrogated actions against third parties has a deterrent effect against negligent behaviour is unconvincing: most negligent behaviour is not of the

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"If the Plaintiff [insurer] cannot recover, the wrongdoer pays nothing and takes all the benefit of a policy of insurance without paying the premium."

But note that since the insured throughout the time of coverage under the policy was in the position that the insurer, rather than he, was on risk, it cannot be right to say that the wrongdoer would take "all of the benefit" of the policy: cf. P.S. Atiyah, "Collateral Benefits Again", (1969) 32 M.L.R. 397, pp. 402-403:

"The fact that the risk [does] not eventuate hardly means that the [insured] has wasted his premiums. One might as well argue that if the [insured] was never injured at all he would have wasted his premiums."

kind that is likely to be deterred in this way\textsuperscript{111}). However, where a third party is without fault, but is still liable to indemnify the insured for a loss, for example because he is contractually bound to do so under the terms of a lease, it is not at all clear that he should be considered primarily liable for the loss.\textsuperscript{112} In an article in 1934, Langmaid\textsuperscript{113} argued that where a third party entirely without fault is liable to the insured in this way, it would be inequitable to shift the entire burden of the loss onto him, and he proposed that instead the loss should be borne both by the third party and by the insurer on the basis of contribution. This certainly seems a more equitable method of apportioning the burden of paying for the loss.

It must be concluded that whilst in many cases the award of "simple subrogation" to an insurer $S$ can be justified on the grounds that the award of the remedy works to prevent the alternative unjust enrichment of the insured $RH$ or a third party $PL$, there are circumstances in which the award of the remedy is less clearly justifiable on these grounds,

\textsuperscript{112} Cf. the Swedish law relating to indemnity insurance, under which it is only when damage has been caused intentionally or with gross negligence that the insurer may be subrogated to claims against persons liable because of their negligence - J. Hellner, Försäkringssivarens regessrätt ("The Insurer's Right of Subrogation") (Uppsala, 1953) (English summary at pp. 257-278), pp. 269-270.
either because RH and/or PL would not have been enriched, absent the remedy, or because even if they would have been enriched, this enrichment could not be construed as unjustly gained at the insurer's expense. In circumstances of this latter kind, it is submitted that insurers should not be entitled to "simple subrogation" by operation of law.\textsuperscript{114}

There remain to be considered a number of limitations to the availability of "simple subrogation" to an insurer.\textsuperscript{115} First, the insurer cannot claim to be "simply subrogated" to the insured's rights before it has paid the insured under the terms of the policy.\textsuperscript{116} And even if the insurer pays the insured under the terms of the policy, but the insured is nonetheless not fully compensated for his loss, \textit{e.g.}, because the policy contains an excess clause, the insured may still have the right to control any proceedings brought against a third party, provided that he is willing

\textsuperscript{114} In practice, of course, insurers are likely to be entitled to "simple subrogation" in any case, by virtue of the contractual terms to that effect which are commonly inserted into insurance policies. For further discussion, see Appendix 2, part (1).


Cf. Scottish Union & National Insurance Co. v Davis [1970] 1 Lloyd's Rep. 1, where an insurer paid a garage to repair the insured's damaged car, but could not thereafter assert that it had indemnified the insured under the policy because the garage failed to do the repairs to the insured's satisfaction.
to bring a claim for the whole loss, and provided that he acts *bona fide* in the insurer's interests.\(^{117}\) It should be noted, though, that in practice this limitation on the insurer's right to claim "simple subrogation" is likely to be made redundant by the express subrogation clauses that are often included in insurance contracts, which give the insurer the right to control proceedings following payment on the policy regardless of whether or not the insured is thereby fully compensated for his loss.\(^{118}\)

Secondly, if the insured agrees to settle or relinquish his claim against a third party, an agreement of this kind would make it impossible for the insurer subsequently to bring an action against the third party in the insured's name: the insurer cannot use "simple subrogation" to acquire the insured's claim for its own benefit, since the insured's claim is extinguished.\(^{119}\) As has been said already, though, the insurer will probably be entitled to sue the insured for damages for prejudicing its interests in this

\(^{117}\) *Commercial Union Assurance Co. v Lister* (1874) L.R. 9 Ch. App. 483. See too Derham, pp. 51-55.

\(^{118}\) See Appendix 2, part (1) for further discussion.


It should be added that the insurer should not be entitled to "reviving subrogation" in these circumstances either, since it is the insured's action in settling or relinquishing his claim, rather than the insurer's action in paying the insured, that operates to extinguish the insured's claim.
Thirdly, "simple subrogation" can only arise when the insured has a right of action to pursue. Hence, if the tortfeasor is in fact the insured himself, no right of action will arise to which the insurer can be "simply subrogated", because the insured can have no right of action against himself.\(^{121}\) And by the same token, where two co-ins-

\(^{120}\) See the cases cited at p. 161, n. 107, supra.

A related point is that in practice it often happens that RH's insurer has a knock-for-knock agreement with PL's insurer. If this is the case, then RH's insurer is likely to direct RH that PL's insurer will pay him for his insured loss, and that he need only sue PL for his uninsured loss. If RH acts accordingly and wins a judgment against PL for the uninsured loss, but it then transpires that in fact PL is not insured after all, e.g. because his policy is invalidated for some reason, then as a general rule it will not be open to RH to bring a second action against PL to recover the balance, because it would constitute an abuse of court process to bring two actions in respect of the same cause of action: Buckland v Palmer [1984] 3 A.E.R. 554, at 558-559, per Sir J. Donaldson, M.R. However, at 589, the Master of the Rolls went on to say that:

"[I] would be surprised and disappointed if this left the courts powerless to do justice if, for example, advantage had been taken of an ill-informed plaintiff by an experienced defendant who offered to submit to judgment in a small sum, well knowing that the plaintiff was under some misapprehension as to the effect of his right therefor to proceed with his substantial claim. . . . I would expect the courts to reappraise the circumstances in which a judgment could be set aside, if justice so required."

\(^{121}\) Simpson & Co. v Thomson (1877) 3 App. Cas. 279, discussed in P.S. James, "The Fallacies of Simpson v Thomson", (1971) 34 M.L.R. 149. At 149-155, James argues that although ("simple") subrogation was rightly denied to the plaintiff insurer in the case, the insurer should nonetheless have been entitled to recover its payment in a direct action against the defendant insured tortfeasor, on the ground that the insured tortfeasor, rather than the plaintiff insurer should have been the party primarily liable for the insured loss. In the writer's view, this argument is fundamentally sound. However, for another view see
ureds with identical insurable interests are covered by the same policy, if one of them negligently causes an insured loss the insurer cannot claim to be "simply subrogated" to the "innocent" co-insured's right of action against the "negligent" co-insured, because, in the words of DeGrandpré, J.:\(^\text{122}\)

"... the interests of the joint insured are so inseparably connected that the several insureds are to be considered as one with the obvious result that subrog-..."

Meagher, Gummow and Lehane, para. 949, who do not really seem to grasp James' point that because no third party was involved subrogation should never have been brought into the case.

Cf. Midland Insurance Co. v Smith (1881) 6 Q.B.D. 561, in which the plaintiff insurers brought an unsuccessful claim to be ("simply") subrogated to their insured's claim against his wife, who had intentionally set fire to the insured property. At 564-567, Watkin-Williams, J. held that because the husband was legally liable for his wife's acts, the insurer's claim amounted to a claim to be subrogated to the insured's rights of action against himself and for this reason must fail, following Simpson v Thomson.\(^\text{122}\)


In American law, insurers are forbidden to exercise subrogation rights against "negligent" co-insureds for a further reason still: it is thought undesirable to put insurers in a position where they could abuse their right to acquire information under policy provisions requiring the insureds' cooperation in defending actions brought against them by third parties: T.S. Brown and M.J. Goode, "Conflicts of Interest in Subrogation Actions", (1988) 22 Tort & Ins. L.J. 16, pp. 29-30.
This analysis was applied by Mr. Anthony Coleman, Q.C., sitting as a deputy High Court judge in *Stone Vickers Ltd. v Appledore Ferguson Shipbuilders Ltd.* [123] Here, the plaintiffs were sub-contractors responsible for supplying a propeller to the defendant shipbuilders. The propeller they supplied was defective, and the defendants therefore refused to pay for it. The plaintiffs sued, claiming the price of the propeller. The defendants meanwhile had been indemnified for the cost of remedying the defective propeller by their insurers, and the insurers sought to bring a ("simply") subrogated counter-claim in the defendants' name in respect of these costs. Mr. Coleman, Q.C. held that they could not do so, on the grounds that the plaintiffs had a "pervasive interest in the entire property" [124] covered by the insurance policy. However, the insurers appealed on this issue and the Court of Appeal held [125] that on the correct construction of the defendant's policy, the plaintiffs were not entitled to have the benefit of it. Hence, it followed that the insurers were entitled to bring a ("simply") subrogated counter-claim against the plaintiffs in the defendants' name. Following this case, it may now be said

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[124] Ibid., at 301.
that where an insurance policy is taken out in the name of an "innocent" co-insured, his "negligent" co-insured can claim immunity from a "simply subrogated" action brought against him in the "innocent" co-insured's name only where the "innocent" co-insured has clearly intended to insure on the "negligent" co-insured's behalf. It further appears from a recent Canadian case\textsuperscript{126} that where the terms of the co-insured's relationship are inconsistent with an intention on the "innocent" co-insured's part to insure for the "negligent" co-insured's benefit, it must follow that the insurer will be entitled to bring a "simply subrogated" action against the "negligent" co-insured. Thus, for example, the insurer will be entitled to "simple subrogation" where the "negligent" co-insured has agreed to insure in his own right in respect of any future liability towards his "innocent" co-insured.

Fourthly, an insurer S cannot be "simply subrogated" to its insured RH's rights against PL where RH has ceased to exist. This point was established in M.H. Smith (Plant Hire) Ltd. v D.L. Mainwaring (T/A Inshore),\textsuperscript{127} where the Court of Appeal held that an insurance firm could not bring a ("simply") subrogated action against an alleged third party tortfeasor in the name of its insured, because the


insured was a company that had been wound up and dissolved. "Reviving subrogation" would have been an inappropriate remedy to rescue the insurers from their difficulty, since this remedy works to revive rights of action extinguished by payment; it does not work to revive rights because the right-holder has ceased to exist as a legal entity. However, in his note of the case McGee has suggested that the insurers might have been able to succeed if they had sought an order under the Companies Act 1985, s. 651, declaring the dissolution of the company to have been void, and then proceeded to bring a ("simply") subrogated action in the normal way.

Fifthly, it should be noted that an insurer cannot recover more than it has actually paid the insured by bringing a subrogated action in the insured's name against a third party. In Lord Atkin's words:


In exactly the same way, where an insurer has paid its insured and the insured subsequently receives a payment in respect of the insured loss from a third party, the insured cannot claim that the insured owes it a duty to account (see (b)(iii), infra) for a portion of this money larger than the amount which the insurer has initially paid: Yorkshire Insurance Co. Ltd. v Nisbet Shipping Co. Ltd. [1962] 2 Q.B. 330. Cf. L. Lucas Ltd. v Export Credit Guarantee Dept. [1973] 1 W.L.R. 914, noted by R. Hodgin (1975) J.I.B.L. 114, a case with similar facts but which was actually decided by the House of Lords on the basis of construing the provisions of the contract between the insurer S and its insured RH.
"Subrogation will only give the insurer rights up to twenty shillings in the pound on what has been paid."

Sixthly and finally, it should be noted that an insurer that has been "simply subrogated" to its insured's rights of action against a third party must bring the subrogated action against the third party in the name of its insured; it cannot bring the action in its own name.\textsuperscript{130} This rule has already been discussed in Chapter 1, part (7)(d).

\textbf{ii) The insurer's direct right of action for money had and received}

When an insured suffers an insured loss, but then receives a payment from a third party which diminishes the loss, his insurer's liability is correspondingly reduced, and the insurer is entitled to deduct a sum corresponding to the amount paid by the third party from the amount it pays to the insured.\textsuperscript{131} The corollary to this rule is that if the insurer subsequently makes a payment to the insured in respect of the insured loss, ignorant of the fact that the am-

\textsuperscript{130} See the cases cited at p. 95, n. 144, \textit{supra}.
\textsuperscript{131} \textit{Hamilton v Mendes} (1761) 2 Burr. 1198, at 1210-1215, \textit{per} Lord Mansfield; \textit{Burnand v Rodocanachi Sons & Co.} (1882) 7 App. Cas. 333, at 339, \textit{per} Lord Blackburn. Where a third party intends his payment to the insured as a gift, rather than as a payment to diminish the insured's loss, this rule will not apply: \textit{Burnand v Rodocanachi Sons & Co.}, ibid.; \textit{Merrett v Capitol Indemnity Corporation} [1991] 1 Lloyd's Rep. 169.
oount which it is liable to pay has been reduced, the insurer may recover its payment to the extent that the insurer’s and third party’s payments more than fully indemnify the insured when taken together. The insurer is entitled in these circumstances to bring an action for money had and received to the use of the insured. The basis of the insurer’s claim is that it paid money under a mistake of fact: it mistakenly thought itself liable to pay a larger sum than was in fact the case. Were the courts to construe the insurer’s mistake in this situation as a mistake of law, the insurer would be unable to recover its payment, but the courts have shown themselves prepared to construe mistakes of this kind in a liberal fashion, to the insurer’s benefit.

Derham has denied that the insurer can bring an action for money had and received in the circumstances described, writing of this action that:

"[I]t is a misconception of the nature of the insur-

132 Burrows, p. 80, suggests that the unjust factor underlying the insurer’s action for money had and received might alternatively be failure of consideration, in that the insurer pays to indemnify the insured, but the insured is already indemnified for his loss by the third party’s payment.

133 Cf. Bilbie v Lumley (1802) 2 East. 469, where an insurer paid its insured, not knowing that it could have avoided the policy for non-disclosure of a material fact. The insurer was not allowed to recover its payment, on the grounds that it had been made under a mistake of law.

134 Derham, p. 10.
er's right of subrogation to suggest that the insurer sues to recover the money previously paid to the insured. Rather the insured seeks to obtain the benefit of what the insured has received from the third party."

However, in the writer's view this analysis is incorrect. Derham relies for his interpretation on Darrell v Tibbitts\(^{135}\) and Castellain v Preston,\(^{136}\) the flawed reasoning of which has already been considered and condemned for its conflation of "simple subrogation" and the principle of indemnity underlying the award of that and other remedies to an insurer (this conflation is indeed reflected in Derham's own use of the phrase "the insurer's right of subrogation"). Furthermore, in the light of Lord Browne-Wilkinson's recent comments in Lord Napier and Ettrick v Hunter\(^{137}\), quoted below,\(^{138}\) it may now be said that the weight of authority favours the view set down here over Derham's interpretation.

One example of a case in which an insurer should have brought an action for money had and received against its insured to recover a mistaken overpayment is Stearns v Village Main Reef Gold Mining Co. Ltd.\(^{139}\) Here, the defendant mine owners' gold, insured by the plaintiffs, was command-

\(^{135}\) (1880) 5 Q.B.D. 560.
\(^{136}\) (1883) 11 Q.B.D. 380.
\(^{138}\) At p. 176, infra.
\(^{139}\) (1905) 10 Com. Cas. 89.
eered by the South African Government in the run-up to the Boer War. The defendants came to an agreement with the South African Government, under which they were paid a sum of money in respect of half the gold, the South African Government kept the other half, and the defendants agreed to keep their mine open. The plaintiff insurers then paid the defendants as for a total loss of the insured gold, unaware that the South African Government had made a payment to the defendants in respect of it. The insurers' claim, perhaps unsurprisingly given the confusion in this area created by the Court of Appeal's judgments in *Darrell v Tibbitts* and *Castellain v Preston*, was framed in an obscure way: they sought to recover their money either as money received to the defendants' use, or on the grounds that the defendants held it on trust for them, or as money paid under a mistake of fact.  

And the Court of Appeal, who found in favour of the plaintiff insurers, in turn fell prey to confusion, holding that the insurers were entitled to recover not their own money, as money overpaid under a mistake of fact, but rather the South African Government's money, as money "paid in reduction of [the insurers'] loss." 

Thus far, this case seems to bear out Derham's analysis. However, when Wynn-Parry, J. came to consider *Stearns* in the course of his judgment in *Re Miller, Gibb & Co.*

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141 *Ibid.*, at 98, per Stirling, L.J.
he identified it as a case in which: 143

". . . what the insurers did was to sue for what in effect had been an overpayment . . . No question of relying on the doctrine of subrogation [i.e., substitution to the insured's rights against a third party] arose, and, indeed, subrogation was not relevant . . ."

And this analysis has now been confirmed by Lord Browne-Wilkinson in Lord Napier and Ettrick v Hunter, who said of Stearns: 144

"It was a case of overpayment by insurers under a mistake, not subsequent recovery by the assured from a third party of a fund for which the assured was accountable to the insurer."

There is scant further authority in support of this proposition, most probably because insurers have been swift to enforce the subrogation clauses written into many insurance contracts, and to settle matters with third party tortfeasors directly, under the authority thereby conferred upon them by their insureds. 145 However, Thesiger, L.J.'s rem-

142 [1957] 1 W.L.R. 703.
143 Ibid., at 710-711.
arks in Darrell v Tibbitts which have been quoted above should also be mentioned in this context.

iii) The insured's duty to account to the insurer for sums received from third parties

Where an insurer indemnifies its insured in respect of an insured loss, and the insured subsequently receives a payment from a third party in respect of the same loss, the insured owes a duty to account to the insurer for the third party's payment to the extent that he is more than fully indemnified by his receipt of the insurer's and the third party's payments taken together. The House of Lords has recently held in Lord Napier and Ettrick v Hunter that in the circumstances described, the insured holds the relevant portion of the third party's payment on constructive trust for the insurer, and that the insurer has a corresponding right to bring a proprietary claim against the insured in respect of this money. Thus, they held that a group of Stop Loss insurers represented by Mr. Hunter, who had paid a group of insured Lloyd's Names represented by

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146 Supra, p. 148. See too the analysis of Darrell v Tibbitts advanced in British Traders' Insurance Co. Ltd. v Monson (1964) 111 C.L.R. 86, at 94, per Kitto, Taylor and Owen, JJ. And cf. Burrows, pp. 80-81, who asks: "Why has the law gone to lengths of involving subrogation, and hence rights to recover money paid by [PL] to the insured, if there is, as there appears to be, a straightforward claim available to the insurer for restitution of the money he has paid to the insured either for mistake of fact or failure of consideration?"

Lord Napier and Ettrick in respect of insured losses, were entitled to a proprietary claim against the insured Names in respect of sums which the Names were subsequently paid by their underwriting syndicate in settlement of an action for alleged negligence. In the writer's view, while their Lordships were right to hold in Lord Napier and Ettrick that the insureds owed a duty to account to their insurers for sums received from third party sources to the extent that these more than fully indemnified them for their insured losses, they were wrong to hold that the insurers should therefore have been given a corresponding proprietary claim in respect of these sums.\textsuperscript{148}

The insurers should not have been given a proprietary claim for the following reasons. First, they could not have been entitled to such a claim on the basis of "proprietary base" reasoning, because the money to which they laid claim had never been in their possession and hence they could not have claimed to "retain" a proprietary interest in it. In this respect the insurers resembled the plaintiffs in Lister & Co. v Stubbs.\textsuperscript{149} The plaintiff firm in Lister brought an action against its foreman in respect of secret commissions he had taken over a ten-year period. Although the Court of Appeal found that the defendant owed a personal duty to account to his employers for the money,

\textsuperscript{148} Burrows, p. 82, takes the same view.
\textsuperscript{149} (1890) 45 Ch. D. 1.
as "constructive trustee", they further held that the relationship between the parties was one of debtor-creditor rather than one of trustee-cestui que trust: they would not give the plaintiffs a proprietary remedy. This decision must be regarded as correct so far as the "proprietary base" analysis is concerned. Since the plaintiffs in *Lister* had never owned the money which they were seeking to recover, they could not have been permitted to trace it into the defendant's hands on the basis that they had retained a proprietary interest in it.\(^{150}\) Whether the plaintiffs in *Lister* should have been entitled to a proprietary remedy on alternative grounds is another question. It is at least arguable that they should have been entitled to a declaration that their employee held the secret commissions on constructive trust for the plaintiffs because of the relationship that existed between them.\(^{151}\) However, this issue


is not relevant to the present discussion, for the reason that the stop loss insurers and insured Names in *Lord Napier and Ettrick* had an entirely different relationship, and the stop loss insurers were not claiming to recover money from the insured Names that had been gained through any wrongdoing. The significance of *Lister* for *Lord Napier* is simply that it confirms the view that the insurers in *Lord Napier* could not have been entitled to a proprietary remedy on the basis of "proprietary base" reasoning.

It must therefore be asked whether the insurers should have been entitled to a proprietary remedy for any other reason. The only alternative justification for the award of a proprietary remedy to the insurers that was advanced in *Lord Napier* was put forward by Lord Templeman, who stated that:

"[I]f the argument on behalf of the names [that the insurers should be awarded only a personal remedy] is correct, the unsecured creditors of the insured name will benefit by double payment. The stop loss insurers will be in a worse position than an unsecured creditor because the insurers could [not] resist payment when-\[152\]


\[153\] This "not" does not appear in the reported text, but it is needed for the sentence to make sense.
ras an unsecured creditor may choose whether to advance moneys or not."

With respect to Lord Templeman, though, this argument is unconvincing. An insurer may choose whether to enter into a contract of insurance with its insured in exactly the same way that a creditor can choose whether to enter a contract of loan with its debtor. Once either contract is entered into, neither the insurer nor the creditor can resist its legal obligation to pay. This suggests that the element of compulsion underlying the insurer's payment that is adverted to in Lord Templeman's judgment does not constitute a sufficient reason for elevating the insurer's claim above the claims of the insured's unsecured creditors. Since the insurer, like the unsecured creditors, does not stipulate for security in its contract with the insured, it should rather be placed in exactly the same position as the unsecured creditors.\(^{154}\)

There is a further reason in principle why the insurers should not have been given a proprietary remedy in Lord Napier. If an insurer pays its insured after the insured's receipt of payment a third party, then as has been discussed in (b)(ii) above, the claim which the insurer is then

\(^{154}\) Cf. Burrows, p. 82, pointing out that in Lord Napier there was no thwarted mutual intention to create a security between insurer and insured analogous to the thwarted mutual intention to create a security in the valid and invalid loan cases discussed infra in Chapter 4.
allowed to bring against its insured is an action for money had and received to recover its overpayment, i.e. a personal claim. Why should the insurer be allowed a proprietary claim rather than a personal claim simply because the insurer happens to have paid its insured before rather than after the insured's receipt of payment from the third party? The effect of giving the insurer a proprietary claim in the latter, but not in the former circumstances is to create an anomaly for which there is no justification.

It is true that various dicta exist in the case-law predating Lord Napier and Ettrick to the effect that once an insured has been fully indemnified by his insurer, any payment he then receives from a third party in respect of his insured loss must be held on constructive trust for the insurer. However, in only two of these cases, Re Miller, Gibb & Co. Ltd. and Re Palmdale Insurance Ltd. (in liq.) (No. 3) was the conclusion expressly drawn, that because the insured was a "constructive trustee", the insurer must

therefore have had a corresponding proprietary right against him. In none of the other cases cited did this question expressly arise, for the reason that in none of them was there an insolvent insured.

Against Re Miller, Gibb & Co. Ltd. stood an obiter dictum from the House of Lords and two decisions by the Court of Appeal. In Burnand v Rodocanachi Sons & Co.,\(^{158}\) the defendant insured was paid by the plaintiff insurers in respect of its insured loss and was then paid by a third party as well. The plaintiff insurers brought an action claiming the third party's payment, but the House of Lords held against them, on the grounds that the third party's payment was intended as a gift, with the result that the insurers could not lay claim to it. For the purposes of the present discussion, the significance of the case is that Lord Fitzgerald stated that:\(^{159}\)

\(^{158}\) (1882) 7 App. Cas. 333.

\(^{159}\) Ibid., at 344. See too Assicurazioni Generali de Trieste v Empress Assurance Corp. Ltd. [1907] 2 K.B. 814, at 822, per Pickford, J.; Yorkshire Insurance Co. Ltd. v Nisbet Shipping Co. Ltd. [1962] 2 Q.B. 330, at 341, per Diplock, J. (though it must be conceded that in support of his contention that an insurer in the circumstances described in the text should have an action for money had and received, Diplock, J. cited a passage from E. Bullen & S.M. Leake, Precedents in Pleadings, 3rd ed. (London, 1868), p. 187, who in turn cited a case that does not bear out this view of the law: Bilbie v Lumley (1802) 2 East. 469, noted supra, p. 173, n. 133. This discrepancy is noted in Lord Napier and Ettrick v Hunter [1993] 1 A.E.R. 385, at 400, per Lord Goff of Chieveley; see too Derham, p. 10.). And cf. Cook v Lister (1863) 13 C.B. (N.S.) 543, at 596-597, per Willes, J., discussed pp. 203-205, infra.
"The case . . . is really the old action for money had and received."

In other words, had he thought the plaintiffs to be entitled to win their case, he would have given them a personal claim only. It is true that it was not quite correct to say that the insurer should have an action for money had and received to recover its payment in these circumstances, since what it was actually entitled to recover was the money paid to the insured by the third party, which the insured was obliged to hold on account for the insurer. However, it is at least clear enough that Lord Fitzgerald entertained no idea of giving the insurer a proprietary claim to this money.

The first of the Court of Appeal authorities which could have been set against Re Miller, Gibb was Lister & Co. v Stubbs,\(^{160}\) which has already been discussed, and the relevance of which to the present issue is confirmed by the fact that it was expressly cited and approved in the second Court of Appeal case, Stearns v Village Main Reef Gold Mining Co.\(^{161}\) This case has also been discussed already:\(^{162}\) it concerned a claim brought by the plaintiff insurers which had paid the defendant insureds in respect of an ins-

\(^{160}\) (1890) 45 Ch. D. 1.
\(^{161}\) (1905) 10 Com. Cas. 89.
\(^{162}\) At pp. 174-175, supra.
ured loss, unaware that the insured had already received a payment in respect of the same loss from a third party. And as has been explained already, the Court of Appeal decided this case on a faulty basis: they incorrectly took the insured to be entitled to claim the third party's payment, rather than to recover their own payment as money paid under a mistake of fact. For this reason, Stirling, L.J.’s comments on the nature of the relationship between insurer and insured must strictly speaking be regarded as obiter. Nonetheless they are highly significant to the present discussion. For Stirling, L.J., in the belief that he was considering a case in which the insured owed a duty to account to its insured for money received from a third party, held that:

"[T]he position seems to me to be exactly the same as in Lister v Stubbs . . . In the present case the moment the underwriters paid in full, there was an obligation upon the company to make good what had been paid to them in reduction of their loss, but the relation is simply that of debtor and creditor, and not that of trustee and cestui que trust."

As has also been said, Wynn-Parry, J. considered Stearns

163 Ibid., at 97-98.
in Re Miller, Gibb, \textsuperscript{164} where he correctly identified it as a case in which the insurer was entitled to bring an action for money had and received against its insured. Unfortunately, though, on these exact grounds, he felt himself able to distinguish Stearns, and to hold that Stirling, L.J.'s dicta on the subject of proprietary claims should not be taken to apply to the situation where the insured is paid by a third party after receiving the insurer's payment. In the writer's view, Wynn-Parry, J. was correct to distinguish between the two situations but reached the wrong conclusion as a result: he should have concluded from the fact that an insurer has a personal action to recover money it has overpaid to its insured that it can only have a personal action in respect of money paid to its insured by the third party.

Both Saville, J. and a unanimous Court of Appeal held in Lord Napier that the insurers could not bring a proprietary claim against the insureds in respect of payments made by third parties in respect of the insured loss.\textsuperscript{165} In the writer's view, the House of Lords' decision to overrule the Court of Appeal on this point, and to grant the insurers a proprietary claim, is to be regretted. None of their Lordships expressly considered Lister v Stubbs in Lord Napier

\textsuperscript{164} [1957] 1 W.L.R. 703, at 711.

\textsuperscript{165} Baron Napier and Ettrick v R.F. Kershaw Ltd. [1993] 1 Lloyd's Rep. 10, at 15-16, per Saville, J., at 18-20, per Dillon, L.J., at 21, per Staughton, L.J., and at 24, per Nolan, L.J.
and Ettrick, it is presumed because they were saving their thoughts on the case for Attorney-General for Hong Kong v Reid, a case in which the New Zealand Court of Appeal followed Lister, and which is due to be heard by the Privy Council later in 1993. Lord Goff and Lord Browne-Wilkinson followed Wynn-Parry, J. in distinguishing Stearns as a case of money had and received, without taking the point that as a matter of principle the difference between the situation in Stearns and the situation in Lord Napier lies merely in the timing of the payments which the insured receives.

Two minor points remain to be made: first, if an insurer pays its insured, and then requests the insured not to pursue his rights against a third party, if the insured pursues them nonetheless, and recovers a sum from the third party, then once the insured is fully indemnified, he will still owe a duty to account for the balance to his insurer, to the extent of its payment, and the fact that the insurer requested the insured not to sue the third party will not debar him from claiming this amount from its insured.

Secondly, where the insured is indemnified by his insurer and then receives a payment from a third party that is not

168 Ibid., at 409.
made in respect of the insured loss, but rather, as a gift to the insured, intended to benefit him over and above any insurance monies he may have received, then the insurers will not be entitled to assert that the insured owes them a duty to account for the third party's payment.\textsuperscript{170}

\textbf{ii) Drawers and indorsers of bills of exchange other than accommodation bills}

When a bill of exchange is paid in due course by the acceptor, his payment will operate to satisfy and extinguish the bill, and discharge the liability of all the parties to it.\textsuperscript{171} When a bill is paid by the drawer, or by the indorser, though, the position is less straightforward. If it

\textsuperscript{170} \textit{Burnand v Rodocanachi Sons & Co.} (1882) 7 App. Cas. 333.

\textsuperscript{171} Bills of Exchange Act 1882, s. 59(1) (unless otherwise indicated, all references to statutory sections in the following discussion are to sections of this Act); \textit{Pownal v Ferrand} (1827) 6 B. & C. 439, at 443, \textit{per} Bayley, J.; \textit{Morley v Culverwell} (1840) 7 M. & W. 174, at 182, \textit{per} Parke, B.; \textit{Harmer v Steele} (1849) 4 Ex. 1, at 13-14, \textit{per} Pollock, C.B. See too Chalmers and Guest, p. 482.

If the acceptor pays the holder but then fails to require the holder to deliver the bill up to him, as he is entitled to do under s. 52(4), the holder might then indorse the bill and deliver it to some other party, who takes it in ignorance of the fact that it has already been paid by the acceptor. In these circumstances, it seems that the indorser will be liable on the bill to his immediate indorsee, because he is estopped from denying to the immediate indorsee that the instrument was valid and subsisting at the time of the indorsement, under s. 55(2)(c). However, the best view is that the acceptor will not be liable on the bill: \textit{Harmer v Steele} (1849) 4 Ex. 1, at 13, \textit{per} Wilde, C.J. (\textit{contra} \textit{Glasscock v Balls} (1889) L.J.Q.B. 51, at 52, \textit{per} Lord Esher, M.R.). See the discussion in Chalmers and Guest, pp. 482-484.
is an accommodation bill, and the drawer or indorser is the party accommodated, then his payment will discharge the bill. However, where the bill is not an accommodation bill, as a general rule the drawer or indorser's payment will not operate to discharge it. Where the bill is not discharged by his payment, the drawer or indorser is entitled to demand that the holder deliver it up to him. Once it is in his possession he may then either come against the acceptor on the bill in his new capacity as holder of the bill or renegotiate it to a fourth party. The drawer or indorser is also entitled to enforce for his own benefit any securities which the acceptor may have given the holder in respect of his liability on the bill. The drawer or indorser's entitlement to these remedies against the acceptor derives from the fact that the payment he makes to the holder is a payment made under legal compulsion in respect of an obligation for which the acceptor is primarily liable.

172 Discussed supra, section (a)(ii).
173 S. 59(3); Lazarus v Cowie (1842) 3 Q.B. 459; Jones v Broadhurst (1850) 9 C.B. 173, at 176, per Wilde, C.J.; Cook v Lister (1863) 13 C.B. (N.S.) 543, at 590, per Williams, J.; Solomon v Davis (1883) 1 Cab. & E. 83; Brown, Johnson & Co. v Cama & Co. (1890) 6 T.L.R. 250. The reason for this rule is that although the party accommodated does not sign the bill as the acceptor, he is nonetheless taken to be the party primarily liable on the bill: Chalmers and Guest, p. 495, n. 77; R. Goode, Commercial Law (Harmonds- worth, 1982), pp. 450-451.
174 In the case of a bill which has been negotiated several times, and is then paid by one of the indorsers, he may then take delivery of the bill and in his new capacity as holder sue either the acceptor or any of the prior indorsers on the instrument.
It should be stressed that the drawer or indorser is only entitled to sue the acceptor on the bill once he has stepped into the position formerly occupied by the holder. That is to say, he may only sue the acceptor on the bill in his capacity as the bill's new holder; in his former capacity as drawer or indorser he was not entitled to do this.\textsuperscript{175}

For this reason, in the writer’s view it must be correct to say that in substance the drawer or indorser’s entitlement to sue on the bill is derived from his having been "simply subrogated" to the holder’s position. The objection which might be raised to this statement is that there exists no procedural requirement that the drawer or indorser bring his "simply subrogated" action against the acceptor in the name of the holder,\textsuperscript{176} and yet it has been argued above, in Chapter 1, part (7)(d), that as a general rule a claimant S who has been "simply subrogated" to the rights of another party RH must bring his "simply subrogated" action in RH’s

\textsuperscript{175} \textit{Ex parte Bishop} (1880) 15 Ch. D. 400, at 411, per James, L.J.:

"An indorser of a bill is not entitled to sue upon it, unless he becomes the holder."

See too Goff and Jones, p. 536. And cf. \textit{Jade International Steel Stahl und Eisen GmbH & Co. K.G. v Robert Nicholas (Steels) Ltd.} [1978] 3 W.L.R. 39, where the plaintiff drawers of a bill were held to be entitled to sue the acceptor on the instrument, once they had established that they derived title to sue from a holder in due course.

\textsuperscript{176} Under the old common law rules, it was formerly possible for a drawer or indorser to oblige the holder to sue the acceptor or the drawer or indorser’s benefit (see the cases cited \textit{infra}, at p. 196, n. 185). However, this procedure seems to have fallen into disuse following the enactment of the Bills of Exchange Act 1882.
name. In the writer's view, though, the substance of the drawer or indorser's remedy, and the rationale which underlies its award, are so closely akin to the substance and to the underlying rationale of "simple subrogation" that the entitlement of the drawer or indorser to acquire the bill and to sue in his capacity as the new holder should be seen as an example of "simple subrogation", notwithstanding the procedural inconsistency. Hence, in the writer's view the law in this area constitutes an exception to the general procedural rule argued for in Chapter 1, part (7)(d).

In the following discussion, the right of a drawer or indorser S to be "simply subrogated" to the holder RH's personal rights against the acceptor PL will first be considered, and then the drawer or indorser S's right to be "simply subrogated" to the holder RH's secured rights against the acceptor PL.

a) The drawer or indorser S's right to be "simply subrogated" to the holder RH's personal rights against the acceptor PL

It has long been held that the acceptor of a bill of exchange is primarily liable, and the drawer and indorsers only secondarily liable for its payment. Furthermore,

177 Tindal v Brown (1786) 1 T.R. 167, at 170, per Buller, J.; Ex parte Yonge (1814) 3 V. & B. 31, at 40, per Lord Eldon, L.C.; Philpot v Briant (1828) 4 Bing. 717, at 720, per Best, C.J.; Duncan, Fox & Co. v North & South Wales Bank (1880) 6 App. Cas. 1, at 13, per Lord Selborne,
drawers and indorsers escape the imputation that they have voluntarily exposed themselves to their liability on a bill because the acceptor is taken impliedly to have authorised their assumption of liability. This implied authorisation is said to follow from the fact that at the time the bill is first drawn, the acceptor either actually knows them (in the case of drawers), or if he does not actually know them, is at least capable of contemplating their future existence (in the case of indorsers). To some extent, therefore, the position occupied by a drawer or indorser S obliged to pay a holder RH may be likened to that of other payors under legal compulsion of debts for which they are only secondarily liable: for the reason that S is legally obliged to pay RH even though the acceptor PL is primarily liable, the courts take it to be desirable that S should be able to recover his payment from PL.

However, the drawer or indorser S's position differs in a crucial respect from that of most other payors under legal compulsion of debts for which they are only secondarily liable. In most cases, where a party secondarily liable for a debt pays it under legal compulsion, the effect of his

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L.C. 178 Payments made in respect of secondary liabilities to which the payors have voluntarily exposed themselves are irrecoverable under the present law: Owen v Tate [1976] Q.B. 402, discussed infra, Chap 5, part (1).

179 Duncan, Fox & Co. v North & South Wales Bank (1880) App. Cas. 1, at 14, per Lord Selborne, L.C.; Ex parte Bishop (1880) 15 Ch. D. 400, at 414-15, per James, L.J., and at 416, per Cotton, L.J.
payment is to discharge the debt, and the payor can then recover his payment from the party primarily liable in an action for money paid to his use. Where the drawer or indorser of a bill S pays the holder RH in full, however, the basic rule has been established that his payment will not prima facie discharge the bill, and S is therefore prima facie unable to recover his payment from the acceptor PL by bringing an action against him for money paid to PL's use.

It should be noted that the basic rule only gives effect to a presumption that S does not intend to discharge the bill by his payment, a presumption that may be rebutted by evidence to the contrary. This will be discussed further below, under heading (ii). It should also be noted that it is not entirely clear what is the effect of S's payment when he does not pay RH in full, but only pays him in part. This will also be discussed further below, under heading (iii). Before considering these issues, though, the basic rule that S's full payment will not prima facie discharge the bill must be set out, and the reasons for it discussed, under heading (i).

180 See generally Goff & Jones, Chap. 14.
i) The basic rule: where a drawer or indorser S pays the holder RH in full, his payment does not prima facie discharge the bill

The rule that the drawer or indorser S's payment does not prima facie discharge the bill is established in the Bills of Exchange Act 1882, s. 59(2), the first part of which sets down that:

"Subject to the provisions hereinafter contained,\textsuperscript{181} when a bill is paid by a drawer or indorser it is not discharged . . ."

From this it inevitably follows that S cannot recover his payment from the acceptor PL in an action for money paid. Despite S's payment to the holder RH, PL's liability to RH subsists, with the result that S has technically conferred no benefit on PL. This is not to say, though, that the purpose of the rule is to deny S the right to recover his payment from PL. On the contrary, the intention of the Bills of Exchange Act 1882 is to arrange matters in such a way that S is given not only the right to recover his payment from PL, but also the alternative course of taking the bill from the holder and renegotiating it to some fourth party where this seems preferable. This becomes clear when

\textsuperscript{181} This proviso refers to s. 59(3), which concerns the discharge of accommodation bills.
the full text of s. 59(2) is given, and considered along-side s. 52(4).

According to s. 52(4):

"Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when the bill is paid the holder shall forthwith deliver it up to the party paying it."

And the full text of s. 59(2) is as follows:

"Subject to the provisions hereinafter contained, when a bill is paid by a drawer or indorser it is not discharged, but:

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not reissue the bill.

(b) Where a bill is paid by an indorser, or where a bill payable to a drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements,

\[182\] I.e., the drawer or indorser regains the rights which he formerly possessed in his capacity as holder of the bill.
and again negotiate the bill."

The effect of these sections may be summarised as follows: when the drawer or indorser S pays the holder RH, his payment does not discharge the acceptor PL's liability on the bill. Thus, the possibility arises that RH may be paid twice in respect of the same right: having received a payment on the bill from S, he remains in a position to pursue PL on the bill. In order to allow S to recover his payment from PL, as well as to prevent the holder of the bill RH from recovering for a second time on the bill by suing PL on it, S may demand that RH deliver the bill up to him, with the result that he is in effect "simply subrogated" to the position formerly occupied by the holder. Once the bill is in his possession, S then has the choice of two courses of action: he may either sue PL on the bill, in his new capacity as holder of the bill; alternative-

183 The right to sue the acceptor on a bill continues to be vested in whomever has de facto possession of it: Agra & Masterman's Bank Ltd. v Leighton (1866) L.R. 2 Exch. 56, at 63, per Bramwell, B.

184 The right to demand delivery up of the bill was conferred on S at common law before 1882: Powell v Roach (1806) 6 Esp. 76; Hansard v Robinson (1827) 7 B. & C. 90; Alexander v Strong (1842) 9 M. & W. 733; Cornes v Taylor (1854) 10 Ex. 441; Duncan, Fox & Co. v North & South Wales Bank (1880) 6 App. Cas. 1, at 18, per Lord Blackburn.

185 Mendez v Carreroon (1701) 1 Ld. Raym. 472; Callow v Lawrence (1814) 3 M. & S. 95, at 97-8, per Lord Ellenborough; Williams v James (1850) 15 Q.B. 498, at 505, per Lord Campbell, C.J. S may also set off the amount of the bill against an action subsequently brought against him by PL: McKinnon v Armstrong Bros. & Co. (1877) 2 App. Cas. 531.

It further appears that at common law S was entitled al-
ly, he may renegotiate the bill to a fourth party.\footnote{186}

As has been remarked, the position of a drawer or indorser S paying the holder of a bill is unusual when compared with that occupied by other payors under compulsion of debts for which they are only secondarily liable. Goff and Jones have suggested that it would be desirable for the sake of consistency to bring the law in this area into line with the general law of compulsory payments:\footnote{187}

Alternatively to leave the bill in RH's hands, and require RH to sue PL for him: Williams v James (1850) 15 Q.B. 498, at 505, \textit{per} Lord Campbell, C.J. See too Cook v Lister (1865) 13 C.B. (N.S.) 543, at 581, \textit{per} Erle, C.J.: "Where the drawer of a bill has been called upon to pay, it is more convenient that the holder should sue than that the drawer should sue in his own name. In some of the cases it has been said that he may require the holder to go on and recover the money from the acceptor, and hand it over to him.""

Presumably S would have to agree to indemnify RH for the costs of suing PL before he could oblige RH to do so. This procedure would have been much closer than the procedure set out in ss. 52(4) and 59(2) to the "simple subrogation" awarded to insurers after paying their insureds, insofar as it would have meant that an action brought for the benefit of the drawer or indorser S would have been brought in the holder RH's name. But it should be stressed that unlike an insurer S wishing to pursue a third party tortfeasor PL, a drawer or indorser S has never been obliged to come against the acceptor PL in this way.

It should also be noted that it was not open to S to sue PL in RH's name without first obtaining RH's permission: in Coleman v Biedman (1849) 7 C.B. 871, the indorser of a promissory note brought an action against the maker in the name of the indorsees without having obtained the indorses' permission to do so. His action failed because this was held to constitute an abuse of court process.

\footnote{186} Callow v Lawrence (1814) 3 M. & S. 95; Hubbard v Jackson (1827) 3 C. & P. 134, subsequent proceedings (1827) 4 Bing. 390; Woodward v Pell (1868) L.R. 4 Q.B. 55.

\footnote{187} Goff and Jones, pp. 317-318.
"No doubt bills of exchange are subject to special considerations. Nevertheless, there is much to be said against the rule so established . . . It is difficult to see . . . why the payment of a drawer or indorser should not operate to discharge the acceptor, pro tanto, if the payment is partial, and completely, if the payment is in full."

However, at least in the context of a drawer or indorser paying a bill in full, Goff and Jones would do the drawer or indorser a disservice here. For the rule-preserving the bill from extinction when it is paid by a drawer or indorser $S$, when taken together with the rule allowing $S$ to demand delivery of the bill, serves to give $S$ a considerable advantage over the common herd of payors under legal compulsion. Not only does it allow him to recover his payment from the acceptor; it also presents him with the alternative course of renegotiating the bill to some fourth party. $S$ may well find this alternative course attractive, even though it requires him to re-expose himself to liability on the bill, because it allows him to release capital that would otherwise be tied up pending his recovery from PL, and because it is less trouble than suing PL himself.\textsuperscript{188}

\textsuperscript{188} This is particularly likely to be the case where the bill has been used to finance an overseas commercial transaction. Exporters frequently draw bills for the price
ii) An exception to the basic rule: where a drawer or indorser S pays the holder RH, expressly acting as the acceptor PL's agent.

Notwithstanding the wording of the Bills of Exchange Act 1882, s. 59(2), it would be wrong to say that a drawer or indorser S can never discharge PL's liability by paying RH. For if S has previously agreed with PL that he will act as PL's agent, then the fact that he is also the drawer or indorser of the bill should not prevent him from paying the holder qua acceptor's agent, rather than qua drawer or indorser, if this is his intention. And if S expressly pays a bill in his capacity as PL's agent, then the effect of his payment should be to discharge the bill, under the Bills of Exchange Act 1882, s. 59(1):^{189}

"A bill is discharged by payment in due course by or on behalf of the drawee or acceptor." (Emphasis added)

^{189} Cf. J. Story, Commentaries on the Law of Bills of Exchange, 3rd ed. (Boston, Ma., 1853), p. 320:
"Payment by any of the other parties to the Bill does not discharge the Acceptor, unless it is so intended by the parties . . ."
As has been discussed in (i) above, the fact that PL is taken impliedly to have authorised S to expose himself to liability on the bill is not sufficient to displace the prima facie rule that S’s payment does not discharge PL’s liability on the bill. It was expressly held in Jones v Broadhurst\(^{190}\) that where S pays the holder of a bill RH, the court will presume that S intended to discharge his own liability on the bill, but not to discharge PL’s liability.\(^{191}\) In order to displace this presumption, it seems

\(^{190}\) (1850) 9 C.B. 173.  
\(^{191}\) Ibid., at 181-183, per Cresswell, J. (though it appears that the judgment delivered by Cresswell, J. was written by Lord Truro: Cook v Lister (1863) 13 C.B. (N.S.) 543, at 586, per Williams, J.) Lord Truro was certainly correct to state that S’s payment should not automatically be taken to have discharged PL’s liability on the bill. However, it is arguable that on the actual facts of Jones v Broadhurst this rule should not have been held to apply, because the drawers in that case expressly paid the holder in respect of the acceptor’s liability, and the acceptor subsequently ratified their payment on his behalf: at 174, it is reported that:

"[T]he defendant [PL] called W. Cook, one of the drawers [S]. He [Cook] proved that the plaintiffs’ [RH’s] traveller called at his warehouse, and looked out the goods, which were sent to the plaintiffs [RH] in satisfaction of the bill. He also admitted that the amount of the bill had been paid to him, Cook, by the defendant [PL]." (Emphasis added)

And at 177, Coltman J. held that:

"[T]here was abundant evidence to warrant the jury in finding that the [drawer S’s] goods were delivered to and accepted by the plaintiffs [RH] in satisfaction and discharge of the liability of every party to the bill." (Emphasis added)

This suggests (i) that S expressly paid RH to discharge PL’s liability on the bill; and (ii) that PL tacitly ratified S’s payment by subsequently reimbursing S. Taken together, (i) and (ii) suggest that S should have been taken to have acted as PL’s agent when paying the bill, and that the
likely that some strong evidence of a prior agreement between S and PL will be needed. Even where this exists, however, if S fails to tell RH in what capacity he is paying, the courts may still be able to find that he has paid in his capacity as drawer or indorser, rather than in his capacity as PL's agent.

Thus, for example, in Pollard v Ogden\textsuperscript{192} the plaintiff drawers of a bill were customers of the defendant bank. The bill in question was drawn on an acceptor PL who was also a customer at the bank. The plaintiffs indorsed the bill to the bank, who then reindorsed to another party RH. When the bill fell due, RH presented it for payment to the defendant bank, who paid it. Unfortunately, the acceptor PL's account with the defendant bank was overdrawn at the time, and the next day he stopped payments from the account. Thus, the bank was unable to recoup itself out of PL's account. The bank therefore gave notice to the plaintiff drawers that the bill had been dishonoured by the acceptor PL, and debited the drawers' account for the amount of the bill. The plaintiff drawers then brought an action against the bank, disputing the bank's right to do this on the ground that when the bank had paid the bill to RH, it had done so in its capacity as agent of the acceptor PL, so

\textsuperscript{192} (1853) 2 E. & B. 459.
that the bill was thereby discharged, and the bank left to its remedies against PL. The bank argued that, on the contrary, it had paid the bill in its capacity as indorser, so that it was remitted to its former rights as holder of the bill against the plaintiff drawers (i.e., it laid claim to the character of "S"). It was held to be a question of fact for the jury to determine, in what capacity the bank had paid, and the jury found as a matter of fact that the bank had paid in its capacity as indorser, so that the plaintiffs' action failed.

It must be said that it is unclear on what evidence the jury could have reached this, or indeed any decision. The bank had only a fictional state of mind at the time of making its payment to which the jury could have referred, and to render matters yet more uncertain, it was held that the bank had been under no obligation at the time of making its payment to RH to tell RH in what capacity it was paying. If similar situations arise in the future, and are decided on the same basis, it will be impossible to predict whether S will be found to have paid qua agent of PL or qua drawer or indorser.

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193 As in Auchteroni & Co. v Midland Bank, Ltd. [1928] 2 K.B. 294, esp. at 300-301, per Wright, J.
194 (1853) 2 E. & B. 459, at 464, per Erle, J.
195 Similar cases turning on the dual character of a payor, and decided on a similarly unpredictable basis are: Graves v Key (1832) 3 B. & Ad. 313; Boyd v Emmerson (1834) 2 A. & E. 184; Sunley v Cunard (1861) 2 F. & F. 548 (which concerned a bill drawn to finance the shipment of rifles to Garibaldi in Naples).
iii) Where S makes a part payment to RH

There remains to be considered the situation which arises where a drawer or indorser S makes a part payment on a bill to the holder. The Bills of Exchange Act 1882 does not touch upon the point, so that the area must be regarded as still governed by common law authority. The case-law is rather confused and self-contradictory, but the best view seems to be that where S pays a bill in part, his payment will not discharge the bill pro tanto. Thus, notwithstanding S's prior part payment, RH is entitled to recover the full amount of the bill from the acceptor PL, but he must account to S for a proportion of the amount he recovers corresponding to the sum which S has previously paid.\(^{196}\)

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\(^{196}\) Cook v Lister (1863) 13 C.B. (N.S.) 543, at 591-2, per Williams, J.:

"[W]here a bill is not an accommodation bill, that is to say, where the acceptor is the person out of whose pocket the money to meet the bill is to come, it may very properly be held, as it was held in Jones v Broadhurst, that notwithstanding the partial payment by the drawer, the holder may recover the whole sum against the acceptor, because he is the person who is ultimately liable to pay the whole, and that, when the holder has so recovered the whole sum, he shall be held to have received the difference between what he recovered from the acceptor, as a trustee from the drawer."


Sir John Byles, author of the leading nineteenth century work on bills, A Treatise on the Law of Bills of Exchange, Promissory Notes etc., revised his opinion on this issue following the decision in Jones v Broadhurst (1850) 9 C.B. 173. In the 5th ed. (London, 1847), pp. 164-165, he wrote:

"It does not appear to be settled, whether part pay-
It is not at all clear from the cases whether RH's duty to account to S is such that S can assert a proprietary claim to the money in RH's hands, although in Cook v Lister Willes, J. thought that:197

"The expression "he [= RH] is a trustee for the rest," does not mean that there is such a trust as must be enforced in the court of Chancery. I should think that an action for money had and received would lie the instant the indorsee [= RH] received more than he was entitled to . . . ."

This dictum may be contrasted with the corresponding rule in insurance law recently established in Lord Napier and

...
Ettrick v Hunter,198 that after an insurer has paid its insured for an insured loss, it has a proprietary claim against the insured to recover so much of a third party's further payment to the insured as more than fully indemnifies him for his loss.199

Goff and Jones200 and Chalmers and Guest201 both take a contrary view to that expressed here. In their common view S's part payment does discharge PL's liability on the bill pro tanto, so that RH can only recover the unpaid balance from PL, and S can bring an action for money paid against PL to recover his payment. They both cite Pownal v Ferrand202 in support of this proposition.203 However, in the writer's view this case is fundamentally consistent with the view stated above, that S's part-payment does not discharge the bill pro tanto. The facts of the case were as follows: S part-paid RH. RH then won a judgment against PL for the full amount of the bill, notwithstanding S's prior part-payment. However, RH only enforced his judgment against PL to the extent of the unpaid balance; that is, RH only recovered the amount owing on the bill less the amount already paid by S. S then brought an action for money paid

199 See the discussion at pp. 177-187, supra.
200 Goff and Jones, p. 536, n. 2.
201 Chalmers and Guest, p. 494, n. 69.
202 (1827) 6 B. & C. 439.
203 See too Cook v Lister (1863) 13 C.B. (N.S.) 543, at 597, per Willes J.; Ex parte Bishop (1880) 15 Ch. D. 400, at 416, per Cotton L.J.
against PL to recover his payment. It should be stressed that these facts were unusual. If RH had recovered the full amount owing on the bill from PL, the court would have had no problem with allowing S to recover from RH the amount of his prior payment to RH.\(^{204}\) However, RH did not recover the full amount, rather perversely, it may be thought, as he had won a judgment for it. Presumably he did not think it worth his while to recover money which he would then have to pay over to S. This left S in an awkward situation, as he could not recover his payment from RH, nor, it appeared, could he sue upon the bill, for in the words of Lord Tenterden, C.J.:\(^{205}\)

"[T]he bill was not in his possession, and even if it was, there might be great difficulty in suing upon it, for the present defendant might have pleaded a former recovery of the whole amount of the bill."\(^{206}\)

To get around this exceptional problem, S was held to be entitled to recover his payment by bringing an action for money paid to PL’s use. Lord Tenterden, C.J. commented, presumably with the general policy in mind, of protecting

\(^{204}\) See the cases cited at p. 203, n. 196, supra.

\(^{205}\) (1827) 6 B. & C. 439, at 443.

\(^{206}\) If RH had taken a verdict only for the amount of the unpaid balance, and had then delivered the bill to S, S could have recovered his payment from PL by suing on the bill: Hemming v Brook (1841) C. & M. 57, at 57, per Lord Abinger, C.B.
the continuing negotiability of bills: 207

"The facts of this case are so very peculiar, that it appears to me that a decision in favour of the plaintiff will not tend to any mischievous consequences."

Hence, Pownal v Ferrand should be seen not as a decision to the effect that S's part payment invariably discharges the bill pro tanto, but as a decision expressly confined to an exceptional situation, which was reached within the framework of the rule that S's payment does not discharge the bill pro tanto. 208

In further support of the view that S's part payment of a bill discharges it pro tanto, Chalmers and Guest209 and Goff and Jones210 also refer to a series of cases establishing that where an acceptor goes bankrupt after the holder has been part paid on the bill by the drawer or indorser, the holder can prove in the acceptor's bankruptcy only for

207 Ibid., at 442.
208 In Johnson v Kennion (1765) 2 Wils. K.B. 262 and Walwyn v St. Quintin (1797) 1 B. & P. 652, at 658, per Eyre, C.J., it was held that RH could recover the whole amount of the bill from PL despite S's prior part payment. Until the mid C19, though, the stronger authority seems to have been Bacon v Searles (1788) 1 H. Bl. 88, which held that S's part payment would discharge the bill pro tanto. Bacon v Searles was then doubted in Purssord v Peek (1841) 9 M. & W. 196, at 201, per Lord Abinger, C.B., and in Jones v Broadhurst (1850) 9 C.B. 173, it was considered and overruled. See J.M. Holden, The History of Negotiable Instruments in English Law (London, 1955), p. 156.
209 Chalmers and Guest, p. 495, n. 71.
210 Goff and Jones, p. 319, n. 65.

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so much of the amount owing on the bill as remained unpaid. Some authority may be cited in support of the contrary view, that the holder can prove for the full amount. But even if the first group of cases is taken to be the stronger line of authority, they can only be regarded as authority for an anomalous rule whose scope is confined to the situation where PL is bankrupt, and which does not apply to the situation where PL remains solvent. This was expressly conceded by Turner, L.J. in Ex parte Tayler:

"Upon the question, whether, had the bankrupt [PL] continued solvent . . . [RH] could have recovered at law the full amount of the bill, I do not mean to give any opinion. I assume, for the purposes of this case, that he could, but I do not think that it therefore follows that he is entitled to prove for the full amount of the bill, for the right to prove in bankruptcy does not in all cases follow the right to recover at law."

211 Cooper v Pepys (1741) 1 Atk. 106; Ex parte Wyldman (1750) 2 Ves. Sen. 113; Ex parte Tayler (1857) 1 De G. & J. 302; Ex parte Maxoudoff (1868) L.R. 6 Eq. 582.
212 Jones v Broadhurst (1850) 9 C.B. 173, at 192, per Cresswell, J. (though see comment on the authorship of Cresswell, J.'s judgment, at n. 191, supra):
"[T]here are . . . numerous cases in bankruptcy, where proof is admitted against the acceptors of bills and makers of notes, for the full amount, notwithstanding partial payments made by other parties."
See too Ex parte De Tastet (1810) 1 Rose 10, at 11, per Lord Eldon, L.C.
213 (1857) 1 De G. & J. 302, at 308.
From S's perspective, it would be preferable were it the general rule that his part payment does discharge the bill pro tanto. This is because he is not entitled to require the delivery of a bill unless he pays it in full. As a result, he is unable to take advantage of the benefits of a continually negotiable bill where he has only paid the bill in part, and his interest is confined to recovering his payment from PL. The difficulty arising for S out of the rule that his payment does not discharge the bill pro tanto is that S can only recover from PL according to RH's whim; he has no mechanism by which he can oblige the holder RH to sue the acceptor on the bill. Thus, if the holder RH fails to exercise his rights against the acceptor PL, S will be left without any means of recovering his payment.

b) The drawer or indorser S's right to be "simply subrogated" to the holder RH's secured rights against the acceptor PL

As has been discussed above, the position of S, the drawer or indorser of an ordinary bill, is similar to that of other parties secondarily liable for debts, insofar as the courts think it desirable for him to recover his payment from PL, the party primarily liable on the bill; and as has been discussed, the means by which S is enabled to do this ("simple subrogation" to RH's rights against PL) are unusual by comparison with the route to recovery taken by most
parties secondarily liable for debts, because S's payment in most cases will be deemed not to have discharged PL's liability on the bill. When the further situation is considered, where PL has given some security to guarantee his payment of the bill to RH, it may be observed that similarly, the courts have held that S, like other parties secondarily liable for debts, is allowed to take over these securities and enforce them for his own benefit; unlike oth-


In Commissioners of the State Savings Bank of Victoria v Patrick Intermarine Acceptances Ltd. (in lig.) [1981] 1 N.S.W.L.R. 175, Meares, J. held that S, the indorser of a bill who paid the holder RH was entitled to be "subrogated" to a security given by the acceptor PL not to RH, but to an antecedent party on the bill. This decision is rightly criticised in R. Cranston, "Subrogation and Contribution: Some Debtor-Creditor Implications", in Current Developments in International Banking and Corporate Financial Operations, eds. Koh Keng Lian, Ho Peng Kee, Choong Thung Cheong and Boo King Ong (National University of Singapore, 1989) p. 159. At p. 171, Cranston observes that S could not have been subrogated to the security given by PL because:

"... the rationale of subrogation is that the party seeking it wishes to take the place of the creditor it has paid."

S's entitlement to acquire the security in this case should rather have been grounded on the principle of contribution. Scholefield Goodman & Sons Ltd. v Zynjer [1986] A.C. 562, noted by E.P. Ellinger, (1986) J.B.L. 399, turned on the question of whether or not PL's guarantor was equally liable with the drawers S for the payment of certain bills, dishonoured by the acceptor PL on their maturity. The Pri-vy Council disapproved two earlier Australian decisions on similar points, D. & J. Fowler (Australia) Ltd. v Bank of New South Wales [1982] 2 N.S.W.L.R. 879 and Maxal Nominees
er secondarily liable parties, though, S is able to acquire RH's secured rights via "simple", rather than via "reviving" subrogation. This is because S's payment does not extinguish the securities given by PL in respect of his liability on the bill and there is therefore no need for them to be artificially revived before they are transferred to him. S's entitlement to be "simply subrogated" to RH's securities cannot be explained on the basis of "proprietary base" reasoning, since RH is legally entitled to S's payment. It can therefore be explained only on the grounds that it would be unjust for S's property to be exonerated from the burden of paying PL's debt to RH at S's expense, where PL has previously executed a charge over his property to secure his liability on the bill.

It should finally be noted that, just as a surety is entitled to acquire via "reviving subrogation" securities formerly held by the creditor against the principal debtor of which the surety was unaware at the time of entering into the contract of suretyship, so the drawer or indorser S is entitled to be "simply subrogated" to securities of

Pty. Ltd. v Dalgety Ltd. [1985] 1 Qd. R. 51, and held that the true construction of the guarantee given to the holder RH was that PL's guarantor had not intended to place herself on an equal footing with any of the parties to the bills, so as to be equally liable with them in the event of PL's default; i.e. she had not agreed to pay RH where RH was still in a position to come against any of the parties to the bill. From this it followed that S were not entitled to any contribution from PL's guarantor, nor could they acquire RH's rights against PL's guarantor by subrogation.
which S was unaware, given by the acceptor PL to the holder RH in respect of his liability on the bill. This entitlement is similarly open to the criticism that it places the drawer or indorser in too favourable a position with respect to the acceptor’s other creditors.

215 Duncan, Fox & Co. v North & South Wales Bank (1880) 6 App. Cas. 1.
CHAPTER 3: MISTAKE

The cases discussed in this chapter all concern the situation where a party S pays money by mistake, and this money is paid to RH in respect of the obligations owed to RH by PL. S may himself pay RH directly; alternatively, S may pay PL, who then pays RH; or again, S may pay some fourth party X, who then pays RH. Before it can properly be considered whether S should be entitled to acquire RH's rights via subrogation, three preliminary issues must be addressed: (i) whether the mistake under which S makes his initial payment is of a kind sufficient to ground a restitutionary claim for its recovery; (ii) whether S's mistake is such that he is entitled to bring a proprietary restitutionary claim to recover his payment; (iii) whether RH's rights against PL are extinguished when RH is paid.

(i) The law of mistaken payments is presently in an uncertain state. Although the rule currently prevailing in English law is that payments made under a mistake of law are irrecoverable,1 the courts have shown themselves on occasion to be willing to construe a claimant's mistake as one of fact, rather than as one of law, in order to allow a

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1 Bilbie v Lumley (1802) 2 East. 469; Brisbane v Dacres (1813) 5 Taunt. 143; Dixon v Monkland Canal Co. (1831) 5 W. & S. 445.
claimant to recover his money. Hence, even this apparently certain limitation on the recovery of mistaken payments has not always proved a bar to recovery. Furthermore, it seems clear that the rule against the recovery of payments under a mistake of law is now in its last throes: it has been abandoned in Australia and Canada, and in England the Law Commission has recommended that it be abolished. It seems unlikely that the rule will survive much longer.

When payments made under a mistake of fact are considered, it must be said that although the courts have propounded various tests to determine which types of mistaken payment should and which should not be recoverable by the payor, it remains hard to predict in every case whether a mistaken payor will be permitted to recover his payment, or denied recovery for the reason that his mistake was insufficient to ground a restitutionary claim. However, it

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2 See e.g. Cooper v Phibbs (1867) L.R. 2 H.L. 149; Lazard Bros. & Co. v Midland Bank Ltd. [1933] A.C. 289; Solle v Butcher [1950] 1 K.B. 671.
6 The "liability test" propounded in Aiken v Short (1856) 1 H. & N. 210, at 215, per Bramwell, B. provides too narrow an explanation of the cases, since it fails to account for cases in which mistaken payors have been allowed to recover e.g. mistaken gifts (Lady Hood of Avalon v Mackinnon [1909] 1 Ch. 476) and payments made under a mistaken belief in moral duty (Larner v L.C.C [1949] 2 K.B. 683). The test of "fundamentality" adopted in Morgan v Ashcroft [1938] 1 K.B. 49, at 77, per Scott, L.J. (see too Porter v Latec Finance (Qld.) Pty. Ltd. (1964) 111 C.L.R. 177, at 187, per Barwick, C.J.) begs the question of what does and
seems likely that the courts will adopt an increasingly liberal approach to the question whether a mistaken payor can recover his payment, particularly now that they can allow the recipient of a mistaken payment to raise the defence of change of position to the payor's claim.\footnote{Lipkin Gorman v Karpnale Ltd. [1991] 2 A.C. 548, at 581, per Lord Goff of Chieveley.}

The significance of these developments for the law of subrogation is as follows. On the basis of current authority it is not always possible to state categorically of a case in which a claimant has been awarded subrogation, and which appears to be susceptible to analysis as a mistake case, that the unjust factor underlying the award of the remedy is mistake. Where subrogation is awarded to a claimant whose mistake has not been of a kind hitherto acknowledged what does not constitute a "fundamental" mistake, and so leaves matters open. The "causative test" proposed in Barclays Bank Ltd. v W.J. Simms Son & Cooke (Southern) Ltd. [1980] Q.B. 677, at 695, per Robert Goff, J. now seems most likely to be generally adopted (cf. David Securities Pty. Ltd. v Commonwealth Bank of Australia (1992) 66 A.L.J.R. 768, at 776-777, per Mason C.J., Deane, Toohey, Gaudron and McHugh, JJ.), but it should be noted that this test is too wide to reconcile with some authorities. Mistaken payors whose mistake has certainly "caused" them to pay have been refused a remedy in the past: see e.g., Bell v Lever Bros., Ltd. [1932] A.C. 161. For further discussion, see Birks, Chap. 6, Part 2; Burrows, Chap. 3; Goff & Jones, Chap. 3; K.G. Nicholson, "Recovery of Money Paid Under a Mistake of Fact", (1986) A.L.J. 459. P. Birks, Note, (1993) 109 L.Q.R. 164, p. 166, has recently suggested as a possible reconciliation of Barclays v Simms and Bell v Lever Bros., that the proper test for the recovery of mistaken payments should be that "the mistake must not only have caused the plaintiff to act but also be such that relief will not inexplicably disturb the risks distributed by any bargain between the parties."
by the courts as a ground for the award of a direct restitutionary remedy, then one of three conclusions must be drawn: either the award of subrogation in the case in question can be justified only by reference to some other unjust factor; or the tests which the courts have applied up until now to discover which mistakes should ground the award of restitutionary remedies are insufficiently wide; or the award of subrogation in the case in question was wrong.

In most of the cases where a claimant S pays under a mistake which is insufficient to ground a restitutionary claim on the basis of current authority, the only alternative explanation of the award of subrogation to S is that he made a payment for a consideration which subsequently failed. Provided that S has been subrogated only to RH's personal rights this alternative explanation is perfectly acceptable. However, for reasons which are discussed fully in Chapter 4, it cannot be correct to say that a payor for a consideration which subsequently fails can have a "proprietary base" to his claim sufficient to allow him to acquire an extinguished security via "reviving subrogation". The award of this proprietary remedy on the grounds of failure of consideration can therefore be explained only by reference to a general policy aim of fulfilling the thwarted mutual intent of lenders and borrowers to create securities. And if this analysis is found unconvincing then only two possible conclusions remain to be drawn. One of them, that
the award of subrogation was simply wrong, is unpalatable. For this reason, it seems preferable to view these cases as authority for the proposition that more types of mistake can ground the award of a restitutionary remedy than has been generally acknowledged to date, subject to a caveat with respect to the award of proprietary claims to mistaken payors that is set out below. This approach coincides with the courts' present inclination towards a more liberal test for the recovery of mistaken payments.

(ii) Assuming that a mistaken payor has been able to establish that his mistake was of a kind sufficient to ground a restitutionary claim, it remains to be considered whether he can go on to say that he is entitled to bring not merely a personal, but a proprietary claim to recover his money. That certain types of mistaken payor are entitled to do this was established in Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd., in which the plaintiffs were permitted by Goulding, J. to bring a proprietary claim in respect of a mistaken overpayment which they had made to the defendants. This case is explicable by reference to "proprietary base" reasoning: the plaintiffs' mistake was sufficient to vitiate their intention to transfer property.

in their money, with the result that they were subsequently entitled to assert a proprietary claim to it.\(^9\) However, it is clear that not every mistake that gives rise to a personal restitutionary claim will also give rise to a proprietary claim in this way. In the words of Robert Goff, J.:\(^{10}\)

"The kind of mistake that will ground recovery [via a personal restitutionary claim] is . . . far wider than the kind of mistake which would vitiate intention to transfer property."

It is not at all clear on the basis of current authority exactly which are the kinds of mistake that will give rise to a proprietary claim. And from this it follows that it is impossible to predict in every case where a mistaken payor S's money has been paid to extinguish RH's secured rights over PL's property, whether or not S will be entitled to acquire RH's extinguished securities via "reviving subrogation". It has been suggested above that some of the cases set out in this chapter may constitute authority in support of the proposition that the courts should apply a wider test to determine what mistakes will ground personal restitutionary claims. And by the same token, it might be

\(^9\) Birks, p. 379.
argued that some of the cases set out here, in which a mistaken payor S is allowed to acquire RH's extinguished security via "reviving subrogation", should similarly be seen as authority supporting the view that every payor under a similar mistake should be given a proprietary restitutionary claim. However, it must be said that it seems less desirable to extend the availability of proprietary, as opposed to personal restitutionary claims to mistaken payors, since the award of a proprietary claim to a mistaken payor is likely to prejudice the position of a class of people whose claims against the recipient of the mistaken payment are no less worthy than the mistaken payor's claim: the recipient's general creditors.\textsuperscript{11}

(iii) For reasons which are considered below in Chapter 5, part (2)(a)(i), where an intervener S with a present interest of his own in PL's property pays RH in respect of RH's charge over the property, the effect of his payment will be to extinguish RH's security automatically, but he will be entitled to acquire RH's extinguished rights against PL via "reviving subrogation". This rule extends to the situation where S is an intervener with a present interest in PL's property pays RH under a mistake (although not to

\textsuperscript{11} Goff and Jones, p. 115, argue that the mistaken payor should be placed in a better position than the recipient's general creditors, because they take the risk of his insolvency when they advance him credit whereas the mistaken payor does not. As to this argument, though, see the remarks made at p. 78, n. 99, \textit{supra}. 
the situation where S in fact has no interest in PL's property but mistakenly believes himself to have such an interest\(^{12}\), and cases to this effect are considered in part (1), below.

Where RH is paid by a party with no present interest in PL's property, then as has been discussed in Chapter 1, part (4), the question of whether RH's rights against PL are extinguished when RH is paid will vary according to whether or not the payment which he receives has been previously authorised or is subsequently ratified by PL. If PL authorises or ratifies the payment made to RH, then RH's rights will be extinguished by the payment; if he does not, then RH's rights will not be extinguished.\(^{13}\) The cases concerning the position of a mistaken payor S with no present interest in PL's property are discussed in part (2).

In essence, there are three possible routes by which money mistakenly paid by S can come into RH's hands: S may pay PL, and PL may then pay RH; S may himself pay RH; S may pay some fourth party X, and X may then pay RH. In the case where S pays PL and PL pays RH, the question of whether or not RH has been paid by an authorised payor does not arise, for the obvious reason that PL's actions are ipso facto

\(^{12}\) See part (2)(b)(ii), infra.

\(^{13}\) Specific authority for this analysis in the context of mistaken payments is to be found in Barclays Bank Ltd. v W.J. Simms Sons & Cooke (Southern) Ltd. [1980] Q.B. 677, at 700, per Robert Goff, J., a decision which is discussed and compared with the other authorities touching upon the point in part (2)(b)(i), infra.
"authorised" by PL.\(^{14}\) However, where RH is paid by S directly, and also where S pays a fourth party X, and X pays RH, the issues raised by the cases discussed in part (2) can become more complex. Generally speaking, it should be easy to determine whether or not PL has expressly authorised or ratified S or X's payment to RH,\(^{15}\) and where it is established that PL has done so, it will follow that RH's rights against PL are extinguished by the payment. Similarly, it should be an easy matter to determine whether PL has impliedly authorised S or X to pay on his behalf. To give an example, where PL has expressly authorised S to manage his business affairs and RH happens to be PL's business creditor, S will have PL's implied authority to pay RH as part of his general authority to handle PL's business. And again, where it is established that S or X has PL's implied authority to pay RH, the effect of S or X's payment will be to extinguish PL's obligations.

\(^{14}\) Cf. the situation, discussed in part (2)(a)(iv), infra, where PL1 and PL2 are the co-owners of a piece of real property which is subject to RH's charge. Here, PL1 often has the capacity to pay off RH's mortgage regardless of PL2's authorisation or ratification, for the reason that his status as part-owner of the property gives him the right to redeem RH's mortgage regardless of PL2's consent. This right of redemption is subject to two provisos, also set out in part (2)(a)(iv).

\(^{15}\) One situation in which PL expressly authorises S's mistaken payment to RH in respect of PL's obligation arises where PL draws a cheque in RH's favour, and PL's bank, S, then pays the cheque in the mistaken belief that PL's account contains sufficient funds to cover the cheque: Barclays Bank Ltd. v W.J. Simms Sons & Cooke (Southern) Ltd. [1980] Q.B. 677, at 700, per Robert Goff, J.
Moving away from the situations where PL has given S or X express or implied authority to pay, however, matters become less clear-cut. For it does not follow from the fact that an intervener has neither express nor implied authority to pay on PL's behalf that his payment to RH can never discharge PL's obligations. This is because the possibility remains that PL may act in such a way, either before or after the intervener's payment, that he is estopped from denying that his obligations have been discharged. In such a situation, the courts may well be justified in concluding that PL's obligations have been discharged by S's payment. However, it must be stressed that some express evidence of PL's behaviour is needed before this conclusion can be drawn. As the law presently stands, it cannot simply be presumed that RH's rights are automatically extinguished in every case.

1) Where S has a present interest in PL's property and he mistakenly pays RH in respect of RH's charge over the property

As has been said, the question of whether or not PL has authorised S's payment to RH does not arise where S has a present interest in PL's property. The reason for this is that the courts are willing as a matter of general policy to allow part-owners of property to pay off charges secured on the property in order to protect their own interest in
the property.\textsuperscript{16} Hence, in the circumstances described, PL's obligations are considered to be discharged automatically by RH's payment, but S is permitted to acquire RH's extinguished charge against PL's property via "reviving subrogation". Laying aside the question of whether or not S should be awarded a proprietary restitutionary remedy simply on the grounds that he has a present interest in PL's property at the time of making his payment,\textsuperscript{17} it may be remarked here that in certain cases it is arguable that "reviving subrogation" to RH's extinguished security has been awarded to a payor S with a present interest in PL's property on the alternative grounds that he has paid under a mistake.

Thus, for example, in \textit{Earl of Buckinghamshire v Hobart}\textsuperscript{18} S was the tenant in tail of an estate, and he paid off RH, who held a charge over the estate, in the mistaken belief

\textsuperscript{16} For further discussion, see Chapter 5, part (2)(a)(i), \textit{infra}.
\textsuperscript{17} This is also discussed in Chapter 5, part (2)(a)(i), \textit{infra}.
\textsuperscript{18} (1818) 3 Swans. 186. See too \textit{Burrell v The Earl of Egremont} (1844) 7 Beav. 205, at 232-233, \textit{per} Lord Langdale, M.R. Cf. \textit{Shaffer v McCloskey} 36 P. 196 (1894). Sutton, p. 96, n. 132, also cites as cases falling into this pattern: \textit{Crosbie-Hill v Sayer} [1908] 1 Ch. 866; \textit{Whiteley v Delaney} [1914] A.C. 132; \textit{Re Foster} [1938] 3 A.E.R. 610; \textit{Re Hill} (1974) 23 Fed. L.R. 329 (reported \textit{sub nom. Hill v ANZ Banking Group} [1974] 4 A.L.R. 634). However, in none of these latter cases does S appear actually to have had a present interest in PL's property at the time of paying RH, and for this reason their proper place is in part (2) below. It is true that in \textit{Re Hill} PL already owed an earlier debt to S at the time when S paid RH, but this earlier debt does not appear to have been secured by a charge over PL's property.
that he was the tenant in fee simple. S mistook the nature of his interest in the estate because he was unaware that PL had been given a life interest in the property under the will of the previous owner. Lord Eldon, L.C. held\textsuperscript{19} that even though S's intention at the time of paying RH was to extinguish RH's security over PL's property, S was nonetheless entitled to have the charge kept alive for his own benefit against the estate. In effect, S was entitled to acquire RH's old charge via "reviving subrogation".

It might perhaps be argued that where S pays RH in the mistaken belief that there are no other incumbrancers over PL's property, on the basis of present authority the courts would not construe S's mistake in a case of this kind to have been sufficiently fundamental to ground a proprietary restitutionary claim,\textsuperscript{20} and that S's entitlement to a prop-

\textsuperscript{19} \textit{Ibid.}, at 202.
\textsuperscript{20} It may be said that S's mistake relates to the quality of PL's property, which S imagines to be more valuable than it actually is, but it cannot be said that S is mistaken as to the existence of PL's property. Cf. \textit{Associated Japanese Bank (International) Ltd. v Crédit du Nord SA} [1988] 3 A.E.R. 902, where a contract of guarantee in respect of a lease of machinery was held to be void \textit{ab initio} for common mistake when it came to light that the machinery in question did not exist.

And cf. \textit{Butler v Broadhead} [1975] Ch. 97, where a company sold a plot of land to X and later became insolvent. The liquidator then inadvertently sold the same land to S, which took it in the mistaken belief that it had therefore acquired title to the property. The liquidator paid some of the purchase money to the company's creditors, and then distributed the remaining surplus to the contributories in the company's winding up. S then discovered the liquidator's error when X brought an action to dispossess it of the land. The court was empowered by the Companies Act 1948, s. 259 to order contributories to a winding-up to repay to
rietary remedy against PL can therefore derive only from the fact that he had a pre-existing interest in PL's property at the time of making his payment. However, it should be remarked that there are also many cases, discussed below in part (2)(a)(i) and (ii), in which subrogation to RH's extinguished charge has been awarded to a payor S who has no interest of his own at the time of paying RH, and who pays RH in the mistaken belief that the charge which PL agrees to execute in his favour will be a first charge on PL's property. And it is submitted that by analogy with these cases it should be possible to say that the unjust factor underlying the award of the remedy in the cases discussed in this section was mistake.

the estate of an insolvent company moneys mistakenly overpaid to them by the liquidator. S therefore claimed to be ("simply") subrogated to the company's right to be repaid by the contributories. However, Templeman, J. held that on the proper construction of s. 259, the section ceased to operate with the dissolution of the company; since the company no longer existed to exercise its rights under the section, S could not be ("simply") subrogated to its position (cf. M.H. Smith (Plant Hire) Ltd. v D.L. Mainwaring (T/A Inshore) [1986] B.C.L.C. 342, discussed supra, pp. 170-171). Had S brought its claim before the company was dissolved, though, its claim should have succeeded.

It should be added that S could not have claimed to acquire the company's rights via "reviving subrogation" because this remedy operates only to revive and transfer rights of action which have been extinguished by payment; it does not operate to revive and transfer rights of action which have been extinguished because the right-holder has legally ceased to exist. However, a claimant in a similar situation should now be able to seek an order under the Companies Act 1985, s. 651, declaring the dissolution of the company to have been void, with a view to bringing a "simply subrogated" action against the contributories afterwards.
2) Where S has no present interest in PL's property

The following account of the cases will be divided into two sections. In section (a) will be considered those cases in which RH's rights are unequivocally extinguished when he receives a payment in respect of PL's obligations. In section (b) will be considered those cases in which RH receives a payment which is not expressly authorised or ratified by PL, with the prima facie result that RH's rights are therefore not extinguished.

a) Where RH's rights are unequivocally extinguished when he is paid in respect of PL's obligations

In this section, four separate situations will be considered in turn: (i) where S pays PL, and PL pays RH; (ii) where S pays RH himself, having been expressly authorised to do so by PL; (iii) where S pays a fourth party X, and X pays RH, having been expressly authorised by PL both to receive S's payment and to pay RH; (iv) where two parties, PL1 and PL2, are co-owners of a piece of property subject to RH's charge, and S either pays RH at PL1's request, or pays PL1, who pays RH.

i) Where S pays PL, and PL pays RH

As has been said already, where S pays PL and PL pays RH, the issue of whether or not PL's payment to RH is authorised obviously does not arise. In situations of this kind
PL's payment will therefore extinguish RH's rights provided that RH has no notice of S's mistake. Where S pays PL under a mistake which is known to be of a kind sufficient to ground a restitutionary claim, and PL pays the money to RH, then S should be unable to recover his payment from RH where RH is able to raise in defence to S's claim the fact that he has bona fide given value for his receipt of the money (viz., the discharge of PL's obligations).\(^{21}\) However, subject to whatever defences PL may raise against him, S will be able to recover his money by bringing a direct action against PL. And for this reason, it is unsurprising that no cases have been found in which S has sought to acquire RH's extinguished personal rights against PL via "reviving subrogation": with a direct personal claim of his own against PL, S has no need to acquire RH's personal rights of action.\(^{22}\)

\(^{21}\) Barclays Bank Ltd. v W.J. Simms Son & Cooke (Southern) Ltd. [1980] Q.B. 677, at 695, per Robert Goff, J. And see the discussion supra, pp. 56-58.

\(^{22}\) In a case heard in the Newfoundland Supreme Court, RBC Dominion Securities Inc. v Dawson (1992) 95 Nfld. & P.E.I.R. 309, the plaintiff securities broker sold shares on behalf of its defendant clients and then mistakenly overpaid the defendants in respect of the proceeds of the sale. One of the defendants used part of the money to pay off his Visa account in a lump sum, something which he would not normally have done. At 314, Hickman, C.J. held that this payment therefore did not constitute a payment to meet ordinary expenses and that the defendant was entitled to raise the defence of change of position in respect of the money he paid to Visa. K.J. Dore, Note, (1992) 15 Dalhousie L.J. 615, pp. 620-621, suggests that as a means of circumventing the defendant's change of position defence in the context of the payment to Visa, the plaintiff should have been entitled to acquire Visa's extinguished rights
However, several cases may be cited here, in which parties whose money has been misappropriated without their knowledge have been allowed to acquire via "reviving subrogation" securities paid off with their money. Where money is misappropriated without its owner's knowledge, it cannot be said that the owner has paid it by mistake, since the owner has made no mistake, but is rather ignorant of the entire transaction. Hence, in cases of this kind it is better to speak of "ignorance", rather than of "mistake" as the unjust factor entitling the owner of the misappropriated money to a restitutionary remedy. However, it is at least possible to draw an analogy between the position of a party whose money has been misappropriated and a party who has paid money under the kind of mistake sufficient to vitiate his intention to transfer property in it, and for against the defendant via ("reviving") subrogation. However, in the writer's view "reviving subrogation" should not be used as a disguised means of circumventing a bar to direct recovery (cf. the discussion of the invalid loan cases in Chapter 4, part (2)(a), infra). If it is accepted that the plaintiff in the RBC case should have been entitled to recover in respect of the money which the defendant subsequently paid to Visa, then this result should have been reached by denying the defendant a change of position defence to the plaintiff's direct claim, on the ground that he had not truly changed his position to his detriment by paying off previously contracted debts.


"[E]ven if legal title to the [appellants'] money did vest in Cass [who misappropriated it] immediately on receipt, nevertheless he would have held it on trust
this reason these cases are considered here.

In McCullough v Marsden\(^{25}\) and McCullough v Elliott,\(^{26}\) a trustee PL misappropriated money from a trust fund and applied the money to pay off two mortgages which he had previously executed over his own property. The Alberta Supreme Court held that the beneficiaries of the trust were entitled to acquire via ("reviving") subrogation the extinguished securities over PL's property formerly held by the first and second mortgagees. As a result, the beneficiaries were given priority over a third mortgagee who claimed to be entitled to stand first in line against PL's property once

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25 (1919) 45 D.L.R. 645.

Under American law, where PL steals from S or defrauds him of his money and then uses it to pay off a charge over his property, S is entitled to be subrogated to the position of the former charge-holder, RH. See Wilson v Todd 26 N.E. 2d 1003 (1940), and cases cited in: J.B. Ames, Lectures in Legal History (Cambridge, Ma., 1913), p. 423, n. 2; Annotation, "Remedy of Mortgagee in Forged or Unauthorised Mortgage Where Proceeds Are Used to Discharge Valid Lien", 43 A.L.R. 1393 (1926), pp. 1405-1406; Comment, "Subrogation - An Equitable Device for Achieving Preferences and Priorities", (1933) 31 Michigan L.R. 826, pp. 831-832, nn. 27-36; A.W. Scott and W.F. Fratcher, The Law of Trusts. 4th ed. (Boston, Ma., 1989), p. 593, n. 2. There is no good reason in principle why the same rule should not be adopted in English law, if it is accepted that a claimant should not have to establish that he and the thief stood in a fiduciary relationship before he can bring a proprietary claim to recover his money (it has in fact been stated in various Commonwealth cases that a thief and his victim stand in a "fiduciary relationship", but these dicta comprise a very strained use of the term: Black v S. Freedman & Co. (1910) 12 C.L.R. 105; Spedding v Spedding (1913) 3 W.N. (N.S.W.) 81; Goodbody v Bank of Montreal (1974) 47 D.L.R. (3d) 335).
the first and second mortgages had been extinguished. In
McCullough v Marsden, Simmons, J. held that:27

"[T]he moneys were at all times the plaintiffs' mon-
eys. If the moneys purchased bonds, mortgages or other
securities and these can be identified in the hands of
the trustee, they are declared to be in his hands as
trustee for the cestui que trust. If the trustee ap-
pplies the money in discharging a mortgage, whether he is
the mortgagor or a stranger is the mortgagor, the cest-
ui que trust will have the benefit of the mortgage or
that part of the mortgage which is discharged by his
moneys."

A similar principle was applied by the Irish High Court
in M'Mahon v Fetherstonhaugh.28 Here, a stockbroker, Rey-
nolds, kept two accounts with the Bank of Ireland, a loan


A slightly different situation again was considered by
the High Court of Australia in Porter v Latec Finance
(Qld.) Pty. Ltd. (1964) 111 C.L.R. 177. Here, a fraudster
masquerading as PL induced S to advance him money, part of
which was paid to RH, PL's secured creditor, in respect of
the mortgage that RH held over PL's land. The fraudster
then executed a new forged mortgage over the property in
S's favour. Although the point was not considered by the
other members of the court, at 202, Windeyer, J. held that
S should have been entitled to acquire RH's old charge via
"reviving subrogation" in these circumstances. However,
since PL never adopted the payment to RH (of which he was
apparently ignorant), Windeyer, J.'s assumption that RH's
mortgage was extinguished seems highly questionable.

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account and a current account, and he lodged certain stocks and shares with the Bank to secure his overdraft on the loan account. Reynolds had a customer, Darcy, on whose behalf he sold some stock. The purchaser of the stock paid Reynolds a cheque made out to Reynolds, which he paid into his current account with the Bank. It does not emerge from the report whether Reynolds intended to misappropriate this money, and there is no reason for supposing that this was his intention. However, at this point Reynolds died. His current account with the Bank was in credit, even before he paid in the cheque, but his loan account was overdrawn. The Bank (as it was entitled to do) therefore used the money in Reynolds' current account, including the money which Reynolds had received on Darcy's behalf, to pay off the overdraft owed on the loan account. In effect, Darcy's money was paid, unknown to him, to discharge Reynolds' secured obligations to the Bank. The court held that Darcy was entitled to "stand in the place of the Bank" as to the securities which Reynolds had formerly lodged with the Bank to secure his overdraft on the loan account.

Where S pays PL under a mistake of fact that on the basis of current authority is insufficient to ground a direct restitutionary action against PL, then as has been discussed already, as a matter of principle S cannot recover his money from PL via "reviving subrogation" to RH's old rights

29 Ibid., at 86.
against PL on the grounds of his mistake, unless it is con-
ceded that contrary to current authority, mistakes of this
kind can ground the award of a restitutionary remedy. Oth-
erwise, S can only hope to be awarded "reviving subrogat-
ion" if he can show that some other unjust factor underlay
the circumstances of his payment.

Thus, if S advances money to PL in ignorance of the fact
that a receiving order has been issued against PL, for ex-
ample, it seems unlikely that the courts would consider S
to have paid PL under a mistake sufficiently fundamental to
ground a personal restitutionary claim to recover his pay-
ment, let alone a proprietary one. Nonetheless, in an
Australian case, Re Hill, Riley, J. held that a lender S
who had advanced money to PL in ignorance of the fact that
a sequestration order had been made against PL's estate,
was entitled to acquire via "reviving subrogation" the
rights of a mortgagee RH to whom PL had paid the money.

30 Cf. Kerrison v Glyn, Mills, Currie, & Co. (1910) 15
Com. Cas. 241, at 248, per Fletcher Moulton, L.J.:
"[T]he plaintiff paid money due from him without
knowledge that an act of bankruptcy had been committed,
and certainly that is not a sufficient ground for gett-
ing it back."
The House of Lords reversed the Court of Appeal's decision
against the plaintiff in this case on a different interpre-
tation of the facts (see (1911) 17 Com. Cas. 41). However,
at 47, Lord Atkin confirmed the finding of law that a debt-
or's ignorance of his creditor's bankruptcy does not "am-
ount to such a mistake of fact as would entitle the debtor
to have the money refunded to him". Contra, Martin v Mor-
gan (1819) 1 Brod. & B. 289, at 293, per Richardson, J.
Assuming that Riley, J.'s decision was correct, it can only be explained on the basis either that the unjust factor underlying the award of the remedy to S was failure of consideration, or that the test for mistaken payments applied in the case was a wider one than current authority suggests should have been applicable.

Again, where S agrees with PL that he will advance money to PL with which PL can pay RH, and S stipulates as a condition of his loan that PL must execute some real security over his property in S's favour, S may be mistaken in his belief that PL has no other creditors with secured rights over his property, with the result that his belief that his loan to PL will be secured by a first charge over PL's property is also mistaken. As has been said already, it is far from clear that the courts would construe S's mistake in such circumstances as sufficient to ground a proprietary restitutionary claim. Nonetheless, in a number of cases of this kind S has been allowed to acquire RH's secured rights via "reviving subrogation".

For example, in Brown v Maclean, the plaintiff S agreed

32 See pp. 224-225, supra.
33 (1889) 18 O.R. 533. See too Carlisle Banking Co. v Thompson (1884) 28 Ch. D. 398; Ferguson v Zinn [1933] 1 D.L.R. 300 (the head-note incorrectly suggests that S paid RH directly, but at 301, per Kingstone, J., it is stated that S lent money to PL, which PL then paid to RH); Mahoney v Carpenter [1933] O.W.N. 721; Financial and Investment Services for Asia Ltd. v Baik Wha International Trading Co. Ltd. [1985] H.K.L.R. 103. Cf. Home Savings Bank of Chicago v Bierstadt 48 N.E. 161 (1897), and for further American cases, see: Annotation, "Subrogation of Purchaser Who Dis-
to lend money to PL, the owner of a piece of land, with
which PL would pay off a registered mortgage over his prop-
erty executed in favour of RH. It was agreed between S and
PL that PL would execute a new charge over the property in
S's favour to secure S's loan, which S believed would be a
first charge on the land. Unknown to S, however, there ex-
isted a further party besides RH with a charge over PL's
land: the defendant, who had won a legal action against PL
and was entitled to a judgment lien over PL's property.
The reason that S was unaware of the defendant's judgment
lien was that the solicitors employed by S had neglected to
search in the sheriff's office for executions over PL's
property. S paid PL as agreed, PL paid RH and executed a
new charge over his property in S's favour. The defendant
then instructed the sheriff of the county to sell PL's
property under execution, and S brought an action seeking a
declaration that the defendant's rights against the proper-
ty were subject to his right to be repaid the amounts he
had advanced for the discharge of RH's mortgage. Street,
charges Superior Lien as Part of Purchase Price, as Against
Recorded Junior Lien", 37 A.L.R. 384 (1925), 113 A.L.R. 958
(1938); Annotation, "Subrogation to Prior Lien of One Who
Advances Money to Discharge It and Takes New Mortgage as
against Intervening Lienor", 70 A.L.R. 1396 (1931); Note,
(1939) 48 Yale L.J. 683, p. 688, nn. 34-39. Contra, Camp-
bell Auto Finance Co. v Warren [1933] 4 D.L.R. 509, at 516,
per Masten, J.A., denying S's claim on the ground that S
was a "volunteer", even though it appears at 511-512 that S
was unaware of the existence of the intervening chargee.
And cf. Parkash v Irani Finance Ltd. [1970] Ch. 101, in
which S's claim failed because it was unable to establish
that PL used S's money to pay RH.
J. held in S's favour, as follows: 34

"[T]he plaintiff here is entitled upon the ground of mistake to be subrogated to the rights of the original mortgagees to the extent of allowing him a priority over the defendant for the amount he paid to discharge their mortgages. It is clear beyond question that he would not have discharged these mortgages had he been aware of the existence of the defendant's fi. fa. He would either have refused to make the advance altogether, or he would have had the mortgages assigned to himself instead of discharging them."

These cases, and a similar group discussed below in which S pays RH directly under the same mistake, 35 have been criticised for subverting the rules concerning the registration of charges over land in an unjustifiable way. 36 A payor who advances money to discharge a security over the property of another, intending his loan to be secured by a first charge over the other's property, clearly cannot bring himself within the scope of these cases where he has

34 Ibid., at 536.
35 See cases cited at p. 239, n. 42, infra.

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actual knowledge of the existence of an intervening chargee, as in these circumstances he will not have made his advance under a mistake. However, the issue raised by these cases is whether a payor who has no actual knowledge of an intervening chargee, but who is fixed with constructive knowledge by a registration statute should be refused subrogation because of his constructive notice. It is true that the negligence of a mistaken payor will not prevent him from recovering his money as a general rule. But it might be argued that a mistaken payor, and particularly a negligently mistaken payor who has failed to search a land register properly, should not be allowed to reach over the head of an intervening chargee whose charge over PL's property is registered, and whose security for that reason should be secure against precisely such parties as S. To this it may be countered, though, that the intervening chargee's position is not really altered to his detriment if S is subrogated to RH's position, since if S had not paid RH, RH's charge would still exist and the intervening chargee would still therefore have only a second charge over PL's property. On balance, therefore, the better view seems to be that the position of intervening chargees is not unfairly prejudiced by allowing S to be subrogated to

37 Robock v Peters (1900) 13 Man. L.R. 124.
38 Kelly v Solari (1841) 9 M. & W. 54, at 59, per Parke, B.; and see the cases cited by Goff and Jones, p. 104, n. 96.
RH's first charge where S has acted under a **bona fide** mistake.\(^3\)

It should be remarked finally in this section that in a series of cases, a lender S has paid money to a company, PL Co., which PL Co. has used to discharge its previously incurred debts to RH, and it then transpires that the contract between S and PL Co. was void **ab initio** because it was **ultra vires** the company. In these circumstances, S has been permitted by the courts in some cases to acquire RH's extinguished rights via "reviving subrogation". And again, in a very similar set of cases a lender S has been awarded the same remedy where he has lent money to an infant PL under a contract that was void **ab initio** under the Infants Relief Act 1874, s. 1,\(^4\) and the infant has used the money to discharge RH's security over his property. It might be argued that on the facts of some of these cases, the unjust factor entitling S to this remedy was mistake. However, even where it can be shown that S mistakenly believed either that PL Co. was acting **intra vires** or that the infant PL was not an infant, it seems inescapable that the mistake under which S pays in such cases is a mistake of law: S is mistaken in his belief that PL is legally capable of enter-

\(^3\) The position where S pays RH in the full knowledge of the existence of an intervening chargee, and intending to acquire RH's charge even though RH has not agreed to assign it to him, is discussed in Chapter 4, part (1)(a), infra.

\(^4\) Now repealed by the Minors' Contracts Act 1987, ss. 1(a) and 4(2).

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ing into a contract. Hence, analysis of these cases as mistake cases appears to founder on the rule against recovery of payments made under mistake of law. It is true that this rule seems likely to be abandoned in the near future, but as the law stands at present, the better view of these cases therefore appears to be that they are "failure of consideration cases", and for this reason they are discussed in Chapter 4, part (2).

ii) Where S pays RH himself, having been expressly authorised to do so by PL

Where S's initial mistake is of a kind sufficient to ground a restitutionary claim, and S pays RH at PL's express request, then S should be entitled to bring a direct restitutionary action against PL for money paid to PL's use. No cases have been found in which a mistaken payor S has sought to be subrogated to RH's rights, personal or secured, in these circumstances.

A number of cases may be cited, though, in which S has been allowed to acquire RH's extinguished secured rights via "reviving subrogation", having paid PL under a mistake of a kind which cannot certainly be said to be sufficient to ground the award of a direct restitutionary proprietary claim. In Meux v Smith, for example, S paid part of the

\[41\] \((1843) 11\ \text{Sim. 410}, \text{ followed in Bird v Philpott [1900] 1 Ch. 822. Cf. Re Hewitt [1933] O.W.N. 641, in which S paid money to RH at PL's request in the full know-

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purchase price of a pub to the vendor RH at the purchaser PL's request, unaware of the fact that PL was an uncertified bankrupt. As has been said already, such a mistake does not appear to be of a kind sufficient to ground a proprietary restitutionary claim. Nonetheless, S was permitted by Lord Cottenham, L.C. to assert a lien over the property to the extent of its payment, a decision which was not expressed in the language of "reviving subrogation", but which is arguably an example of the remedy in operation.

Again, in a long series of cases, S has been awarded "reviving subrogation" after paying a charge-holder RH under the terms of a contract with PL, PL having agreed in turn to execute a new charge over his property in S's favour, which charge S mistakenly believes to be a first charge because he is unaware of the existence of PL's other secured creditors. In essence, these cases are identical with those already discussed, in which S pays PL under a similar mistake, and PL in turn pays RH. One case falling into this pattern is Ghana Commercial Bank v Chandiram,42 which

was decided by the Judicial Committee of the Privy Council. Here, a debtor PL created an equitable mortgage over his property in favour of his bank, RH. Subsequently, a writ of fieri facias was issued against PL's property at the instance of a judgment creditor, under which PL was prohibited from alienating his property "by sale, gift or in any other way". PL then entered into an arrangement with a second bank, S, the appellants in the case, under which S agreed to pay off PL's debt to RH Bank, and PL agreed to execute a legal mortgage over his property in S's favour. S and PL carried out the terms of this agreement. PL's property was then sold at auction at the instance of the judgment creditor, and the property was bought by the respondent in the case, who brought an action claiming a declaration of his title of ownership and possession.

Walker v Cote (1932) 41 O.W.N. 313; Coupland Acceptance Ltd. v Walsh [1954] S.C.R. 90; Nova Scotia Savings & Loan Co. v LeFresne and LeFresne (1978) 33 N.S.R. (2d) 105. Cf. McLeod v Wadland (1893) 25 O.R. 118, in which S was held to be estopped from asserting his right to be subrogated to RH's charge because of the time-lapse between his discovery of the existence of the intervening chargee, and his decision to bring an action. In Hosking v Smith (1888) 13 App. Cas. 582, the House of Lords carried the principle one stage further (and arguably, one stage too far) by allowing S not only to acquire RH's mortgage via "reviving subrogation", but also to tack its own subsequent mortgage to RH's old mortgage. As a result, S was given priority over the intervening chargee not only in respect of the money it had paid to RH, but also in respect of its further secured advances to PL.

For American cases touching upon the same point, see Belcher v Belcher 87 P. 2d 762 (1939), rehearing denied 89 P. 2d 573 (1939), noted (1939) 24 Minn. L.R. 121 and (1939) 87 U. Pa. L.R. 1012; and cases cited in G.E. Palmer, The Law of Restitution (Boston, Ma., 1978), p. 247, nn. 4 and 5.
The Judicial Committee held, *inter alia*, that the legal mortgage which PL had executed in S Bank’s favour was null and void, but that S Bank were entitled to the equitable mortgage formerly held by RH Bank, which S Bank had paid off. Their Lordships reached this decision on the grounds that "where a third party pays off a mortgage he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit". However, as has been discussed in Chapter 1, part (6), the "rule" establishing such a presumption in favour of an intervener without a present interest in the mortgagor’s property is both misconceived in principle and unjustifiable as a matter of authority, and it should be abandoned. The better explanation of the Ghana Commercial Bank case is that S Bank was unaware of the judgment creditor’s intervening lien at the time of paying off RH Bank and taking a new mortgage over PL’s property, and that it was therefore entitled to acquire RH’s old mortgage via "reviving subrogation", on the grounds of that it paid RH under a mistake of fact.

iii) Where S pays X, and X pays RH, having been expressly authorised by PL both to receive S’s payment and to pay RH

Where PL has appointed X to act as his agent and has expressly authorised him to receive and to make payments on PL’s behalf, then as a matter of principle there should be

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no difference between the situation where S pays X and X pays RH, and the situation already described above where S pays PL and PL pays RH himself. Hence, by analogy with the cases discussed in section (a), where X receives a payment from S on PL's behalf and then pays RH on PL's behalf, RH's rights will be extinguished by X's payment, but S should be entitled to acquire them via "reviving subrogation", provided that his initial payment to X has been made under a mistake of fact sufficient to ground the award of a restitutionary remedy.

Thus, in Re Byfield\textsuperscript{44} a bank S paid money at the request of its customer PL to PL's mother, X. At the time of paying X, the bank was unaware of the fact that a receiving order had been issued and gazetted against PL. X then paid some of the money at PL's request to PL's creditors RH, and paid the balance to the receiver. Because the bank had paid X after the receiving order was gazetted, it was liable to pay the receiver so much of the sum paid to X as the receiver had been unable to recover from X, an amount corresponding to the sum which X had paid to PL's creditors. The bank paid the receiver, and then submitted a proof of debt in respect of this sum, claiming that it was entitled to acquire via ("reviving") subrogation the extinguished rights of the creditors RH, who had been paid by X.

As matters had turned out, there was a surplus in PL's

\textsuperscript{44} [1982] Ch. 267.

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bankruptcy. Yet even so, Goulding, J. refused to allow the bank's claim, a decision that was remarkably harsh on the bank, since its effect was to allow PL's other creditors to share in the surplus at the bank's expense. The purpose of the rules under which the bank was made liable to pay the receiver was to protect the general body of a bankrupt's creditors from unauthorised depletions of the bankrupt's estate, but it was not to enable them to recover more than they were owed. It is submitted that Goulding, J. should have held that the bank was entitled to be subrogated to RH's right to prove in PL's bankruptcy, on the grounds that the bank paid X under a mistake of fact, that PL had requested the bank to pay X, and that X then paid RH at PL's request. It is submitted that in these circumstances Goulding, J. cannot have been correct to hold that "there was no immediate compelling nexus between those payments [by X to RH] and the bank's acts."  

Re Byfield should be compared with several cases in which PL has authorised X to act as his agent and to pay his debts, but at the same time has stipulated that X has no authority to borrow money on PL's behalf. S has then

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45 Ibid., at 276.
46 Burrows, pp. 91-92, takes the same view. See too Goff and Jones, pp. 51 and 132.
lent money to X in the mistaken belief that X has been au-
thorised to borrow money on PL's behalf, and X has paid the
money to RH in respect of PL's previously incurred debts to
RH. It is not at all clear in these cases whether or not
X's payment to RH has the effect of extinguishing RH's
rights against PL. If the view is taken that PL has auth-
orised X to pay RH with any money whatsoever, regardless of
its provenance, then X's payment will extinguish RH's
rights. However, it might be alternatively argued that
because PL has expressly withheld from X the authority to
borrow on his behalf, he must also by implication have
withheld the authority to pay improperly borrowed money to
his creditors. These cases are discussed further below, in
section (b)(iii).

(iv) Where two parties, PL1 and PL2, are the co-owners of
real property that is subject to RH's charge, and S either
pays RH at PL1's request, or pays PL1, who pays RH

The situation has arisen several times in the case-law
that RH is the mortgagee of a piece of real property in
which PL1 and PL2 have concurrent interests, for example
because legal title to the property is vested in PL1, but
the property is subject to an equitable charge in PL2's fa-
vour, or again, because PL1 and PL2 are the joint tenants

48 For discussion of the assessment of cohabitees' beneficial interests in property, see: C. Davies, "Unjust Enrichment and the Remedies of Constructive Trust and Quan-
of property held for their benefit on a trust for sale under the Law of Property Act, s. 36. A lender S then enters an agreement with PL1 under which S agrees to pay RH, or to advance money to PL1 to pay to RH, and PL1 in turn agrees to execute a new charge over the property in S's favour. S mistakenly thinks that PL1 has been authorised by his co-owner, PL2, to enter into this arrangement, but it then transpires that PL1 has been acting without PL2's authority or knowledge. The questions arise in these circumstances whether PL2's interest in the property takes precedence over S's new charge, and if so, whether S should be entitled to acquire RH's old charge via "reviving subrogation" in order to gain priority over PL2's claim.

These cases are considered here in section (a) for the reason that where PL1 and PL2 are the co-owners of a piece of real property, PL1 has the capacity, subject to two provisos, to pay off RH's mortgage regardless of PL2's authorisation or ratification. This is because PL1's status as part-owner of the property gives him the right to redeem regardless of PL2's consent. This right of redemption is subject to the proviso that PL1 discharges the whole debt secured on the property, and does not seek merely to pay

off his own share.\(^9\) It is also subject to the further proviso that where PL1 and PL2 are the joint tenants of property held for their benefit on a trust for sale, under English law PL1 must proceed through the trustees if he wishes to redeem the property from RH’s mortgage.\(^5\)

A recent Australian case falling into this pattern, which concerned two joint tenants, was **Rogers v Resi-Statewide Corporation Ltd.**\(^5\) Here, Mr. and Mrs. Rogers were the joint tenants of a house, which they twice mortgaged to Westpac in 1986 and 1987. In 1988, Rogers then entered into an agreement with Resi-Statewide, under which Resi paid Westpac in respect of Westpac’s mortgages, and they also paid a further sum to Rogers, and Rogers executed a new mortgage over the property in their favour. It later emerged that Rogers had been acting behind Mrs. Rogers’ back, and that he had forged her signature on the memorandum of mortgage he had purported to execute in Resi’s favour. The questions therefore arose, whether Westpac’s mortgages were extinguished, whether the mortgage executed by Rogers in Resi’s favour was valid, in whole or in part,

\(^9\) Marquis of Cholmondeley v Lord Clinton (1820) 2 J. & W. 1, at 134, per Sir T. Plumer, M.R.
\(^5\) (1991) 105 A.L.R. 145. See too Hecimovic v Schembri (Supreme Court (N.S.W.), Holland, J., 28th June 1974, unreported, but discussed in Meagher, Gummow and Lehan, para. 916); Canada Permanent Mortgage Corp. v Marchand and Marchand (1979) 37 N.S.R. (2d) 208; Western Trust & Saving Ltd. v Rock (unreported, Court of Appeal, 26th February 1993). Cf. Wilson v Todd 26 N.E. 2d. 1003 (1940).
and whether Resi would be entitled to acquire Westpac's mortgage via subrogation.

Von Doussa, J. held that the effect of Resi's payment to Westpac was to extinguish Westpac's mortgages.52

"Although the payment was made without the knowledge or consent of Mrs. Rogers, it was made at the request of Mr. Rogers. The personal liability of Mr. and Mrs. Rogers under the mortgages was joint and several. Mr. Rogers could pay off all the secured debt."53

Van Doussa, J. also held54 that because Rogers had forged his wife's signature on the mortgage memorandum in Resi's favour, this charge was void not only against Mrs. Rogers' share of the property, but against Rogers' share as well. It seems unlikely that this part of his judgment would be followed in an English court, since it appears that in English law where a joint tenant PL1 purports to execute a mortgage over his property without the consent of the other joint tenant PL2, the joint tenancy is thereupon severed, and a charge created over over PL1's beneficial interest in

52 Ibid., at 150.
53 At 150, he further held that Mrs. Rogers had in any event subsequently adopted Resi's payment when she later sought to argue that the property was no longer subject to Westpac's charge. Cf. Butler v Rice [1910] 2 Ch. 277, discussed infra, pp. 273-275.
54 Ibid., at 150, following Daniell v Paradiso (1991) 55 S.A.S.R. 359, esp. at 365, per King, C.J.
the property, while PL2's beneficial interest in the property remains unaffected. This point aside, though, the significance of Rogers v Resi-Statewide is that von Doussa, J. then went on to hold that because they had paid off Westpac's mortgages over the property, Resi were entitled to acquire these via "reviving subrogation" so as to gain priority not only over Rogers' interest in the property (to which under English law they would have been entitled by dint of the charge he had executed in their favour), but also over Mrs. Rogers' interest. Von Doussa, J. expressed Resi's entitlement to acquire Westpac's mortgages as an incident of the "rule" that a party who pays off a mortgage is entitled to a presumption that he intends it to be kept alive for his own benefit. However, as has been discussed in Chapter 1, part (6), this "rule" is an incorrect statement of the law and should be abandoned. The case should rather be understood as one in which Resi were entitled to acquire Westpac's extinguished mortgages via "reviving subrogation" on the grounds that they had paid

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Westpac under a mistake.

A recent English case falling into a similar pattern, in which PL1 was the legal owner of a piece of real property that was subject to PL2's equitable charge, was Equity & Law Home Loans Ltd. v Prestidge. Here, Mr. Prestidge and Mrs. Brown bought a house together for £40,000. Mrs. Brown supplied £10,000 of the purchase money, and the remaining £30,000 was raised by a mortgage with Britannia Building Society. The conveyance of the house named Mr. Prestidge alone as the purchaser, and the deed of charge named Mr. Prestidge alone as the borrower from Britannia. Subsequently, Mr. Prestidge arranged with Equity & Law that they would advance him £43,000, that he would use £30,000 to pay


And cf. Chetwynd v Allen [1899] 1 Ch. 353, where a husband borrowed money without his wife's knowledge to pay off a mortgage secured both on his own property and on property which he held as trustee for his wife. As his wife's trustee, he appears to have had the power to pay off the mortgage over her property without consulting her, but not the power to create a new charge over her property without her consent. Hence, the new charge which he executed in the lender's favour over his wife's property was held to be invalid, but the lender was entitled to acquire the old charge over her property via "reviving subrogation". In the writer's view, the lender's entitlement to this remedy derived from the fact that he had paid the husband by mistake. Besides the fact that he was his wife's trustee, it seems arguable that the husband's capacity to discharge the original mortgage could also be justified by reference to the principle set down in Hall v Heward (1886) 32 Ch. D. 430, where it was held that if two pieces of property are mortgaged to secure one debt, the owner of each piece of property has the right to redeem the mortgage.
off Britannia's mortgage, retain the balance for himself, and execute a new charge over the property in Equity & Law's favour. Mr. Prestidge then defaulted on the mortgage repayments owed to Equity & Law, and it came to light that Mr. Prestidge had entered the agreement with Equity & Law without Mrs. Brown's knowledge or authorisation.

The Court of Appeal held that under these circumstances Equity & Law were entitled to a declaration that their mortgage took precedence over Mrs. Brown's equitable charge over the property. The grounds on which they reached this decision were that Mrs. Brown's consent to the remortgage could be imputed, even though she had no knowledge of the transaction, by analogy with *Bristol & West Building Society v Henning*, an earlier case in which it had been held that the beneficial owner of a piece of property had the imputed intention to postpone her charge to a mortgage over the property, where she knew that the property could not have been bought without the mortgagee's financial assistance. Mustill, L.J. justified the court's decision in *Prestidge* on the following grounds:

"Any other answer would be absurd, for it would mean that if Mr. Prestidge had in good faith and without the knowledge of [Mrs. Brown] transferred the mortgage to

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another society in order, say, to obtain a more favourable rate of interest, she would suddenly receive a windfall in the shape of the removal of an encumbrance which she had intended should be created in consequence of a transaction which could not do her any harm and of which she was entirely ignorant."

This reasoning has rightly been criticised by Smith\(^6\) for its artificiality. In truth, Mrs. Brown can have had no intention to postpone her interest to Equity & Law's new mortgage for the obvious reason that she was unaware that Mr. Prestidge had executed a new charge in Equity & Law's favour. Her position was thus quite different from that of the beneficial owner in Henning, who at least was aware of the mortgagee's existence.\(^6\) Smith suggests that the Court of Appeal should rather have founded its decision on the basis of subrogation, and this suggestion in the writer's view is a sound one. Equity & Law should have been entitled to acquire Britannia's old mortgage via ("reviving") subrogation, on the grounds that it had paid Mr. Prestidge under a mistake, and by that means could have been awarded priority over Mrs. Brown's charge without the court having


\(^{61}\) This is not to say, of course, that the "imputed intention" reasoning adopted in Henning cannot similarly be criticised for its artificiality. For criticism of Henning on these grounds, see M.P. Thompson, Note, (1986) 49 M.L.R. 245, and M.P. Thompson, Note, (1986) 50 Conv. 57.
to resort to an unconvincing and highly artificial analysis founded upon "imputed intention" reasoning.62

b) Where RH receives a payment which is not expressly authorised or ratified by PL, with the prima facie result that RH's rights are therefore not extinguished

The cases described in this section all concern the situation where S or X makes a payment to RH which has not been expressly authorised or ratified by PL. In these circumstances, the conclusion that RH's rights against PL have been extinguished, with the result that S is entitled to recover from PL, ought as a matter of principle to be drawn only where it can be shown that PL has acted in such a way that he is estopped from subsequently denying that S or X has paid RH on his behalf.

62 M.P. Thompson, Note, (1992) 56 Conv. 206, p. 211, writes that subrogation could not have been available in the case because Equity & Law did not specify in their loan contract with Mr. Prestidge that he use the money to pay off Britannia, and it was held in Orakpo v Manson Investments Ltd, [1978] A.C. 95, at 101, per Lord Diplock that:

"The mere fact that money lent has been expended upon discharging a secured liability of the borrower does not give rise to any implication of subrogation unless the contract under which the money was borrowed provides that the money is to be applied for this purpose." However, in the writer's opinion the fact that Equity & Law paid Mr. Prestidge in the mistaken belief that he was authorised to act on Mrs. Brown's behalf constituted a sufficient ground to award them the remedy (furthermore, the converse proposition advanced by Lord Diplock, that where money has been advanced for the specific purpose of paying off a charge the lender should invariably be allowed to acquire the charge via "reviving subrogation", is also flawed: see the comment at p. 297, n. 27, infra).
The following discussion will consider in turn three situations: (i) where S pays RH in the mistaken belief that PL has authorised him to do so; (ii) where S mistakenly thinks he has a present interest in PL's property, to protect which he pays RH; (iii) where S lends money to X in the mistaken belief that X has been authorised by PL to borrow from S on PL's behalf, and X purports to pay the money to RH whilst acting in his capacity as PL's agent.

i) Where S pays RH in the mistaken belief that PL has authorised him to do so

Where S pays RH in the mistaken belief that PL has authorised him to do so, and PL does not subsequently adopt S's payment, the rule currently prevailing in English law is that PL's obligations are not automatically discharged by S's payment, that S is therefore prima facie unable either to bring an action against PL for money paid to PL's use, or to acquire RH's rights against PL via "reviving subrogation", but that he can prima facie recover his money from RH in an action for money had and received, subject to any defences that RH may be able to raise against S's claim. The first part of the following account will set out the opposing lines of English authority touching upon this point. The second part of this discussion will then consider whether the prima facie conclusion that S's mistaken payment has not discharged PL's obligations should be dis-
placed where S has had apparent authority to pay. It has been argued by some academic commentators that where PL has held S out to RH as having authority to pay on his behalf and RH acts to his detriment on PL's representation, then PL will be estopped from denying that his obligation to RH is discharged, S will be unable to recover from RH where RH can raise in defense to S's claim the fact that he has bona fide given value for his receipt of the money, but S will be entitled to recover his payment as money paid from PL, and he should also be entitled to acquire any extinguished secured rights formerly held by RH via "reviving subrogation". Whether or not this argument is a valid one will be considered below.

The leading English authority for the proposition that S's mistaken payment automatically discharges PL's obligations is B. Liggett (Liverpool) Ltd. v Barclays Bank Ltd.63 Here, the plaintiff company, PL Co., kept an account with the defendant bank, S. It was arranged that cheques drawn on PL Co.'s account had to be signed by two of the company's directors. However, the bank paid several cheques which had been signed by only one of the authorised signatories, and it also paid a second group of cheques, signed by two people, one of whom was an authorised signatory, but the other of whom turned out subsequently to be a director whose appointment had been made improperly. The cheques

were drawn in favour of the company’s trade creditors, RH. The bank paid the amounts shown on the cheques to the creditors, and then debited the company’s account by a corresponding amount. When the truth came to light, PL Co. sued the bank for money had and received, in respect of the amounts by which the bank had debited PL Co.’s account after paying the improperly drawn up cheques.

Wright, J. held that the bank had a good defence to PL Co.’s claim. He held that although PL Co. had not authorised the bank to make the payments, with the result that the bank could not have recovered the money paid in a direct action against PL Co., because the bank’s money had been paid to discharge PL Co.’s previously incurred liabilities towards its trade creditors RH, and because the bank’s payment did discharge them, the bank would have been entitled to acquire RH’s extinguished rights of action against PL Co. via "reviving subrogation" in order to recover its payments from PL Co.64

The Liggett case has been followed in various Commonweal-

64 At 61, Wright, J. refused to express this decision in the language of subrogation, because he mistakenly believed that subrogation could be used only to transfer secured rights, and that it could not be used to transfer personal rights of action from one party to another. There is, however, no technical reason why subrogation cannot be used to transfer personal rights (cf. the sureties cases discussed supra, in Chapter 2, part (2)(a)(i)(a)). It is therefore submitted that that the true effect of Wright, J.’s judgment is that the bank was allowed to acquire RH’s extinguished rights against PL via "reviving subrogation".

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th cases, in which it has been adopted as authority for the proposition that when a bank, S, pays its customer PL's creditor RH in the mistaken belief that PL has authorised it to do so, PL's obligations should be treated as automatically discharged, leaving S Bank unable to recover from the payee RH, but entitled to recover from its customer PL via "reviving subrogation" to RH's rights against PL. This interpretation of the case has also been advanced by a number of academic writers.

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In Westpac Banking Corporation v Rae [1992] 1 N.Z.L.R. 338, Holland, J. entered judgment in favour of a bank which had paid a countermanded cheque both against its payee (on the ground that its payment had not discharged its customer's debt to the payee at common law) and against the customer (on the ground that the bank's payment had discharged the debt in equity). With respect to Holland, J. (and pace Burrows, p. 222, who appears to favour giving the mistaken payor of another's debt a choice of defendant), it must surely be for the courts to decide one way or the other whether a debt is discharged by an unauthorised mistaken payment. In the words of P.G. Watts, Note, [1991] N.Z. Recent Law Review 438, p. 440, this must be preferable to leaving "both defendants in a state of uncertainty whilst the plaintiff dithers as to the party against whom it enforces judgment."

66 Burrows, pp. 90-91, points out that once it is accepted that the bank's payment in Liggett had the effect of discharging PL Co.'s obligations, "reviving subrogation" was an unnecessary complication in the case and the bank should have been allowed a direct claim. See too E.P. Ellinger, Modern Banking Law (Oxford, 1987), pp. 300-301; E.P. Ellinger and C.Y. Lee, "The "Liggett" Defence: A Banker's Last Resort", [1984] L.M.C.L.Q. 459, passim (though at p. 473, Ellinger and Lee incorrectly assert that the doctrine applied in Liggett cannot have been subrogation because
Whether *Liggett* stands as good authority in English law for the proposition that S’s unauthorised mistaken payment automatically discharge PL’s obligations must be doubted, however. The case was reviewed by the Court of Appeal in *Re Cleadon Trust Ltd.*, and the only ground upon which the majority of their Lordships thought that the decision in *Liggett* could be sustained was that the bank had been expressly authorised to pay by one of PL Co.’s directors, and that the director himself had had the authority to do this, even though he did not have the authority to borrow money on PL Co.’s behalf. In other words, they thought that the *Liggett* case was a case of the kind considered in subsection (iii) below, in which a claimant S is permitted to acquire RH’s extinguished rights via "reviving subrogation" after he has paid a fourth party X in the mistaken belief that X was entitled to borrow money on PL’s behalf, and X

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67 [1939] Ch. 286, discussed further in Chapter 5, part (1), infra.
has then paid the money to PL's creditor RH, an action which does lie within the scope of his authority. Thus, for example, Scott, L.J. held of Wright, J.'s decision in Liggett that:68

"The "discharge" of the company's debts, to which Wright, J. refers, must be taken to have been made under [the director's] authority to pay current debts when he had money of the firm's out of which to pay them."

Whether Scott and Clauson, L.JJ.'s interpretation of Liggett is correct must be questioned. It is argued in subsection (iii) below that an agent who has no authority to borrow money on his principal's behalf should by implication have no authority to pay improperly borrowed money to his principal's creditors, and by the same token it must surely be the case that a company director who has no authority to borrow on the company's behalf can equally have no authority to direct a bank to pay the company's creditors on the company's behalf. For this reason, it is submitted that Sir Wilfrid Greene, M.R. was correct to hold in his dissenting judgment in Re Cleadon Trust that:69

"... the company's debts in [Liggett] were not

68 Ibid., at 318. See too Clauson, L.J.'s judgment at 326-327.
69 Ibid., at 305-306. See too Burrows, p. 90, n. 7.
paid by any agent of the company having authority to pay debts, but by the bank out of its own money. The sending of the cheques to the company's creditors by the director who signed them was not a payment of the company's debt at all, because the cheques, as cheques, were irregular and it was the bank's duty to refuse to honour them. On the other hand, the cheques, although bad cheques, were treated as requests by the director to the bank to discharge the company's debts, and the director had no authority to make any such request."

For the purposes of the present discussion, however, the significance of Re Cleadon Trust is that the majority of the Court of Appeal thought that the result reached in Liggett was justifiable only on the ground that the bank's payment had been expressly authorised by a director of PL Co. who was himself authorised to authorise the bank. They did not think that Wright, J.'s decision was correct on the ground that the bank's payment, although unauthorised, operated to discharge PL Co.'s obligations automatically.\textsuperscript{70}

Furthermore, express authority for the view that S's mistaken payment does not automatically discharge PL's obligations is to be found in Barclays Bank Ltd. v W.J. Simms Son & Cooke (Southern) Ltd.\textsuperscript{71} Here, Robert Goff, J. cons-

\textsuperscript{70} Goff and Jones, p. 554, n. 11, make the same point.  
\textsuperscript{71} [1980] Q.B. 677.
idered what would be the effect of S's mistaken payment where S was a bank which paid a cheque drawn by its customer PL in favour of PL's creditor RH, overlooking the fact that PL had countermanded the cheque before it was presented for payment, and he held that in these circumstances:72

"[T]he bank's payment is without mandate. The bank has no recourse to the customer; and the debt of the customer to the payee is not discharged. Prima facie, the bank is entitled to recover the money from the payee, unless the payee has changed his position in good faith, or is deemed in law to have done so."

It is submitted therefore that as a matter of authority, the rule currently prevailing in English law is that where S makes an unauthorised payment to RH in the mistaken belief that PL has requested him to do so, PL's obligations are not automatically discharged by S's payment and S is therefore *prima facie* unable to bring an action against PL for money paid and to acquire RH's extinguished secured rights against PL via "reviving subrogation".\(^{73}\)

It remains to be asked whether it should be open to S to say that he is entitled to recover from PL because PL has

\(^{73}\) The same rule formerly prevailed in American law: American Defense Soc. Inc. v Sherman National Bank of New York 122 N.E. 695 (1919); Chase National Bank of the City of New York v Battat 78 N.E. 2d 465 (1948). However, the position in American law is now governed by the Uniform Commercial Code, s. 4-407:

"If a payor bank has paid an item over the stop payment order of the drawer or maker or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights

(a) of any holder in due course on the item against the drawer or maker; and

(b) of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and

(c) of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose."

acted in such a way that he is estopped from denying that his obligations to RH have been discharged by S's payment. Goode\textsuperscript{74} and Friedmann\textsuperscript{75} have both suggested that where a bank S pays its customer PL's countermanded cheque to RH, PL should be estopped from denying that his obligations to RH are thereby discharged, provided that RH has no actual knowledge of PL's countermand. By holding S Bank out as his authorised agent to RH, they have argued, PL acts in such a way that it would be inequitable for him subsequent­ly to repudiate S's payment. This analysis does not seem ever to have been laid before an English court.\textsuperscript{76} However, it has been powerfully criticised by Matthews,\textsuperscript{77} and in the writer's view his arguments against it are conclusive.\textsuperscript{78}

\textsuperscript{75} Friedmann, p. 552, n. 87 and accompanying text.
\textsuperscript{76} But cf. Trueman v Loder (1840) 11 A. & E. 589; Summers v Solomon (1857) 7 E. & B. 879; Drew v Nunn (1879) 4 Q.B.D. 661. In all of these cases, a principal has been held to be bound by the acts of his agent even though the agent's authority has been revoked, where the agent has en­tered a contract with a third party on the principal's behalf and the third party has no knowledge of the principal's revocation.
\textsuperscript{78} Goff and Jones, p. 112, advance two further arguments against the view that a bank's apparently authorised payment of a cheque should discharge the drawer's obligations to the payee, but neither is conclusive: (i) they argue that "[i]t cannot be right that the drawer has held out the bank as having his authority to make the payment so as to preclude him from subsequently asserting that the bank did not have the authority to do so." However, the drawer of a cheque need not have made such a sweeping representation for the apparent authority analysis to work: it could sim-
Matthews\textsuperscript{79} points out that where a bank S pays a countermanded cheque to the payee RH and then seeks to recover its payment from RH, RH cannot raise in defence to the bank's claim the fact that PL has represented the bank as authorised to pay. Hence, in Matthews' words, so far as PL's representation to RH is concerned, "the doctrine of apparent authority . . . hits the wrong target." Furthermore, it appears that the courts would not construe the mere fact of the bank's payment to RH to have been a representation by the bank that it was authorised to pay. This is sugges-

\textsuperscript{79} Cited supra, n. 77, pp. 285-286.

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ted by analogy with *R.E. Jones Ltd. v Waring & Gillow Ltd.*,\(^8^0\) where it was held that mere payment constituted no representation that the money was owed to the payee, and with *National Westminster Bank Ltd. v Barclays Bank International Ltd.*,\(^8^1\) where it was held that mere payment of a forged cheque constituted no representation that the cheque was genuine. Given that RH cannot rely on PL’s representation in defense to an action brought against him by the bank, and also that the bank, on whose representation RH could rely had it made one, has in fact made none, it must be concluded that the doctrine of apparent authority will not assist RH against S. Nor, of course, can it assist the bank S to recover from PL, since the bank knows that PL has countermanded his request that the bank pay RH, and it cannot recover from PL on the strength of PL’s representation to RH.

**ii) Where S mistakenly thinks he has a present interest in PL’s property, to protect which he pays RH**

In a number of cases, S has paid RH in the mistaken belief that he must do so in order to protect an interest in PL’s property that he does not actually possess. In these circumstances, the best view seems to be that S’s payment will not *prima facie* discharge PL’s obligations, and that

\(^8^0\) [1926] A.C. 670.
\(^8^1\) [1975] Q.B. 654.
he will therefore be prima facie entitled neither to bring a claim against PL for money paid, nor to be subrogated to RH's security. However, it appears that if S can show that PL knew of his mistake and stood by, doing nothing to stop S from paying, then S can assert that PL is estopped from denying that his adoption of S's payment, that PL's obligations to RH are therefore discharged, and that S is therefore entitled to bring an action for money paid against PL. Furthermore, it appears that in these circumstances, S should be entitled to acquire RH's extinguished security over PL's property via "reviving subrogation".

That S's mistake in situations of this kind is sufficient to allow him to bring a proprietary claim to recover his money is suggested by analogy with certain dicta in Falcke v Scottish Imperial Insurance Co. Here, Emmanuel was the ultimate owner of the equity of redemption of an insurance policy. He paid premiums owed on the policy, but the Court of Appeal took the view that his interest in the policy was not of a kind that could justify giving him a lien over the policy in respect of his payments, so as to

82 (1886) 34 Ch. D. 234. The following analysis is based on the account of Falcke given in Sutton, pp. 92-94.

83 It should be noted that the owner of an insurance policy is not legally obliged to pay premiums on the policy, although of course if the premiums are not paid the policy will lapse. For this reason, it cannot be said that Emmanuel's position was exactly that of an intervener who pays another's legal liability.

84 Ibid., at 243, per Cotton, L.J., at 250-251, per Bowen L.J., and at 253, per Fry, L.J.
give his claim priority over the claims against the policy of the mortgagees. As a result, when the policy was eventually sold the mortgagees were entitled to the whole of the moneys realised by the sale, notwithstanding the fact that the policy had been kept afoot by Emmanuel's payment of the premiums. In effect, although he had an interest in the policy as the owner of the equity of redemption, the Court of Appeal decided that the nature of this interest was such that so far as the mortgagees were concerned Emmanuel's payments should be treated as those of an intervener with no interest in the policy.

Emmanuel's claim to be reimbursed for his payments out of the policy moneys did not rest on the sole grounds that he had paid the premiums in order to protect his interest as the owner of the equity of redemption of the policy. He advanced the further argument that he had paid the premiums in the mistaken belief that he had taken a valid assignment from Falcke of Falcke's interest in the policy as first mortgagee, and two members of the Court of Appeal\(^5\) held that had he successfully established that he had paid under this mistaken belief, and had he also established that Falcke had stood by, knowing of his mistake, but failing to stop him from paying, then he might still have been entitled to a lien over the policy for his payments. As matters

\(^5\) Ibid., at 241-243, per Cotton, L.J., and at 253, per Fry, L.J.
turned out, the majority of the Court of Appeal were satisfied neither that Emmanuel was truly mistaken as to the nature of his title at the time of paying, nor that he had shown that Falcke had stood by in the knowledge that Emmanuel was paying the premiums under a mistake. And whilst the third member of the court, Cotton, L.J., seems to have been prepared to accept that Emmanuel had paid under a mistake, he held that Emmanuel had failed to establish that Falcke had stood by in such a way that he should be estopped from denying that he had adopted Emmanuel's payments. Hence, their Lordships held that Emmanuel's claim failed on the facts of the case. Had he been able to establish both that he had paid by mistake and that Falcke had stood by, however, it appears that their Lordships would have given him a lien against the moneys realised by the sale of the policy, i.e., they would have given him a proprietary claim to recover his money from Falcke.

Falcke was obviously not a case in which S paid money to a third party RH with a charge over PL's property. Hence, no question arose in the case of S claiming to acquire a security over PL's property via "reviving subrogation".

86 Ibid., at 251, per Bowen, L.J., and at 253, per Fry, L.J.
87 Ibid., at 243.
88 See too Re Foster [1938] 3 A.E.R. 610, at 613, per Crossman, J., holding that where S pays the premiums on PL's insurance policy in the mistaken belief that it is his own, and PL, the true owner of the policy, "knowing that he himself is the true owner, allows this to be done", S is entitled to a lien over the policy for his payments.
However, this situation did arise in an Australian case, *Hill v Ziymack*. Mrs. Hill and Mrs. Ziymack were respectively the widow and mother of a man who died leaving as part of his estate a flock of sheep which had been mortgaged to another party. In the belief that she had a good claim to the ownership of the flock, Mrs. Ziymack paid the mortgagee in respect of his charge. However, Mrs. Hill disputed Mrs. Ziymack's claim, and it was later held in court that the flock belonged to Mrs. Hill. Mrs. Ziymack therefore claimed, *inter alia*, that she should be subrogated to the mortgage over the flock because she had paid the mortgagee under a mistake of fact. Griffith, C.J. held that on the authority of Falcke this argument must fail because "[t]he only basis for a claim to recover the amount of these payments is a request or ratification, and there is no evidence of either." However, if she had been able to show that Mrs. Hill had known of her payments and had done nothing to prevent her from paying, then Mrs. Ziymack's claim to be subrogated to the position formerly occupied by the mortgagee should arguably have succeeded.

Support for this view can be found in a Canadian case, *Riddell v MacRae*. Here, the plaintiff was the administrator of Riddell's estate, and he paid land taxes owed on a piece of land which he believed to belong to the estate.

89 (1908) 7 C.L.R. 353.
90 Ibid., at 364.
91 (1917) 34 D.L.R. 102.
but which was in fact owned by the defendant MacRae. The Alberta Supreme Court, Appellate Division, held that the plaintiff was therefore entitled to a lien over MacRae’s property, either in his own right, or via "reviving subrogation" to the lien over MacRae’s property formerly owned in respect of the taxes by the relevant tax-gathering authority. It must be conceded this decision does not seem to have been based on any direct evidence that MacRae knew of Riddell’s mistaken payments, but rather upon the "fair inference" that MacRae must have known of them. Whether such an inference properly constitutes evidence of standing by sufficient to entitle a claimant S to assert that another party PL has adopted his payment must be doubted. Certainly the Saskatchewan Court of Appeal refused to draw such a conclusion in a case with almost identical facts, Barish & Co. v Biss. However, Riddell v MacRae should at least be taken as authority for the view that a mistaken inter-

92 Ibid., at 103, per Beck, J. Cf. Coke v Bargaines 116 S.W. 2d 904 (1938), in which the Court of Civil Appeals of Texas allowed the mistaken payor of another’s taxes to be subrogated to the tax-gathering authority’s lien, and no evidence of standing by seems to have been brought forward.

93 [1925] 3 D.L.R. 738. This case differed slightly from Riddell v MacRae because the court held that the true owner of the property in respect of which taxes were owed had never been assessed for the property and so could not have been legally liable to the tax-gathering authority under the relevant tax statute. For present purposes, however, the notable feature of the case was that the court found “nothing in the evidence to support the contention that [the true owner of the property] subsequently ratified or adopted [the intervener’s] payment or in any way promised, either expressly or by implication, to repay the amount in question” (ibid., at 740, per Haultain, C.J.S.).
vener S will be entitled to take RH's charge via "reviving subrogation" where he can produce some real evidence of PL's standing by.

iii) Where S lends money to X in the mistaken belief that X has been authorised by PL to borrow from S on PL's behalf, and X uses the money to pay RH

In several cases where S has advanced money to X in the mistaken belief that X has been authorised by PL to borrow from S on PL's behalf, and X has then used the money to pay PL's creditor RH in respect of PL's previously incurred liabilities to RH, the courts have held that X's payment discharges PL's obligations and that S is entitled to acquire RH's extinguished rights against PL via "reviving subrogation". In Bannatyne v D. & C. Maclver,94 for example, Romer, L.J. laid down that as a general rule:95

94 [1906] 1 K.B. 103. See too Re The Japanese Curtains and Patent Fabric Co. (Ltd.) (1880) 28 W.R. 339; Brocklesby v The Temperance Permanent Building Society [1895] A.C. 173; City Bank of Sydney v McLaughlin (1909) 9 C.L.R. 615. Cf. Reid v Rigby & Co. [1894] 2 Q.B. 40, in which a lender in similar circumstances was allowed to recover from PL in a direct action for money paid to PL's use. And cf. Hazlewood v West Coast Securities Ltd. (1974) 49 D.L.R. (3d) 46, where the plaintiff advanced money to X in the mistaken belief that X was authorised to act on the defendant's behalf, and X used the money to discharge obligations which he had previously incurred towards the defendants. The plaintiff was held to be entitled to recover from the defendant so much of its advance to X as X had used to discharge his debts towards the defendant. 95 Ibid., at 109.
"Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that his act has not been authorised, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal."

The difficulty with this formulation is that it assumes that when the agent X pays S's money to RH, the effect of this payment is to discharge the principal PL's obligations to RH because PL has expressly authorised X to pay on his behalf. However, it must be questioned whether this is really so. For where X has a general authority to pay his principal PL's debts, but he is not authorised to borrow money on PL's behalf, it should arguably follow by implication from this that he is not authorised to pay PL's debts with improperly borrowed money. This suggests that when X pays RH his payment cannot operate to discharge PL's obligations on the grounds that PL has expressly authorised him to pay. And from this it follows that S should be entitled to recover his money from RH, but that he should be unable
to recover from PL, either directly or via "reviving subrogation".

A rather different situation arose in Reversion Fund & Insurance Co. Ltd. v Maison Cosway Ltd. Here, S advanced money to X in the full knowledge that X was not authorised to borrow from S on PL's behalf. X then used the money to pay RH, and a majority of the Court of Appeal held that S should be entitled to acquire RH's rights against PL via "reviving subrogation", by extension of the principle set down in the cases discussed above. However, even if the argument set out above against recovery by the mistaken payors in these cases is not accepted, in this case because S knew that X was not authorised to borrow money on PL's behalf, it cannot have been correct for the court to have treated him as though he were a mistaken payor. He should rather have been treated as a volunteer so far as PL was concerned, and he should not have been permitted to recover

97 Buckley and Kennedy, L.JJ., Vaughan Williams, L.J. dissenting.
98 In fact, Buckley and Kennedy, L.JJ. thought that the remedy to which S should have been entitled could not be subrogation because S was not entitled to acquire RH's secured rights (ibid., at 377, per Buckley, L.J.). However, there is no technical reason why personal rights of action should not be transferred via subrogation, and it is therefore submitted that this was in fact the remedy to which they thought S entitled.
his payment from PL. 99

Something must finally be said in this sub-section of Butler v Rice. 100 Here, Mrs. Rice owned two pieces of property that were mortgaged to a bank. Unknown to Mrs. Rice, her husband, who it appears had no interest in either property, then borrowed money from Butler for the purpose of paying off this charge. Rice falsely represented to Butler that the charge he wished to pay off was secured on only one of the properties, and also that this property belonged to him, rather than to Mrs. Rice. Rice agreed with Butler that he would execute a new mortgage over this property in Butler's favour to secure Butler's loan. Butler then lent Rice the money as agreed, and Rice used it to pay off the bank's charge over his wife's two properties. Mrs.

99 In his dissenting judgment, Vaughan Williams, L.J. refused to extend the principle set down in the earlier cases to cover the situation where S actually knew of X's want of authority. Langan, p. 229 observes that Vaughan Williams, J.'s judgment was correct as a matter of authority (citing the passage from Romer, L.J.'s judgment in Bannatyne v D. & C. MacIver quoted at p. 271, supra, which clearly states that S must have made a mistake). However, Langan, pp. 230-231, then goes on to argue that the result reached in the Reversion Fund case was justifiable in principle because it can have made no difference to PL whether it owed its debt to S or RH. However, even if it is conceded that PL's debt to RH was discharged by X's payment (and in the writer's view it was not), the result reached by the majority of the Court of Appeal in the Reversion Fund case cannot have been correct because no unjust factor underlay S's payment on the basis of which he could have been entitled to a restitutionary remedy. 100 [1910] 2 Ch. 277.

101 Ibid., at 283, per Warrington, J. For this reason Butler v Rice must be distinguished from the cases discussed in section (a)(iv), supra.
Rice then refused to execute a charge over her property in Butler's favour, and, crucially, she claimed that her property now belonged to her free from any mortgage.

Warrington, J. held\textsuperscript{102} that in these circumstances Butler would be entitled to a presumption in his favour that the bank's mortgage should be "kept alive" for his benefit, on the authority of \textit{Patten v Bond}.\textsuperscript{103} However, as has been discussed already,\textsuperscript{104} the reasoning adopted in that case was badly flawed, and the better explanation of \textit{Butler v Rice} is that Butler was entitled to acquire the bank's extinguished mortgage over Mrs. Rice's property via "reviving subrogation", on the grounds that he had paid his money under a mistake. Given that Mr. Rice had no interest of his own in Mrs. Rice's property, it remains of course to be asked how his payment to the bank could have had the effect of extinguishing the bank's mortgage over Mrs. Rice's property, particularly in the light of her subsequent repudiation of his agreement with Butler and payment to the bank? The answer to this question lies in the fact that Mrs. Rice claimed to be entitled to take her property free not only of Butler's mortgage, but of the bank's mortgage as well, and in doing this, she must be taken to have adopted the benefit of Rice's unauthorised payment by

\textsuperscript{102} \textit{Ibid.}, at 282-283.
\textsuperscript{103} (1889) 60 L.T. 583.
\textsuperscript{104} See the discussion in Chapter 1, part (6), \textit{supra}.
implication:¹⁰⁵ it was not open to her simultaneously to repudiate her husband's payment to the bank and to adopt the benefit of it.

¹⁰⁵ This interpretation of Butler v Rice is advanced in: Birks, p. 392, n. 87; Birks and Beatson, p. 205, n. 2, now Beatson, p. 194, n. 101.
CHAPTER 4: FAILURE OF CONSIDERATION

This chapter is essentially concerned with the following situation: S enters a contract with PL. S agrees either to make a payment to RH on PL's behalf, in respect of an obligation to RH which PL has previously incurred, or to lend money to PL, which PL then uses to pay RH in respect of his previously incurred obligation. PL agrees that he will repay S at some future date, but in later failing to make the repayment causes the consideration for S's advance to fail. Where RH is paid directly by S, PL's obligations will be discharged by S's payment because PL has ipso facto authorised S to act on his behalf; where RH is paid by PL, the issue of whether PL has authorised the payment obvious-

1 A more complex situation than the basic one set out here has arisen in the case-law: S enters a contract with X, under which he pays X money, and X in turn either pays this money to PL, who pays it to RH, or else pays it to RH directly with PL's authority. PL's obligations are thereby discharged. If X fails to repay S as required under their contract, it is trite law that S may sue X. However, it seems that S may also be entitled to sue PL and to acquire RH's extinguished rights against PL in some circumstances. If PL has given X value for his receipt of the money, then no claim would lie against him. But if, for example, consideration for X's payment to PL fails, and PL rescinds his contract with X, then X and through him S may both be entitled to acquire RH's extinguished rights against PL via "reviving subrogation": Hillel v Christoforides (1991) 63 P. & C.R. 301, at 307, per Millett, J.; Chohan v Saggar [1992] B.C.C. 750, at 756, per Edward Evans-Lombe Q.C., sitting as a deputy High Court judge (who would have been prepared to award S ("reviving") subrogation on the grounds that it had bargained for a security, but would have refused it to X on the grounds that she had not). Contra, Porter v Associated Securities Ltd. (1976) 1 B.P.R. 97027, at 9249, per Needham, J.
ly does not arise, and again PL’s obligations are discharged by PL’s payment. The question which is addressed in this chapter is whether S should be entitled to acquire RH’s rights against PL via "reviving subrogation" on the grounds of failure of consideration. In part (1), the position will be considered where S and PL’s contract is a valid one. In part (2), the position will then be considered where S and PL’s contract is deemed by the courts or the legislature to be void or voidable for some reason.

1) Where S and PL’s initial contract is valid

If S and PL’s contract is a valid one, S can sue PL on the contract in the event that PL fails to repay him as agreed. S can alternatively bring a restitutionary action against PL founded on the unjust factor of failure of consideration, either for money had and received or for money paid, according to whether he has paid his money to PL or to RH at PL’s request. Given that S has these direct actions against RH, he clearly has no need to take over RH’s extinguished personal rights against RH via "reviving subrogation" in order to recover his money. There is no reason as a matter of principle why he should not be permitted to acquire them, but in practice he should never need them.

However, the question arises where not only RH’s personal

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2 Birks, Chap. 7; Burrows, Chap. 9; Goff and Jones, pp. 449-454.
rights against PL have been extinguished, but also some secured right which RH possessed against PL, whether S should ever be entitled to acquire this secured right by "reviving subrogation". As has already been discussed in Chapter 1, part (5), Birks' "proprietary base" analysis constitutes the strongest possible explanation of an entitlement to acquire secured rights via "reviving subrogation", but where this analysis is untenable it is necessary to fall back on some other explanation of the remedy's award. Here, it cannot be said that S has retained a proprietary interest in his money sufficient to allow him to assert a proprietary claim for its recovery. This is because the right to rescind a contract for breach, which is a necessary precondition for the assertion of a restitutionary claim to recover money paid for a consideration which has subsequently failed,\(^3\) can only take effect de futuro; it cannot take effect ab initio.\(^4\) Hence, when a claimant rescinds a contract in order to bring a restitutionary claim, this cannot retrospectively affect the fact that at the time of making his payment in accordance with the terms of the contract,

\(^3\) Goff and Jones, pp. 31-32, and 460, citing Weston v Downes (1778) 1 Doug. K.B. 23; Toussaint v Martinnant (1787) 2 T.R. 100, at 105, per Buller, J.; Gompertz v Denton (1832) 1 C. & M. 207.

he unequivocally intended property in the money to pass to his payee, and that property in the money therefore did fully pass to the payee. Thus, where S has paid either PL or RH in accordance with the terms of his contract with PL, and PL later fails to repay him as agreed, S cannot claim to have retained any proprietary interest in the money sufficient to justify the award of a proprietary remedy to recover it. 5

From this it follows that a claimant S seeking to acquire

5 It has been suggested in certain cases that payors for a consideration which subsequently fails are entitled as a general rule to bring a proprietary claim to recover the money they have paid: Neste Oy v Lloyds Bank PLC [1983] 2 Lloyd's Rep. 658, discussed in S.R. Scott, "The Constructive Trust and the Recovery of Advance Payments", (1991) 14 N.Z.U.L.R. 375; Yorkshire Trust Co. v Empire Acceptance Corp. Ltd. (1983) 44 B.C.L.R. 334. See too F. Oditah, "Assets and the Treatment of Claims in Insolvency", (1992) 108 L.Q.R. 459, p. 470, n. 76. However, in the writer's view a payor for a consideration which fails can have no such general right for the reasons set out in the text. Cf. DFC New Zealand Ltd. v Goddard [1992] 2 N.Z.L.R. 445, where the plaintiff deposited money with the defendant merchant bank, instructing the bank to pay this money and accumulated interest into another bank account at the end of a year. At the end of the year, the bank overlooked this order and invested the total sum with itself on call, and before the respondent could give the bank further instructions, the bank went into receivership. The respondent sought to bring a proprietary claim to recover his money, but his claim was rejected by the New Zealand Court of Appeal. At 447-448, Cooke, P. said:

"It is elementary that an unsecured deposit, whether for a term or at call, with a bank or similar financial institution creates normally only a debtor-creditor relationship and not a trust . . . If it be kept firmly in mind that a banker or other taker of unsecured deposits does not in truth hold the money of his customers but is merely bound to repay each customer on demand or agreed notice, the untenability of the trust notion in this case becomes apparent."
RH's extinguished security via "reviving subrogation" on the grounds of failure of consideration must advance some other explanation of why he is entitled to a proprietary remedy. One possible alternative explanation would be available to S if he could show that he had lent money to PL for a specific purpose, and that PL had failed to use the money as specified and had paid it to RH instead: according to Barclays Bank Ltd. v Quistclose Investments Ltd., money lent for a specific purpose is subject to a resulting trust in the lender's favour if misapplied. However, only one case has been found in which the "specific purpose" explanation could have been advanced to support a lender's claim to acquire a security via "reviving subrogation", and none


7 Jack v Jack (1885) 12 O.A.R. 476. Here PL fraudulently induced S to lend him money for a specific purpose, and PL instead paid this money to RH, who held a mortgage over PL's land. It is arguable that S should have been entitled to acquire RH's extinguished charge via "reviving subrogation" not only on the grounds of mistake (cf. the cases discussed in Chapter 3, part (2)(a)(i), supra), but also on the grounds that he had lent PL the money for a specific purpose that was not fulfilled. At 480-481, Hagarty, C.J.O. commented that:

"This contract was perhaps liable to have been avoided by [S] as obtained from him by fraud, but until so avoided, [PL] had the possession and property therein, for a special, but none the less so because he wrongfully applied it to another, purpose."

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of the other cases discussed in this part fall into this pattern. On the contrary, they concern the situation where a lender S either pays RH directly at PL's request, or else advances money to PL for PL to pay RH, and PL uses the money to do precisely that. The only possible explanation of the award to S of "reviving subrogation" to RH's security in these cases would therefore seem to be that where S and PL have agreed that S's advance should be secured by a charge over PL's property, the courts think it desirable to give effect to this mutual intent if it is thwarted by PL's subsequent failure to create a security in S's favour as agreed.®

This explanation is obviously inapplicable to the situation where S and PL have agreed that S's advance should be unsecured, but this is no cause for worry since S should certainly be denied "reviving subrogation" to RH's security where he has bargained to make an unsecured loan. However, it must be pointed out that where S and PL have agreed that S's advance should be secured by a charge over PL's property, in most cases the courts should not need to use "reviving subrogation" to give effect to this mutual intention since they can achieve the same result by awarding S an

® Burrows, pp. 85-87, gives this explanation of the cases. Cf. Meagher, Gummow and Lehane, para. 907, remarking that where PL has induced S to lend him money on the basis that he will charge his property in S's favour, subrogating S to RH's old charge is "the best means equity has available of treating [PL] as fulfilling his inducement."
order for specific performance of the contract.⁹ There is one situation where S might prefer to acquire RH's charge via "reviving subrogation" rather than a new charge over PL's property as agreed, but it is far from clear in this situation that S should be entitled to such a remedy. This is where there exist intervening chargees with rights over PL's property ranking lower than RH's security but higher than the security for which S bargained. The position of intervening chargees must be treated with care. It need not invariably be the case that they will be unfairly disadvantaged if S is substituted for RH as the first chargeholder over PL's property. If RH is threatening to foreclose on PL's property because PL's business is going badly, for example, and S is willing to pay RH off and to give PL time to bring the business back into profit before enforcing repayment, allowing S to step into RH's shoes would not necessarily prejudice the rights of subsequent chargees.

⁹ Once S has paid his money in consideration for PL's promise to execute a security over his property in S's favour, the courts will treat the agreed-to security as having been created in equity in any case: Tebb v Hodge (1869) L.R. 5 C.P. 73. But if an equitable charge is not good enough for S's purposes, it is quite clear that he can seek an order for specific performance of his agreement with PL, and by that means acquire the security for which he has bargained: Ashton v Corrigan (1871) L.R. 13 Eq. 76; Hermann v Hodges (1873) L.R. 16 Eq. 18; Taylor v Eckersley (1876) 2 Ch. D. 302; Lamont v Osborn (1902) 28 V.L.R. 434. See too G. Jones & W. Goodhart, Specific Performance (London, 1986), p. 124. But cf. Thames Guaranty Ltd. v Campbell [1985] 1 Q.B. 210, where the Court of Appeal would not order a husband to execute a charge on his interest as joint tenant of a matrimonial home, on the grounds that to do so would cause hardship to his wife.
holders. Having said this, though, it will be strongly arguable in many cases that where S has bargained for a security ranking below those held by intervening chargees, it would be inequitable to disadvantage them by putting S into a better position than the one for which he bargained. And for this reason, it is submitted that as a matter of principle "reviving subrogation" to RH's extinguished security should only be awarded to S on the grounds of failure of consideration either where there are no intervening chargees (in which case he might equally well seek an order for specific performance) or, where there are such intervening chargees and S has specifically bargained for RH's old security rather than for a security which is lower in priority than the securities held by the intervening chargees, where the intervening chargees have expressly consented to such an arrangement.

For the purposes of the following discussion, it will be assumed that RH has not expressly agreed, either with S or with PL, to assign his rights against PL to S. The means by which RH can effect such an assignment are set out in Appendix 2, part (3). The following discussion is concerned only with the position where RH has accepted payment, either from S or from PL, on the understanding that the payment is made in order to discharge his rights. The cases in which this situation has arisen fall into three distinct types, which vary according to the nature of S and
PL's initial agreement: (a) where S and PL have agreed between themselves that S should acquire RH's old charge; (b) where S and PL have agreed that PL will execute a new charge over his property in S's favour; (c) where S and PL have made no mention in their agreement of S acquiring a charge.

a) Where S and PL have agreed that S should acquire RH's old charge

S may expressly stipulate in his agreement with PL that he wishes to acquire RH's old security over PL's property. If RH agrees to assign his charge to S in consideration for payment, then this can be simply accomplished by a deed of transfer or endorsed receipt, under the Law of Property Act 1925, ss. 114 and 115 respectively. But it should be noted that a further means of transferring RH's charge to S, which does not require RH's consent, is provided by the Law of Property Act 1925, s. 95. This section provides that where PL is entitled to redeem his property from RH's charge (i.e. where he is entitled to compel RH to accept

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For further discussion, see Appendix 2, part (3).

According to the definition section of the Law of Property Act 1925, s. 205(1)(xvi):

"Mortgage" includes any charge or lien on property for securing money or money's worth . . . ."

Hence, although the wording of s. 95 refers to "mortgages", it is in fact applicable not only where RH has a legal mortgage over PL's property, but also where he has an equitable mortgage or other equitable charge. Cf. Everitt v Automatic Weighing Machine Co. [1892] 3 Ch. 506, where a shareholder who owed money to a company was held to be entitled on repaying the debt to require that the company transfer its corresponding equitable lien over his shares
his payment in discharge of RH's secured rights) PL may compel RH to assign his charge to S in lieu of taking PL's money in discharge of the security. Section 95(1) reads as follows:¹²

"Where a mortgagor [= PL] is entitled to redeem, then subject to compliance with the terms on compliance with which he would be entitled to require a reconveyance or surrender, he is entitled to require the mortgagee [= RH], instead of reconveying or surrendering, to assign the mortgage debt and convey the mortgaged property to any third person [= S], as the mortgagor directs; and the mortgagee shall be bound to assign and convey accordingly."

The original purpose of s. 95(1), which was first enacted as the Conveyancing and Law of Property Act 1881, s. 15, was to make matters easier for legal mortgagors who wished to pay off creditors with legal mortgages over their property and then to execute a new legal mortgage over their to a third party of his choosing.¹² It should be noted that under s. 95(3), s. 95 is deemed not to apply where the mortgagee is or has been in possession of the mortgaged property. The reason for this exception is that once a mortgagee is or has been in possession of the property, if he then transfers the mortgage without having been ordered to do so by the court he will be liable to account to the mortgagor for any profits which the transferee should have raised from the property but failed to do so through neglect or wilful default: Hall v Heward (1886) 32 Ch. D. 430, at 435, per Cotton, L.J.
property in favour of some third party. Before 1881, it was impossible for a legal mortgagor to oblige his mortgagee to assign his security to a third party; on receiving a payment to extinguish his secured rights, the mortgagor could only be compelled to reconvey the mortgaged property to the owner of the equity of redemption. This meant that under the old system of creating and extinguishing legal mortgages, which required that mortgaged properties be respectively conveyed and reconveyed, it was a laborious process to extinguish the mortgagor's security and then to create a new one in favour of a third party. The purpose of the Conveyancing and Law of Property Act 1881, s. 15, was to introduce a quicker and cheaper means of accomplishing this end.

Besides the fact that it offers S and PL a simple and cheap means of substituting S for RH in the circumstances described, though, there is another obvious reason why S and PL might wish to invoke s. 95. This is that there may exist further incumbrancers over PL's property, whose rights against PL would take priority over any new charge that PL might execute in S's favour. In these circumstances, it would obviously be to S's advantage if matters could be so contrived that he was enabled to take over RH's charge. Under the wording of s. 95(1), it is not open to

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13 James v Biou (1819) 3 Swans. 234, at 241, per Lord Eldon, L.C.; Colyer v Colyer (1863) 3 De G.J. & S. 676, at 693, per Turner, L.J.
PL to compel RH to assign his charge to S in this situation, because his right to have RH assign his security to S arises under s. 95 (1) only where PL has the *prima facie* right to take a reconveyance of his property, something to which he is not entitled where there exist further incumbrancers over his property. However, under s. 95(2) it is further provided that:

"The rights conferred by this section belong to and are capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer prevails over a requisition of the mortgagor; and, as between incumbrancers, a requisition of a prior incumbrancer prevails over a requisition of a subsequent incumbrancer." (Emphasis added)

S. 95(2) was first enacted as the Conveyancing Act 1882, s. 12. *Prima facie*, it appears to empower PL to require RH to assign his security to PL, notwithstanding the fact that this will disadvantage any subsequent chargees. However, the fact that the section further provides that "a requisition of an incumbrancer prevails over a requisition of the

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"mortgagor" suggests that it would be open to a subsequent chargee to dispute S's right to step into RH's shoes, where he purported to do so by dint of an enforced assignment under s. 95 without the subsequent chargee's consent. Furthermore, it appears that at common law, where RH has notice of the existence of any subsequent chargees, he is not safe in assigning his security to S without their consent, since he owes them a fiduciary duty to protect their interests which would be breached if he prejudiced their position in this way.  

The question arises, what action the courts should take, if PL agrees with S that he will exercise his rights against RH under s. 95 in S's favour, but then reneges on his promise and tenders money to RH in discharge of RH's security? In the event that PL subsequently fails to repay S his loan, S will obviously have a personal claim against PL, but he will not have the security he bargained for. Assuming that there are no intervening chargees, it is sub-

15 Corbett v The National Provident Institution (1900) 17 T.L.R. 5; Re Magneta Time Co. Ltd. (1915) 84 L.J. Ch. 814, at 816, per Neville, J.; Lev v Scarff (1981) 146 C.L.R. 56, at 62, per Barwick, C.J., noted by P. Butt, (1981) 55 A.L.J. 69. See too Fisher's Law of Mortgages, 5th ed. by A. Underhill (London, 1897), para. 1978. And cf. Watson v Dowser (1881) 28 Gr. 478, at 483-484, per Spragge, C., holding that a term of S and PL's agreement that "in the event of the money hereby advanced . . . being applied to the payment of any charge or incumbrance, [S] shall stand in the position, and be entitled to all the equities of the person or persons so paid off" could not affect prior mortgagees who were not party to the agreement.
mitted that the courts could use "reviving subrogation" in this situation to put S and PL into the position for which they bargained. However, where there are intervening chargees, it is submitted that the courts should be obliged to consult their interests before allowing S to take RH's old security over their heads.

b) Where S and PL have agreed that S should have a new charge over PL's property

Where S and PL have agreed that S should take a new charge over PL's property, and S makes an advance under this agreement, there are a number of reasons why S might subsequently wish to acquire RH's old charge via "reviving subrogation". These will be considered in turn.\textsuperscript{16}

\textsuperscript{16} It should be added here that where PL executes a new charge over Blackacre in S's favour, but a prior chargee RH with rights over both Blackacre and Whiteacre chooses to exercise his rights over Blackacre to S's prejudice, S will be entitled to be "simply subrogated" to RH's rights over Whiteacre by dint of the equitable doctrine of marshalling. In Webb v Smith (1885) 30 Ch. D. 192, at 200, per Cotton, L.J., this doctrine was said to be founded on the following principle:

"If A has a charge upon Whiteacre and Blackacre, and if B also has a charge upon Blackacre only, A must take payment of his charge out of Whiteacre, and must leave Blackacre, so that B the other creditor, may follow it and obtain payment of his debt out of it . . ." As an incident of this principle, where a doubly secured creditor RH has come against that part of his debtor PL's property that is also subject to a singly secured creditor S's charge, and has thereby effectively rendered S's charge worthless, S will be entitled to be "simply" subrogated to RH's charge over that part of PL's property which is subject to RH's charge alone: Lanoy v Duke and Duchess of Atholl (1742) 2 Atk. 444; Dolphin v Aylward (1870) L.R. 4 H.L. 486, at 500-501, per Lord Hatherly, L.C.; Noyes v Pollock
i) Where PL fails to execute the new charge as agreed

Where S and PL have agreed that S should take a new charge over PL's property, and S makes his payment on that basis, but PL fails to create the new security in S's favour as agreed, there is some authority that S should be entitled to acquire RH's old charge against PL via "reviving subrogation". In *Evandale Estates Pty. Ltd. v Keck*, Hudson, J. said: 17

"[Where it appears] . . . from the whole of the circumstances of the transaction that it was the intention of the parties that the lender [= PL] should have security over the property for his loan . . . [because he] made the loan on this understanding, it would be inequitable to deny him the security for which he stipulat-

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(1886) 32 Ch. D. 53; Ernst Brothers Co. v Canada Permanent Mortgage Corp. (1921) 57 D.L.R. 500; Butler Engineering Ltd. v First Investors Corporation Ltd. [1986] 1 W.W.R. 469. S is not entitled to this remedy where allowing him to take over RH's rights over the second piece of property would unfairly prejudice the position of a subsequent chargee: *The Chioggia* [1898] P. 1; *Victoria and Grey Trust Co. v Brewer* (1970) 14 D.L.R. (3d) 28; *Williamson v Loonstra* (1973) 34 D.L.R. (3d) 275; and see the cases cited by Meagher, Gummow and Lehane, para. 1126.


ed, and the appropriate manner in which to give it to him is by subrogating him to the position of the vendor [= RH]."

And similarly, in an Irish case, *Bank of Ireland Finance Ltd. v D.J. Daly Ltd. (in liq.),*\(^{18}\) S agreed to lend money to PL to enable PL to buy property from RH. PL agreed in turn to deposit the title deeds of the property with S by way of equitable mortgage once RH had conveyed the property. PL bought the property but failed to deposit the deeds as agreed, and he then also failed to repay S's loan. McMahon, J. held that in these circumstances S should be entitled to acquire RH's vendor's lien via ("reviving") subrogation.

As has been said already, it is unclear that "reviving subrogation" has a legitimate function to perform in situations of this kind that could not be performed equally well by specific performance. Provided that the rights of intervening chargees are not in issue, however, there seems to be no reason in principle why S should not be allowed "reviving subrogation" rather than specific performance if he so wishes.

\(^{18}\) (1978) I.R. 79.
ii) Where PL executes the new charge as agreed, but it is subsequently invalidated through S's failure to register it

In two cases, Capital Finance Co. Ltd. v Stokes\(^1\) and Burston Finance Ltd. v Speirway Ltd. (in liq.),\(^2\) PL executed a new charge over his property in S's favour, and S failed to comply with registration requirements under the Companies Act 1948, s. 95, with the result that its charge was deemed to be void against subsequent charge-holders. In both of these cases, it was held that S could not claim to acquire RH's old charge via "reviving subrogation".

These decisions seem absolutely sound. It would have defeated the whole purpose of the registration system to allow S to acquire RH's old charge in such circumstances,\(^2\) and it would also have given S more than it bargained for. It is true that those of PL's unsecured creditors that had dealt with PL on the understanding that PL's assets were subject to RH's old charge would not have been unfairly prejudiced if S had been permitted to take over RH's old charge via "reviving subrogation". However, to have all-

\(^{19}\) [1969] 1 Ch. 261.

A third case which seems to fall into the same pattern is Grace v Kuebler (1917) 38 D.L.R. 149. Here S advanced money to PL to pay RH, and took from PL as security for his advance an assignment of an agreement of sale of the lands covered by RH's charge. S negligently failed to give notice of the assignment to the purchasers of the property, and the Alberta Supreme Court refused to allow him to acquire RH's extinguished charge via "reviving subrogation" in order to establish a claim against the property with priority over the rights of the purchasers.

\(^{21}\) Goff and Jones, p. 564, make the same point.

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owed S to do this would have unfairly prejudiced both the position of any intervening chargees (priority over whom S certainly had not bargained for) and the position of all PL's creditors who had dealt with PL subsequent to the discharge of RH's old security, on the understanding that PL's assets were subject neither to RH's old charge, nor to S's new security. Of this latter group, it would be particularly unfair to prejudice the position of those who themselves took a valid security from PL.\textsuperscript{22}

\textsuperscript{22} This point is made in J. Martin, Note, (1975) 38 M.L.R. 580, p. 584.

If PL grants S a registrable charge over his property and S registers this charge, but only after PL has executed a further registrable charge in favour of some other party, X, who has no actual notice of S's charge, then S's charge will rank below X's charge but above any further charges which PL may create after S's charge is registered. In these circumstances, provided that X registers his charge before PL grants any further charges, the order of priority between PL's secured creditors is simply determined as: X-S-further chargees.

However, if S registers his charge after PL grants a registrable charge to X, and X fails to register his charge before PL then grants a further charge again to Y, who has no actual notice of X's charge, matters become complex. For in these circumstances X will hold a charge with priority over the charge held by S, which in turn takes priority over the charge held by Y, which in turn takes priority over the charge held by X. It has been suggested in certain cases that the solution to this problem of circular priorities lies in ("simply") subrogating e.g. Y to X's position, to the extent that X has priority over S: Benham v Keene (1861) 1 J. & H. 685, at 710-712, per Sir W. Page-Wood, V.-C.; Re Wyatt [1892] 1 Ch. 188, at 208-209, per Fry, L.J.; Taylor v London & County Banking Co. [1901] 2 Ch. 231, at 262-264, per Stirling, L.J.; Re Fablehill Ltd. [1991] B.C.C. 590, at 600-601, per Vinelott, J. Cf. Re Woodroffes (Musical Instruments) Ltd. [1986] Ch. 366, noted by L.S. Sealy, [1986] 45 C.L.J. 25, and recently distinguished in Re Portbase Clothing Ltd. [1993] 3 W.L.R. 14: these cases both concerned similar problems in the context of subordin-
Where PL executes the new charge as agreed, but it then transpires that it is inferior in priority to those of PL's intervening secured creditors, of whose existence S was unaware

Where PL executes a new charge over his property in S's favour, but it then transpires that PL has either a co-habitee or a prior secured creditor with rights over the property in question, of whose existence S was unaware at the time of entering into the contract, it has been held in a number of cases that S should be entitled to acquire RH's old charge via "reviving subrogation" in order to defeat the claims of these intervening security holders. One possible explanation of these cases is that S is awarded

ated debt agreements (see Appendix 2, part (2) for further discussion).

The obvious problem with using "simple subrogation" in this way is that there is no reason to break the circle at one point rather than another. The result of "simply subrogating" e.g. Y to X's position would be that X could recover nothing until after S and Y were paid, even though X's claim took priority over S's claim. Why should X's position be prejudiced in this way? In truth, this is not an area in which "simple subrogation" can be awarded in order to rearrange the relationship between S, X and Y in a satisfactory way; to award any one of them the right to come against PL first would have the effect of enriching him unjustly at the expense of one of the others. For further discussion, see: G. Gilmore, "Circular Priority Systems", (1961-62) 71 Yale L.J. 53, now G. Gilmore, Security Interests in Personal Property (Boston, Ma. and Toronto, 1965), Vol. II, Chap. 39; W. Lee, "An Insoluble Problem of Mortgagees' Priorities", (1968) 32 Conv. 325; Cheshire and Burn's Modern Law of Real Property, 14th ed. by E.H. Burn (London, 1988), pp. 686-687.

See supra, in Chapter 3, part (2)(a)(i), (ii) and (iv).
"reviving subrogation" on the grounds of failure of consideration. However, this analysis encounters the difficulty that PL does in fact grant S the charge for which he bargained, with the result that it cannot be said that S is entitled to acquire RH's old charge via "reviving subrogation" on the grounds that the parties' mutual intent to create a security has been thwarted. S's problem is not that PL has failed to create a bargained-for security, but rather that the security in question is worth less to S than he expected it would be. For this reason, these cases are better understood as mistake cases, and they are therefore discussed in Chapter 3.

c) Where S and PL have made no mention in their agreement of S acquiring a charge

As a matter of principle, where it can be shown that S and PL's intention at the time of forming their contract was unequivocally that S should make an unsecured advance, then S should not subsequently be entitled to acquire RH's old charge by "reviving subrogation". To allow S to do this would clearly be unjust both to PL and to PL's other creditors, since it would have the effect of putting S in a better position than the one he bargained for.

In many of the cases this conclusion is framed as an exception to the "rule" that S should be entitled to acquire RH's old charge wherever his money has been used to exting-
uish it. However, as has already been discussed in Chapter 1, part (6), the presumption that an intervener S intends that RH's charge should be kept alive for his own benefit should never have been extended beyond the situation where S has a present interest in PL's property at the time of making his payment. Thus, where S has no such present interest it would be better to say that as a general rule S is not entitled to acquire RH's old charge via "reviving subrogation" until he can show some unjust factor on the basis of which the remedy should be awarded to him, and that where S and PL have expressly agreed that S's advance should be unsecured, then prima facie no unjust factor is present, unless some strong evidence of a contrary intention is brought forward.

At issue here is essentially the question of where the burden of proof should lie. Where S and PL make no mention in their agreement of S acquiring a charge over PL's prop-

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25 Cf. Wylie v Carlyon [1922] 1 Ch. 51, at 63, per Eve, J.:

"An individual who advances money to another for the purpose of enabling that other to pay specific debts does not in the absence of a special bargain thereby acquire the rights of the persons whose debts are discharged out of his moneys against the property of the debtor."
erty to secure his advance, whether it be RH's old charge or a new charge, there is nothing wrong with saying that this in itself should not conclusively determine the question of their intentions at the time of forming their contract. But it must be recognised that this fact is strong evidence that S and PL did not intend S to acquire a charge over PL's property; for if that was their intention, it would have been a simple matter for them to make some provision to that effect in their contract.

In Boodle, Hatfield & Co. v British Films Ltd., the


27 Cf. Orakpo v Manson Investments Ltd. [1978] A.C. 95, at 104, per Lord Diplock:

"[W]here a contract of loan provides that moneys lent by L to B are to be applied in discharging a liability of B to C secured on property, it is an implied term of that contract that L is to be subrogated to C's security."

Again, whilst it is certainly arguable that where a lender takes the trouble of expressly stipulating in his contract with the borrower that the money he advances must be used to discharge the borrower's prior liability to a third party with a charge on his property, this fact may be interpretable as evidence of the lender's intention to acquire the charge via "reviving subrogation", it must surely be open to question whether such evidence should be regarded as conclusive of the parties' intentions in the absence of any express agreement between the lender and the borrower to this effect.

28 (1986) 2 B.C.C. 99,221. Cf. Countrywide Banking Corporation Ltd. v Kingston [1990] 1 N.Z.L.R. 629, where a solicitor gave a personal undertaking to repay a secured loan owed to a bank by his client in the event of the client's default. The client defaulted, the solicitor refused to pay unless the bank transferred its charge to him and the bank in turn refused to assign the charge. At 638, Wylie, J. held that even if the solicitor would have been entitled by operation of law to acquire the charge via
plaintiffs were a firm of solicitors acting for the defendant company in connection with the purchase of a piece of property. The defendants gave the plaintiffs a cheque drawn in the plaintiffs' favour to cover the outstanding purchase price, and told the plaintiffs that although there were currently insufficient funds in their account to meet the cheque, there would be sufficient funds the following week. On the strength of this assurance, the plaintiffs agreed to complete the purchase with bankers' drafts drawn by them on their own account. Nothing was said about the plaintiffs taking a charge on the property, nor about the defendants giving the plaintiffs any security for the advance. The defendants' cheque was then dishonoured, and the defendants went into receivership. The plaintiffs therefore brought an action seeking to acquire the vendor's lien on the property via "reviving subrogation", and Nicholls, J. held in the plaintiffs' favour.

This decision appears to have been rendered inevitable by the fact that counsel on both sides accepted it to be the law that:

"[W]here a third party acting on behalf and at the request of a purchaser uses his own money in paying ("reviving") subrogation on paying the bank (an issue on which the judge expressed no opinion), this did not constitute valid grounds for the solicitor to refuse to pay the bank when the bank refused to assign its charge to him."

Ibid., at 99,223, per Nicholls, J.

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part of the purchase price due under the contract, the third party is *prima facie* entitled by subrogation to the vendor's lien."

However, there is much to be said against Nicholls, J.'s decision. There is no satisfactory reason why a third party should be entitled to such a presumption in his favour; and even if such a presumption were justifiable, the fact that no reference was made in the parties' agreement to the plaintiffs' acquiring a charge over the defendants' property to secure their advance must surely have constituted strong evidence that their intention was simply for the plaintiffs to make an unsecured loan.\(^{30}\) The effect of allowing the plaintiffs to acquire the vendor's lien via "reviving subrogation" in this case was to prejudice the position of the defendant's other creditors in an unjustifiable way.

There is one exceptional situation in which the rule argued for here, that S should *prima facie* be refused "reviving subrogation" to RH's old charge where S and PL have agreed that S should make an unsecured advance, is relaxed.

\(^{30}\) Cf. Note, (1986) 50 Conv. 149, at 152:
"[The plaintiffs] ... were perhaps fortunate that Nicholls, J. started with the assumption that they should be secured creditors. If solicitors who are well aware of the difference between secured and unsecured loans and could stipulate for security do not do so, it would be quite possible to draw an adverse conclusion from their omission."
Where PL is an employer in financial difficulties who is unable to meet the wage demands of his employees, he is unlikely to be able to borrow money for this purpose unless banks and other lenders are given some special incentive to lend to him. And although it is provided by the Insolvency Act 1986, s. 386 and Sched. 6, paras. 9 and 10, that up to certain amounts employees' claims in respect of wages and holiday pay are accorded preferential status in the event of the employer's insolvency, these provisions do not meet the difficulty that there is likely to be a considerable delay between the onset of winding-up and the payment of any dividends, during which time the employees are likely to suffer hardship. To meet this difficulty it has also been enacted under the Insolvency Act 1986, s. 386 and Sched. 6, para. 11, that a further category of debt accorded preferential status in an employer's insolvency is:

31 This provision was originally enacted as the Companies Act 1948, s. 319(4):
"Where any payment has been made -
(a) to any clerk, servant, workman or labourer in the employment of a company, on account of wages or salary; or
(b) to any such clerk, servant, workman or labourer or, in the case of his death, to any other person in his right, on account of accrued holiday remuneration;
out of money advanced by some person for that purpose, the person by whom the money was advanced shall in a winding up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which the clerk, servant, workman or labourer, or other person in his right, would have been entitled to priority in the winding up has been diminished by reason of the payment having been made."
"So much of any sum owed in respect of money advanced for the purpose as has been applied for the payment of a debt which, if it had not been paid, would have been a debt falling within paragraph 9 or 10."

The effect of para. 11 is to encourage banks and other financial institutions to lend money to an employer PL for the purpose of paying employees S by allowing them to acquire via "reviving subrogation" the employees' preferential status in PL's insolvency, regardless of whether or not S and PL agreed that S should have some security for its advance. The incentive offered is a generous one: a lender S is not obliged to establish even that he lent PL the money for the specific purpose of paying RH, in order to bring himself within the scope of para. 11. He need only show that his money was in fact used to pay RH's wages and/or holiday pay, and that he had agreed to advance the money to PL on the basis that it might be used to pay RH's wages, but need not be used exclusively for that purpose.\textsuperscript{32}

\textsuperscript{32} Re Primrose (Builders) Ltd. [1950] Ch. 561; Re Rampgill Mill Ltd. [1967] Ch. 1138. See too Re E.J. Morel (1934) Ltd. [1962] Ch. 21; Re James R. Rutherford & Sons. Ltd. [1964] 3 A.E.R. 137; Re William Hall (Contractors), Ltd. [1967] 2 A.E.R. 1150; Re Unit 2 Windows Ltd. [1985] 3 A.E.R. 647. These latter cases concern the situation where PL has more than one account with a bank S, perhaps even a special wages account, and one or more of the accounts is overdrawn. For detailed discussion, see Pennington's Corporate Insolvency Law (London, 1991), pp. 281-283. And cf. Waikato Savings Bank v Andrews Furniture Ltd. [1982] 2
In contrast to the regime established under the Insolvency Act 1986, Schedule 6, under the rules evolved in the Admiralty Court concerning the rights of a lender S who advances money to pay the wages of seamen, S is prima facie unable to acquire via "reviving subrogation" the maritime lien over the ship formerly held by the seamen in respect of their wages. Although it is similarly desirable in this context to give lenders an incentive to advance money for wages, the Admiralty Court seems to have been more powerfully influenced by a countervailing policy of preventing seamen's maritime liens over their ships from becoming freely alienable. As the law now stands, it is necessary to obtain judicial consent in advance to the arrangement before a lender S can be subrogated to the seamen's lien.


The "Kammerhevie Rosenkrants" (1822) 1 Hag. Adm. 62; The "Janet Wilson" (1857) Swab. 261; The Cornelia Henrietta (1866) L.R. 1 A. & E. 51; The Fair Haven (1866) L.R. 1 A. & E. 67; The John Fehrman (1852) 16 Jur. 1122; The Bridgewater (1875-78) 3 Asp. M.L.C. 506; The Petone [1917] P. 198; The "Berostar" [1970] 2 Lloyd's Rep. 403; The
2) Where S and PL's initial contract is invalid

Where S and PL's initial contract is invalid for some reason, the contractual remedies which would have been available to S in the event of PL's default, had the contract been valid, will not be available to him. However, he may nonetheless be able to bring a restitutionary action to recover his payment from PL. The leading case in this area is Sinclair v Brougham. Here, the House of Lords held that ultra vires depositors with a building society could not bring a claim for money had and received against the society in respect of the money they had paid, on the ground that this would infringe the policy underlying the ultra vires rule by indirectly giving effect to the terms of the parties' invalid ultra vires contract. However, their Lordships also held that the depositors could bring an equitable tracing claim in respect of the money that survived in the building society's hands, on the ground that it would be unjust to allow the building society to retain this money.

This decision has been criticised by a number of academic commentators. Most of these critics have taken the view that the House of Lords were wrong in principle to hold that allowing the depositors an action for money had and received based on total failure of consideration would


contradict the policy bar against recovery on the contract. Hence, these writers argue that the House of Lords should have given the depositors an action for money had and received against the building society. In contrast, Birks takes the view that the House of Lords were right to think that allowing the depositors a claim for money had and received would contradict the ultra vires rule, but he argues that they were wrong to hold that the depositors should therefore be given a proprietary claim against the building society so as to recover the money remaining in the building society's hands. In Birks' view, the depositors should rather have been given a personal claim to the value surviving in the building society's hands, a claim which he describes as a personal claim "in the second measure" (a claim "in the first measure" being a claim to recover the value initially received by a defendant).

Birks' analysis of Sinclair v Brougham has been attacked by Burrows. Burrows' objection to Birks' analysis is essentially rooted in his rejection of the House of Lords'
view that allowing an invalid lender a claim for money had and received based on total failure of consideration would contradict the policy bar against recovery on the contract. He asks: "If the defendant has received value, what difference should it make whether the value survives or not?", and if there were no policy bar against allowing the plaintiff to bring an action for money had and received it would indeed make no difference to the plaintiff's entitlement to bring such a claim whether the defendant still had the plaintiff's money in his possession (although in some circumstances this might constitute evidence that the defendant had not changed his position). However, it must be borne in mind that Burrows' assertion that the depositors should not have been barred from bringing an action for money had and received is as open as Birks' claim that they should have been allowed to bring a personal claim in the second measure to the criticism that it is not sustained by what the House of Lords actually held in the case. If Birks is right to argue that "restitution in the first measure would have flatly contradicted the ultra vires rule", then it must follow from this that Burrows is incorrect to say that a personal claim in the second measure does nothing that

41 Burrows, p. 373.
43 Birks, p. 396.
could not be done by a claim in the first measure.\textsuperscript{44}

Whichever of these alternative analyses of Sinclair v Brougham is correct (something which must finally depend on whether it is thought that allowing an invalid lender a claim for money had and received infringes the policy bar against recovery on the contract), it should be noted that both schools of thought are united in their rejection of the view that the depositors in Sinclair v Brougham should have been given a proprietary remedy. This conclusion seems justifiable in terms of the Birksian "proprietary base" theory, since by analogy with the cases holding that a payor under a contract made void by the Infants' Relief Act 1874, s. 1,\textsuperscript{45} retains no proprietary interest in the money,\textsuperscript{46} it could not have been right to say that the ultra

\textsuperscript{44} Cf. Burrows, p. 373:
"[T]he emphasis on value surviving attempts to move thinking away from the idea of pre-existing ownership and of the plaintiff tracing his property. But without the link to ownership, it is hard to see what the force of value surviving is meant to be."

\textsuperscript{45} Under the Infants Relief Act 1874, s. 1:
"All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void . . ."

This section has now been "disapplied" and repealed by the Minors' Contracts Act 1987, ss. 1(a) and (4)(2) respectively.

vires depositors had retained a proprietary interest in their money. Furthermore, since the depositors never intended to make a secured deposit with the society, it could not alternatively have been argued that they should have been entitled to a proprietary remedy as a means of fulfilling the parties' thwarted mutual intent to create a security. It is submitted that it may possibly be justifiable to award an ultra vires creditor a proprietary claim on these latter grounds where he has expressly contracted for a security, but Sinclair v Brougham was not a case in which this situation arose. Hence, in the writer's view it must be correct to say that the House of Lords' should not have given the depositors a proprietary claim.47

The following discussion will be divided into two sect-

47 This analysis must now be read in the light of Hobhouse, J.'s decision in Westdeutsche Landesbank Girozentrale v Islington London Borough Council, The Times, 23rd February 1993, that a proprietary claim may be brought to recover money paid under a contract which is void ab initio for ultra vires, on the novel ground of "absence of consideration", and regardless of the bargain struck between the parties to the void contract. In Hobhouse, J.'s words (Transcript, p. 58):

"[A]ny payments made under a contract which is void ab initio, in the way that an ultra vires contract is void, are not contractual payments at all. They are payments in which the legal property in the money passes to the recipient but in equity the property in the money remains with the payer. The recipient holds the money as a fiduciary for the payer and is bound to recognise his equity and repay the money to him... Neither mistake nor the contractual principle of total failure of consideration are the basis for the right of recovery."

For criticism of this decision, and in particular of the notion that "absence of consideration" constitutes an unjust factor, see A. Burrows, Note, (1993) 143 N.L.J. 480.
ions. In section (a), the situation will be considered where S makes a payment under an invalid contract, and this money is paid to RH in respect of RH's personal rights against PL. In all of the cases discussed in section (a) the motive behind the courts' award to S of "reviving subrogation" to S seems to have been that there existed some countervailing policy reason why S should be allowed to recover notwithstanding the fact that he paid under an invalid contract. For example, although the courts thought it desirable as a matter of general policy to prevent people from taking advantage of minors by refusing to recognise minors' contracts, they were prepared to relax this rule in favour of people supplying minors with necessaries. And again, whilst they refused to enforce ultra vires contracts so as to protect company shareholders and intra vires creditors, they would relax this rule where ultra vires borrowings were applied to discharge intra vires debts, since the net effect of such an arrangement was that the company's liabilities were not increased. As a result, it can be argued on two quite different grounds that "reviving subrogation" was not needed in these cases, and that S should have been allowed to bring a direct action against PL. It might be said in the first place that because of the countervailing policy reason S the invalidity of S and PL's contract should have been ignored, and S given either a remedy on the contract or a direct restitutionary action to recover
the value received by PL. Alternatively, adopting Birks' "claim in the second measure" theory, it might be argued that even if there was no such countervailing policy present in the case, S should anyway be entitled to bring a direct restitutionary claim for the value surviving in PL's hands in the form of the discharge of his obligations to RH (its quantum to be determined by reference to the amount of PL's obligation, less any counter-claims or defences PL may have had against RH).

In section (b) the situation will be considered, where the money paid by S under an invalid contract is used to extinguish some real security which RH holds over PL's property. As has been said already, in the writer's view S cannot claim to have retained a proprietary interest in the money he pays under an invalid contract. Hence, some other explanation is needed for the award to S of RH's extinguished security via "reviving subrogation", and the only alternative explanation seems to be that which has already been advanced above in part (1), in the context of the valid loan cases; to wit, that the courts think it desirable to fulfil the parties' thwarted mutual intent to create a security.  

Discussion in both section (a) and section (b) will be divided under two headings: (i) where S and PL have intend-

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48 This explanation of the cases in question is advanced by Burrows, p. 88.
ed that $S$ should make an unsecured advance; (ii) where $S$ and $PL$ have agreed that $S$ should have a security for his loan.

a) Where RH’s personal rights have been discharged

i) Where $S$ and $PL$ have intended that $S$ should make an unsecured advance

Under the old rules concerning individuals unable to contract, a person who lent money or supplied goods to a deserted wife or to an infant could not recover the money or the cost of the goods, respectively from the woman’s husband or from the infant’s estate, in the event that the woman or the infant failed to repay him as agreed. But this regime was relaxed in favour of suppliers of necessaries, who were permitted to recover the cost of the necessaries from the husband or the infant’s estate. And as an extension of this exception to the general rule against recovery an equitable doctrine evolved, under which a lender $S$ who advanced money to an infant or a deserted wife could recover the amount of his loan to the extent that it was applied to the purchase of necessaries. This was said to be achieved by putting the lender $S$ "into the shoes of" the discharged supplier RH, so that he could acquire RH’s right to sue the husband or the infant’s estate $PL$.\footnote{At law, the courts would grant no relief, because they could not look behind the transaction to determine whether the wife or infant really did spend the money on
words, he was allowed to acquire the supplier RH's extinguished personal rights against PL via "reviving subrogation". On the basis of identical reasoning, lenders to mental incompetents whose money is used to buy necessaries are similarly entitled to be subrogated to the extinguished but revived personal rights of the suppliers against the mental incompetent's estate.50

As has been said, allowing S to acquire RH's extinguished personal rights against PL via "reviving subrogation" in these circumstances really constitutes no more than an acknowledgement that the policy reason underlying the refusal of a direct claim against PL is struck down by a countervailing policy reason why S should be allowed to bring a direct claim, and the result achieved in these cases could

necessaries: Darby v Boucher (1693) 1 Salk. 279; Earle v Peale (1711) 1 Salk. 386, at 387, per Parker, C.J; Probart v Knouth (1783) 2 Esp. 472n. In equity, however, this presented no difficulty: James v Warren (1706) Holt K.B. 104; Harris v Lee (1718) 1 P. Wms. 483; Marlow v Pitfeild (1719) 1 P. Wms. 558; Jenner v Morris (1861) 3 De G.F. & J. 45; Glass v Munsen (1865) 12 Gr. 77; Deare v Soutten (1869) L.R. 9 Eq. 151; Lewis v Alleyne (1888) 4 T.L.R. 560.

Married women no longer have the power to pledge their husbands' credit for necessaries: Matrimonial Proceedings and Property Act 1970, s. 41(1) (repealed by the Matrimonial Causes Act 1973, s. 54(1)(b) and Sch. 3, but the common law not thereby revived: Interpretation Act 1889, s. 38(2)(a)). Nor are contracts for money lent to infants any longer absolutely void under the Infants Relief Act 1874, s. 1, since this act has been "disapplied" and repealed by the Minors' Contracts Act 1987, ss. 1(a) and (4)(2) respectively. It is now open to lenders to infants for the purchase of necessaries to recover their advances directly, under the Minors' Contracts Act 1987, s. 3, where this would be "just and equitable".

have been more simply reached by allowing S to bring his own direct restitutionary claim to recover the value received by PL when his obligation to RH was discharged. As has also been said already, the result reached in these cases could alternatively have been reached by saying that notwithstanding the policy bar against S's recovery, S should nonetheless have been entitled to bring a direct restitutionary action to recover the value surviving in PL's hands in the form of the discharge of his obligation to RH. Either way, it seems strongly arguable that "reviving subrogation" was not really needed in these cases to produce the result which the courts wished to achieve.

Very similar principles emerge from a series of cases in which an ultra vires lender S to a company PL has been held to be entitled to recoup his payment to the extent that it was applied by the company to discharge previously con-

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51 Cf. J. Dickinson, "The Problem of the Unprovided Case", Chap. 5 in Receuil d'Etudes sur les Sources du Droit en l'Honneur de Francois Gény, Tome II (Paris, 1934), pp. 517-518:

"[The cases] . . . which involve the liability of a husband for money furnished to an abandoned wife for necessaries disclose how even the transition from an established rule to a new one is made nominally by means of an intermediate technical concept like "subrogation" . . .[T]he determination to apply or exclude the concept of subrogation . . . depends in great measure, if not wholly, on whether or not it is regarded as desirable to extend or limit the liability of the husband; and only after this decision has been made does the legal concept intervene decisively to give technical form to the result."
tracted intra vires unsecured debts.\textsuperscript{52} Again, the effect of giving S "reviving subrogation" to RH's rights in these circumstances is to give S a disguised direct claim against PL Co.\textsuperscript{53}

It should be added here that in the writer's view the cases in which the business creditors of a trustee have been "simply subrogated" to the trustee's right of indem-


The ultra vires lender's position has now been radically altered by the Companies Act 1985, s. 35(1), as amended by the Companies Act 1989, s. 108, the effect of which is to make it impossible for a company to avoid a loan contract on the grounds that it is ultra vires.


"[It was] . . . obviously unjust that one party to an ultra vires contract should retain the benefit of an actual performance and escape scot free himself. The result was a long series of decisions in which, by one means or another, the Courts upheld claims against companies in such circumstances. Generally, those claims were upheld in so far as moneys borrowed by an ultra vires loan were used to pay off existing legal obligations of the company. Such payment plainly benefited the company, and the invalidity of the contractual arrangements was not allowed to stand in the way of recovery."

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nity against the trust estate properly fall within the scope of this section. Where a trustee or personal representative is conducting business on behalf of a trust, he is made personally liable to the creditors of the busi-


55 Burrows, p. 84, points out that if the unjust factor underlying the business creditors' right to subrogation is failure of consideration, this "requires one to accept that failure of consideration can trigger restitution from a third party beneficiary of a contract", a point he develops further at pp. 271-272.
ess,\textsuperscript{56} but he is entitled to be indemnified out of the trust's assets for any liability he incurs while carrying on business for the trust,\textsuperscript{57} and it is well established that the business creditors can be "simply subrogated" to the trustee's right of indemnity out of the trust assets.\textsuperscript{58} The true effect of these cases is that because the trustee is running the business for the benefit of the trust estate,\textsuperscript{59} it is the trust estate which should be made primarily liable for the debts incurred during the course of the business. However, the trust estate is not a legal entity which is capable of being sued directly by the business creditors,\textsuperscript{60} and neither the settlor\textsuperscript{61} nor the beneficiar-

\textsuperscript{56} Farhall v Farhall (1871) L.R. 7 Ch. App. 123; Owen v Delamere (1872) L.R. 15 Eq. 134; Re Evans (1887) 34 Ch. D. 597.
\textsuperscript{57} Dowse v Gorton [1891] A.C. 190.
\textsuperscript{58} Yonge v Reynell (1852) 9 Hare 809, at 819, per Sir G. Turner, V.-C.; Re Johnson (1880) 15 Ch. D. 548; Re Blundell (1889) 44 Ch. D. 1, at 9-10, per Cotton, L.J.; Re Frith [1902] 1 Ch. 342; Re British Power Tracton & Lighting Co. Ltd. [1910] 2 Ch. 470; Re Oxley [1914] 1 Ch. 604.
\textsuperscript{59} It is tempting to argue that the trustee acts as agent for the trust beneficiaries, but this analysis founders where it can be shown that the trustee is invested with powers and discretions with which the beneficiaries are not entitled to interfere.
\textsuperscript{60} But cf. Re Raybould [1900] 1 Ch. 199, at 201-202, per Byrne, J., suggesting that it should be. McPherson, cited supra, n. 54, p. 151, observes that if creditors were generally allowed to be paid directly out of a trust estate, this might open the way to one creditor unfairly gaining priority over another by getting his claim in first. However, once the creditors' claims are all brought before a court, this danger should not arise, and direct payments out of the trust estate should be permitted (as in Re Evans (1887) 34 Ch. D. 597 and Tinkler v Hindmarsh (1840) 2 Beav. 348).
\textsuperscript{61} Fraser v Murdoch (1881) 6 App. Cas. 855, at 872, per Lord Blackburn.
ies\textsuperscript{62} can be made directly liable for the trust's liabilities. Hence, the expedient of "simply subrogating" the business creditors to the trustee's right of indemnity is used as a means of giving the business creditors a disguised direct action against the trust estate. This is implicit in Sir George Jessel, M.R.'s comment that:\textsuperscript{63}

"The trust assets having been devoted to carrying on the trade, it would not be right that the cestui que trust should get the benefit of the trade without paying the liabilities."

\textbf{ii) Where S and PL agree that S should have a security for his loan}

Where PL agrees to exercise a charge over his property to secure his repayment of S's advance, but it then transpires that S and PL's contract is void, and the security executed under the terms of the contract along with it, the question arises whether S can nonetheless somehow enforce his security where he is allowed to bring a disguised direct right of action against PL, but this is expressed by the courts as "reviving subrogation" to RH's former position, and RH had no charge over PL's property?

\textsuperscript{62} \textit{Re Enhill Pty. Ltd.} (1982) 7 A.C.L.R. 8, at 15, \textit{per} Lush, J.

\textsuperscript{63} \textit{Re Johnson} (1880) 15 Ch. D. 548, at 552.
At first sight, it looks as though the answer to this question ought to be a negative one: where S's right of recovery is expressed to be achieved via "reviving subrogation" to RH's old position, and RH enjoyed no secured rights against PL, it would seem to be impossible for S to have any secured rights against PL. S's initial charge is void, and RH never had any charge against PL of which S might take advantage. And indeed this was the conclusion reached by Sir George Jessel, M.R. in *Martin v Gale.* Here, the plaintiff S advanced money to the defendant infant PL, partly in order to buy necessaries, and PL by deed assigned to S his reversionary interest as security for repayment. When PL reached twenty-one, S brought an action against PL seeking repayment, and claiming a charge on PL's reversionary interest. Sir George Jessel, M.R. held that on the basis of the principles already elaborated above, S was entitled to an order for repayment, to the extent that his money had been used to pay off the suppliers of necessaries. But he went on to hold that because the deed was not binding on PL the security could not be enforced.

In contrast to this case, however, a contrary conclusion was reached in several cases concerning *ultra vires* loans: *Re Durham County Permanent Investment Land and Building Society,* *Blackburn Benefit Building Society v Cunliffe*

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64 (1876) 4 Ch. D. 428.
65 (1871) L.R. 12 Eq. 516.
Brooks, & Co.\textsuperscript{66} and Re Harris Calculating Machine Co.\textsuperscript{67} In each of these cases, a company or building society PL borrowed money from S in a transaction that was void for ultra vires because PL thereby exceeded its borrowing powers, and used the money to pay off an intra vires creditor RH. Under the terms of its invalid contract with S, PL executed a security in S’s favour, e.g. by depositing title deeds with S or executing a debenture in S’s favour. In each case, it was held that because S’s money was used to extinguish PL’s previously incurred intra vires debt to RH, the ultra vires principle was therefore not breached by the transaction between S and PL. And from this it was held to follow that the security executed by PL in S’s favour was not void for ultra vires, and could be enforced by S against PL. The reasoning of these cases is clearly founded on the premise that S’s rights against PL are in reality S’s own rights, rather than rights acquired via “reviving subrogation” to PL’s position. Hence, they provide support for the proposition already argued for above, that the award of “reviving subrogation” to RH’s personal rights really constitutes the award to S of a disguised direct right of action against PL, where S’s own direct personal right against PL is

\textsuperscript{66} (1882) 22 Ch. D. 61, affirmed sub nom. Cunliffe Brooks, & Co. v The Blackburn and District Benefit Building Society (1884) 9 App. Cas. 857.

\textsuperscript{67} [1914] 1 Ch. 920. See too James Richardson & Sons, Ltd. v J. McCarthy & Sons Co., Ltd. (1921) 59 D.L.R. 513, at 517, per Orde, J.
prima facie invalid for some reason of public policy and this policy is relaxed for some countervailing policy reason.

b) Where RH's secured rights have been discharged

i) Where S and PL have intended that S should make an unsecured advance

Where S and PL have intended that S should make an unsecured advance, and S's money is used to extinguish RH's secured rights against PL, then for exactly the same reason as that discussed above in part (1), section (c), it can never be correct to allow S to acquire RH's secured rights via "reviving subrogation": this would have the effect of giving S more than he originally bargained for. Thus, as Goff and Jones have pointed out,\(^68\) in a case like Re Wrexham, Mold & Connah's Quay Railway Co.,\(^69\) where S makes an unsecured advance under an invalid contract and then seeks to be subrogated to the secured rights of PL's valid creditors RH, it would be quite wrong to put S into such a favourable position, although S should be entitled to acquire RH's discharged personal rights against PL.\(^70\)

\(^68\) Goff and Jones, pp. 526, 555, and 566-567.
\(^69\) [1899] 1 Ch. 440.
\(^70\) Some doubt is now cast on this analysis by Westdeutsche Landesbank Girozentrale v Islington London Borough Council, The Times, 23rd February 1993, discussed at p. 307, n. 47, supra. In the writer's view, where a lender has expressly agreed to make an unsecured loan, it cannot be right to give him a proprietary claim to recover his money when it later turns out that the loan contract is void.
Where S and PL agree that S should have a security for his loan

Where S and PL agree that PL will execute a charge over his property in S's favour, S advances his money, the money is used to discharge RH's secured rights, PL executes a charge over his property as agreed, and it then transpires that S and PL's initial contract is invalid, the question arises whether S can claim to be subrogated to RH's secured rights on the grounds of failure of consideration? As has been said already, in the writer's view S should not be entitled to this remedy on the basis of "proprietary base" reasoning, but it seems arguable that he should be entitled to the remedy on the grounds that S and PL's mutual intent that S should acquire a security over PL's property would otherwise be thwarted.

The leading case in this area is the Court of Appeal's decision in *Thurstan v Nottingham Permanent Benefit Building Society*. Here, the plaintiff PL was an infant who purchased land from RH. Part of the purchase price was paid directly to the vendor RH by the defendant building society S, at PL's request. RH conveyed the land to PL, and she then executed a mortgage over the property in S's favour. S then discovered for the first time that PL was

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71 [1902] 1 Ch. 1, affirmed on another point [1903] A.C. 6. An American case with almost identical facts, in which the U.S. Supreme Court reached the same conclusion as that reached in Thurstan's case was *MacGreal v Taylor* 167 U.S. 688 (1896).
an infant, and took possession of the property in question. When she reached twenty-one, PL brought an action against S, seeking to set aside the mortgage as being void against her under the Infants Relief Act 1874, s. 1, and claiming possession of the land and delivery up of the title deeds. At first instance, Joyce, J. held against PL, on the grounds that the purchase of the land and the execution of the mortgage formed one transaction, and that PL could not repudiate one part of the transaction while retaining the benefit of another. PL appealed, and the Court of Appeal held inter alia that the purchase and the mortgage were actually two distinct transactions, and that section 1 did indeed render the mortgage absolutely void. However, they also held that to the extent that S’s money had gone to pay the vendor RH, S should be entitled to acquire RH’s vendor’s lien over the property via ("reviving") subrogation. PL did not appeal against this part of their decision, although the building society subsequently lost an appeal to the House of Lords on another point.

Thurstan’s case was followed in Congresbury Motors Ltd. v Anglo-Belge Finance Co. Ltd. and Coptic Ltd. v Bailey, both of which concerned contracts that infringed the requ-

72 This section has now been repealed by the Minors’ Contracts Act 1987, ss. 1(a) and (4)(2).
74 [1971] Ch. 81.
irements of the Moneylenders Act 1927, s. 6. This section stipulates that a note or memorandum of all moneylending contracts must be made, containing certain information (e.g., the date on which the loan was made and all the terms of the agreement). In both Congresbury and Coptic, a moneylender S agreed with PL to advance money which was used to pay off RH's rights over PL's property. In accordance with the terms of S and PL's agreement, PL executed a charge over the property in S's favour, but it then transpired that S and PL's initial agreement was invalid. As a result S could not enforce the security executed in its favour over PL's property because under s. 6 that security was deemed to be void. However, following Thurstan's case, the Court of Appeal and Whitford, J. respectively held that S was entitled to acquire RH's old charge via "reviving subrogation".

Congresbury and Coptic were overruled by the House of Lords in Orakpo v Manson Investments Ltd. This case, too, concerned a secured loan contract which infringed the Moneylenders Act 1927, s. 6. However, the House of Lords held that the respondent lender S was not entitled to acquire RH's old charge via "reviving subrogation", on the ground that the policy underlying the 1927 Act would be infringed not only by allowing the respondent lender to bring a direct claim against the appellant borrower, but

also by allowing the lender to acquire RH's extinguished claim against the borrower via "reviving subrogation". Their Lordships thought that to hold otherwise would be to provide moneylenders in breach of the Act's requirements with a loophole that could not be justified by reference to the wording of the Act.\(^77\) As Lord Edmund-Davies acknowledged in his judgment,\(^78\) the effect of this decision was particularly unfortunate as the appellant borrower's position was devoid of all merits other than those of a purely technical kind, and the decision has been strongly criticised by a number of academic commentators\(^79\) for its unnecessarily narrow interpretation of the 1927 Act, and for the highly unconvincing way in which their Lordships distinguished Thurstan's case in order to reach their decision.\(^80\) In principle the House of Lords in Orakpo should

\(^77\) Ibid., at 111, per Lord Salmon, at 115, per Lord Edmund-Davies, and at 119, per Lord Keith. Contra, ibid., at 110, per Viscount Dilhorne.

\(^78\) Ibid., at 111.


\(^80\) Their Lordships took it to be significant that the security created by PL in S's favour was rendered void by the Infants Relief Act 1874, s. 1 in Thurstan's case, whereas the security in Orakpo was rendered merely unenforceable by the Moneylenders Act 1927, s. 6: ibid., at 106, per Lord Diplock, and at 114, per Lord Edmund-Davies. But the illogical effect of their judgment was that a lender under a contract rendered invalid by the more restrictive of the two acts could use "reviving subrogation" as a means of circumventing the policy bar against his recovery, whereas a lender under a contract rendered invalid by the less restrictive act could not (this point is made by Burrows, p. 90, and Goff and Jones, p. 51).
have allowed the respondent lender to acquire RH's old security via "reviving subrogation" on the authority of Thurstan's case, on the basis that it was desirable to give effect to the lender S and borrower PL's thwarted mutual intent that S should acquire a security for his loan over PL's property.81 This conclusion can also be justified by reference to Birks' "value surviving" analysis of Sinclair v Brougham:82 the value surviving in the appellant borrower's hands in Orakpo was the discharge of the debt secured on his property, and by analogy with Sinclair v Brougham, the respondent lender should have been entitled to trace its money into the discharged security.

81 Cf. R. Cranston, "Subrogation and Contribution: Some Debtor-Creditor Implications", in Current Developments in International Banking and Corporate Financial Operations, eds. Koh Keng Lian, Ho Peng Kee, Choong Thung Cheong and Boo King Ong (National University of Singapore, 1989), p. 159. At pp. 163-164, Cranston takes "the most convincing explanation" of Thurstan's case to lie in the notion of equitable inducement: "Because [S] has been induced to lend to [PL] on the basis of an understanding that it will obtain security, equity provides security as best it can."

Analogous support for Thurstan's case can be drawn from several further cases in which S has been allowed to acquire RH's security where his own security is invalid because: (a) it was created in his favour by PL Co. in breach of PL Co.'s previous undertaking to debenture holders not to create any further charges: Re Connolly Bros. Ltd. (No. 2) [1912] 2 Ch. 25, at 28, per Warrington, J. (affirmed on an alternative ground by the Court of Appeal at 30-32), discussed in Paul v Speirway Ltd. (in liq.) [1976] Ch. 220, at 228-229, per Oliver, J., and followed in Security Trust Co. v Royal Bank of Canada [1976] A.C. 503, at 518-519, per Lord Cross of Chelsea; (b) the agreement between S and PL was invalid under the Companies Act 1948, s. 227: Re Tramway Building & Construction Co., Ltd. [1988] Ch. 293, at 308, per Scott, J.

82 See discussion supra, pp. 303-307.
CHAPTER 5: VOLUNTEERS

As has been discussed in Chapter 1, part (4), the rule currently prevailing in English law is that where a volunteer $S$ pays $RH$ in respect of $PL$ 's obligations, $PL$ 's obligations are not automatically discharged by $S$ 's payment. That is to say, $PL$ 's obligations are not discharged unless $PL$ subsequently ratifies $S$ 's payment. It will be considered in part (1) of this chapter whether the courts should award a volunteer $S$ "simple subrogation" to $RH$ 's rights where $S$ has paid $RH$, $PL$ has not subsequently ratified $S$ 's payment and $RH$ 's rights are therefore not extinguished.

Two exceptions were made out in Chapter 1, part (4), to the currently prevailing rule against automatic discharge by a voluntary intervener. Where $S$ is prima facie a volunteer, but he pays $RH$ to protect his own interest in $PL$ 's property, the effect of $S$ 's payment is to discharge $PL$ 's obligations automatically. And again, where $S$ is prima facie a volunteer, but he pays $RH$ out of necessity, in circumstances where the courts have adopted a general policy of encouraging intervention by allowing interveners a remedy notwithstanding that they have acted voluntarily,\(^1\) in most

\(^1\) In some cases where the courts have awarded a remedy to a necessitous intervener, it might be said that the unjust factor entitling the intervener to a remedy is moral compulsion. However, whilst the moral compulsion cases may all be explained by reference to the courts' general policy of encouraging intervention, not all the necessitous intervention cases can be explained on ground that the interven-
cases PL's obligations will be automatically discharged. In two particular situations of this latter kind, however, for reasons which are discussed below, the effect of S's payment is not to discharge PL's obligations: where S pays a bill of exchange which he has taken up for the honour of the acceptor, his payment does not discharge the bill; and where S is an insurer under no legal obligation to pay its insured but which pays its insured nonetheless, its payment does not extinguish any rights of action which the insured may have against a third party in respect of the loss for which the insurer has paid him. The discussion in part (2) of this chapter will therefore be divided as follows. In part (2)(a) it will be considered whether "reviving subrogation" should be awarded to an intervener S who is *prima facie* a volunteer, but whose payment to RH has nonetheless discharged PL's obligations automatically either (i) because S has paid in order to protect his own interest in PL's property or (ii) because S has paid out of necessity, in circumstances where the courts have the policy-motivated desire to give interveners a remedy. In part (2)(b) it will then be considered whether "simple subrogation" should be awarded to an intervener S who is *prima facie* a volunteer felt morally compelled to pay. For this reason the moral compulsion cases are considered here as a sub-category of the necessity cases.

In this respect, the insurer S is of course no different from an insurer which pays its insured under legal compulsion.
teer, but who has acted out of necessity and whose payment has exceptionally not operated to discharge PL's obligations despite the general rule favouring automatic discharge in situations of this kind.

1) Should "simple subrogation" be awarded to a volunteer S whose payment to RH has not extinguished RH's rights?

Where a volunteer S has paid RH in respect of PL's obligations and PL does not subsequently ratify S's payment, it is clear that the courts will not allow S to recover an indemnity from PL by bringing a direct restitutionary claim against him. Besides the technical reason that S has conferred no benefit on PL, since PL's obligations subsist notwithstanding S's payment, the courts will in any case refuse to award S a remedy against PL for the fundamental reason that S has acted as a volunteer. And for the same fundamental reason, the courts should never allow a volunt-

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3 In addition to the cases cited at p. 61, n. 59, supra, see: Stokes v Lewis (1785) 1 T.R. 20; Tappin v Brost er (1823) 1 C. & P. 112; Ram Tuhul Singh v Bis eswar Lall Sahoo (1875) L.R. 2 Ind. App. 131; Re National Motor Mail- Coach Co. Ltd. [1908] 2 Ch. 228; McKissick v Hall [1929] 1 D.L.R. 48; Re Cleadon Trust Ltd. [1939] Ch. 286 (discussed infra, pp. 333-336).

4 It is true that in certain cases the courts seem to have proceeded on the basis that PL's obligations are discharged by S's payment: Re National Motor Mail-Coach Co. Ltd. [1908] 2 Ch. 228; Re Cleadon Trust Ltd. [1939] Ch. 286. However, in the writer's view the courts' approach in these cases was mistaken, and the line of authority set out at p. 61, n. 59, supra, to the effect that PL's obligations are not automatically discharged by S's payment, is decisive of the point in this direction.

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eer S to be "simply subrogated" to RH's subsisting rights against PL. In Goff and Jones' words:

"[A] plaintiff who thrusts a benefit on a defendant, who neither seeks nor desires that benefit, will not be granted any restitutionary relief. A person who acts officiously [i.e. a volunteer] cannot therefore be subrogated to another's rights."

This principle may be illustrated by reference to the facts of Esso Petroleum Co. Ltd. v Hall Russell & Co. Ltd. Here, an oil tanker, The Esso Bernicia, was being berthed...
at a jetty on one of the Shetland Islands when one of the three tugs in attendance caught fire. The fire was started when a coupling blew out of a hydraulic pipe in the tug's engine room, and escaping hydraulic oil came into contact with an engine exhaust. The tow line from the tug to the tanker had to be cast off and the remaining tugs were unable to control the tanker properly, with the result that the tanker crashed into the jetty, damaging its hull and spilling oil into the sea. The resulting pollution caused damage, inter alia, to crofters on the island whose sheep came into contact with the oil.

During the course of the litigation which subsequently followed, it was established that Hall Russell, the shipbuilding firm which had designed and built the tug, had done so negligently, and that Hall Russell were therefore liable to pay tortious damages to the crofters. However, long before Hall Russell's tortious liability to the crofters was established, the tanker owner Esso paid the crofters in respect of their losses. Esso paid the crofters because it was a party to the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution ("TOVALOP"), the parties to which had agreed between themselves that in the event of oil spillage from one of their tankers, the owner of the tanker would pay anyone damaged by the resulting pollution for his loss, regardless of whether the tanker owner was legally liable for the spillage.
After paying the crofters, Esso brought an action against Hall Russell, seeking to recover in respect of the damage caused to the tanker, and claiming also that it was entitled either to recover its payments to the crofters in a direct action against Hall Russell, or to be ("simply") subrogated to the crofters' rights against Hall Russell to the extent of the payments Esso had made them. The House of Lords held that Esso could not recover its payments to the crofters as tortious damages from Hall Russell, for the reason that Esso had not been bound to pay the crofters as an inevitable consequence of Hall Russell's negligence. In Lord Jauncey's words:7

"TOVALOP is and remains a gratuitous contract of indemnity notwithstanding that the event which gave rise to the payments thereunder was damage to the Bernicia. Esso cannot pray in aid the latter event in order to convert their claim to repayment of sums paid under that indemnity into a claim for economic loss resulting directly from the damage."

Furthermore, according to Lord Goff:8

"There can of course be no direct claim by Esso ag-

7 Ibid., at 678.
8 Ibid., at 663.
against Hall Russell in restitution if only because Esso has not by its payment discharged the liability of Hall Russell and so has not enriched Hall Russell; if anybody has been enriched, it is the crofters, to the extent that they have been indemnified by Esso and yet continue to have vested in them rights of action against Hall Russell in respect of the loss or damage which was the subject matter of Esso's payment to them."

This of course left open the possibility that Esso might be entitled to acquire the crofters' rights against Hall Russell via "simple subrogation". However, the House of Lords held that Esso's claim to be ("simply") subrogated to the crofters' rights must also fail, on procedural grounds: Esso could not succeed in its claim to be ("simply") subrogated to the crofters' rights for the reason that it should have brought its ("simply") subrogated action in the name of the crofters, but had in fact sued Hall Russell in its own name.10

From a procedural perspective, this was an important decision because it lends support to the proposition set out in Chapter 1, part (7)(d), that claimants bringing "simply

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9 Ibid., at 662-663, per Lord Goff of Chieveley, and at 674, per Lord Jauncey of Tullichettle.

10 Esso would have been entitled to sue Hall Russell in its own name if it had taken an assignment of the crofters' claims against the shipbuilders. However, it had not done this.
"subrogated" actions are generally required to do so in the name of the party to whose rights they claim to have acquired via "simple subrogation". However, for the purposes of the present discussion, the significant feature of the Esso case is that there was a far more fundamental reason than the procedural point, why Esso's claim to be "simply subrogated" to the crofters' rights should have failed. This was that Esso paid the crofters voluntarily. Whilst Esso could have been obliged by the other members of TOVALOP to pay them, it could never have been obliged to pay by the crofters themselves, since they were not party to the agreement.\textsuperscript{11} Had Esso been legally bound to pay the crofters under a contract of indemnity with them, it would clearly have been entitled to be "simply subrogated" to their rights of action against Hall Russell.\textsuperscript{12} But no contract

\textsuperscript{11} \textit{Ibid.}, at 677-678, \textit{per} Lord Jauncey of Tullichettle:

"Esso chose to enter into and remain a party to TOVALOP for what were no doubt sound policy and commercial reasons but under no compulsitor of law so to do. They agreed voluntarily to indemnify persons affected by oil spillage. They were under no general duty in law to the crofters and as far as they were concerned the payments which they received were entirely gratuitous."

\textsuperscript{12} \textit{Ibid.}, at 662, \textit{per} Lord Goff of Chieveley.

Esso's position should also be compared with the position of the professional organisations required by the statutes cited at p. 159, n. 102, \textit{supra}, to maintain fidelity guarantee funds out of which to reimburse members of the public caused loss by wrongdoing members of the organisations. The statutes in question go on to provide that the organisations are entitled to be subrogated to the rights of the injured members of the public against the wrongdoers once they have been indemnified out of the fund.
of indemnity existed between Esso and the crofters, and Esso's payments were therefore purely voluntary so far as both the crofters and Hall Russell were concerned. For this reason Esso should never have been entitled to bring a direct restitutionary claim against Hall Russell to recover its payments to the crofters, and for this reason also Esso should never have been entitled to acquire the crofters' rights against Hall Russell via "simple subrogation", whether it brought its action against Hall Russell in its own name or in the name of the crofters.

A more difficult case in which similar issues arose was Re Cleadon Trust Ltd. Here, S was one of the two direct-

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13 Cf. Martell v Whitten (1867) 5 Nfld. L.R. 200, where a tug-captain wrongfully took the plaintiff's ship from a safe berth at a wharf and left it at a dangerous mooring from which it was then blown into a neighbouring pier. The plaintiff paid the pier owner in respect of the damage done to the pier in the mistaken belief that he was liable for this damage. The plaintiff's claim to recover this amount from the owner of the tug was refused on the ground that the tug owner had neither requested nor ratified his payment.

14 At 663, Lord Goff of Chieveley remarked that "it might have been inequitable to deny Esso the opportunity to take advantage of [the crofters' claims against Hall Russell]", which is difficult to reconcile with the view that Esso acted voluntarily. One possible explanation of this comment could be that he thought Esso entitled to a remedy as a payor under moral compulsion. But it appears from his judgment that Lord Jauncey might have disagreed with this, given his emphasis on the "sound commercial reasons" that lay behind Esso's membership of TOVALOP (see the passage from Lord Jauncey's judgment quoted at p. 332, n. 11, supra). Another explanation for Lord Goff's remark might be that he thought Esso entitled to a remedy because it had been legally compelled to pay the crofters, albeit that its obligation to pay was owed not to the crofters but to the other members of TOVALOP.

15 [1939] Ch. 286.
ors of a company, PL Co., which had guaranteed the debts of two subsidiary companies. The subsidiaries were unable to pay their creditors and PL Co. therefore became liable under the guarantee. However, at this stage S stepped in at the request of the company secretary and with the approval of his fellow company director, and paid the subsidiaries' creditors himself. S's intention was to pay the creditors on PL Co.'s behalf, and for PL Co. to repay him at a later date. In the meantime, it was arranged for PL Co. to pay S interest on the money he had advanced, and S and his fellow director also purported to ratify some of his advances on PL Co.'s behalf by passing a resolution to that effect at a directors' meeting.

PL Co. and its subsidiaries later went into liquidation. The subsidiaries' assets were insufficient to discharge the amounts owing on the debentures which they had issued, with the result that any claim which S might have had against them was worthless. However, PL Co. had sufficient remaining assets to make it worthwhile for S to prove in PL Co.'s liquidation for the money he had paid the subsidiaries' creditors, either in his own right, or via subrogation to the claims of the creditors who would have come against PL Co. on the guarantee, had S not paid them on PL Co.'s behalf. However, the liquidator raised an objection to his claim to prove in PL Co.'s insolvency: under PL Co.'s articles, two directors were required as a quorum for board
meetings, and the directors were forbidden to vote in respect of any agreements with the company in which they had a personal interest. Hence, S had been barred under the articles from casting his vote at PL Co.'s board meetings when the board came to ratify his advances on PL Co.'s behalf, and (worse still for S) since the company had only one other director the board had been inquorate whenever PL Co.'s agreement with S was considered. From this it followed not merely that the board's resolutions purporting to ratify S's payments on PL Co.'s behalf were invalid, but that so far as PL Co. was concerned, S's payments to PL Co.'s subsidiaries' creditors must have been made voluntarily, since PL Co. had lacked the capacity to authorise him to pay. The majority of the Court of Appeal, Scott and Clauson, L.JJ., therefore held that because S had paid PL Co.'s creditors voluntarily he could be entitled to recover from PL Co. neither via a direct action for money paid, nor via subrogation to the rights of PL Co.'s creditors.

The members of the Court of Appeal who decided Re Cleadon Trust all seem to have assumed in their judgments that the effect of S's payments to the creditors was to discharge PL

\[16\] Ibid., at 311-312, per Scott, L.J.:

"[B]oth of the appellant's grounds of claim . . . are affected by two fundamental conclusions of fact to be drawn from the evidence: (1) that the company as a juridical persona took no action whatsoever; it could take none and was therefore wholly impassive; and (2) that the appellant's advances so far as the company was concerned were purely voluntary and gratuitous."
Co.'s liability under the guarantee, even though PL Co. had neither requested nor ratified S's payments. The reason that they made this assumption seems to have been that both counsel for the appellant S and counsel for the respondent liquidator of PL Co. argued the case on this basis. However, it is submitted that they were incorrect to have done so. On the authority of the cases concerning payments by voluntary interveners set out in Chapter 1, part (4), the case should rather have been decided on the basis that S's payments did not discharge PL Co.'s liability under the guarantee, and the court should therefore have held that S could neither recover from PL directly, nor via "simple subrogation", on the grounds that he was a volunteer.

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17 Ibid., at 304, per Sir W. Greene, M.R., at 308-309, per Scott, L.J., and at 319 and 328, per Clauson, L.J.
18 Ibid., at 292, arguendo: "It is admitted that the company benefited by the advances."
19 Ibid., at 293-294, arguendo.
Cf. Birks, pp. 289-290, who argues that PL Co.'s liability may have been discharged in Re Cleadon because the liquidator freely accepted S's payments on PL Co.'s behalf, and that S should have been entitled to a remedy for that reason. Burrows, p. 318, concedes that the discharge of the company's liability in Re Cleadon may be explicable on the basis of free acceptance reasoning (a concession which rather undermines his assertion at pp. 229-230 that the case is authority for the proposition that S's voluntary payment will automatically discharge PL's debts), but argues that S was rightly refused a remedy in the case because free acceptance does not constitute an unjust factor.
20 Supra, p. 61, n. 59.
21 Burrows, p. 230, n. 12, argues that S might have been entitled to recover from PL Co. on the ground that he paid under a mistake of fact which caused him to pay (viz., that his votes ratifying his advances would be valid). However, it is submitted that even if S did pay under a mistake of fact, on the authority of Barclays Bank Ltd. v
Something must finally be said here about Owen v Tate. In this well-known case the Tates' debt to a bank was secured by a mortgage on property owned by Lightfoot. Without the Tates' knowledge, and in order to benefit Lightfoot, Owen agreed with the bank that if it would release Lightfoot from the mortgage, he himself would guarantee the Tates' debt and give the bank a new security to support his secondary liability. When they learnt of Owen's actions, the Tates protested to the bank, but the bank ignored their protests. Subsequently, the Tates defaulted on the debt and referred the bank to Owen's security. Owen paid the debt and then brought an action against the Tates, seeking reimbursement. The Court of Appeal held that Owen could not recover from the Tates, on the grounds that he had acted as a volunteer. Because he had voluntarily assumed his position as the Tates' surety, the court thought that his payment of the debt should be treated as a voluntary payment, even though he was legally obliged to pay under the guarantee. The court also thought that the Tates had not adopted Owen's payment, even though it was established as a matter of fact that they had "invited the bank to clear

W.J. Simms Son & Cooke (Southern) Ltd. [1980] Q.B. 677, at 700, per Robert Goff, J. (discussed in Chapter 3, part (2) (b)(i), supra), because PL Co. neither authorised nor ratified S's payment, his payment cannot have discharged PL Co.'s obligations and he should for this reason have been unable to recover from PL Co.

their overdraft by recourse to the plaintiff".23

Goff and Jones24 have argued that because Owen's payment was held to have been made voluntarily it must have followed from this that the bank's rights of action against the Tates were therefore not extinguished by Owen's payment and that Owen should therefore have been entitled to be ("simply") subrogated to the bank's rights against the Tates.25 With respect, though, it must be incorrect to say that as a general proposition the courts should be able to circumvent the rule against direct recovery for volunteers by allowing a volunteer S to be "simply subrogated" to RH's rights ag-

23 Ibid., at 410, per Scarman, L.J. At 411, Scarman, L.J. justified his conclusion that the Tates had nonetheless never adopted Owen's payment on the grounds that:

"[The Tates] never wished to lose the security of Miss Lightfoot's deeds. They lost it through circumstances outside their control and notwithstanding their protest. When the bank decided to call in the debt the defendants no longer had the security for the overdraft which was acceptable to them: they had to put up with a security which without their consent or authority had been substituted by the plaintiff for that which was, or had been, acceptable to them and agreed by them. I do not criticise the defendants, nor do I think they can be reasonably criticised, for making the best of the situation..."

24 Goff and Jones, pp. 529-531.

25 Goff and Jones further argue that although a volunteer S can generally recover his payment from RH on the ground of failure of consideration (as to this, see the cases cited at p. 62, n. 63, supra), in Owen v Tate this was not the case, because it would have been open to the bank to argue that it had in fact given consideration for Owen's payment in the shape of the release of Lightfoot's mortgage. Quaere, though, whether the release of Lightfoot's mortgage was not past consideration so far as Owen's payment was concerned, given in a separate transaction in exchange for Owen's promise to become surety in Lightfoot's place?
ainst PL. The reason for this is the fundamental one set down by Goff and Jones themselves,\(^2^6\) that a volunteer is by reason of his status no more entitled to subrogation than to any other restitutionary remedy. In the writer's view, Goff and Jones are right to say that Owen should have been entitled to a remedy, but wrong to take this position whilst still agreeing with the Court of Appeal's conclusion that Owen's payment was a voluntary payment.\(^2^7\) Owen should have been entitled to recover from the Tates in a direct action because he was not a volunteer, either on the ground that the Tates had effectively requested him to pay at the time when they referred the bank to his security, or on the ground that he had been legally compelled under the terms of the guarantee to pay on their behalf.\(^2^8\)

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\(^{26}\) See the passage quoted at p. 328, supra.

\(^{27}\) Cf. P. Watts, Note, [1989] L.M.C.L.Q. 7, p. 10:

"If all that underlies [subrogation as a doctrine arising without contract] is the concept of unjust enrichment, then it is difficult to see on what ground one might permit subrogation when an indemnity is denied on restitutionary principles."

And cf. Birks, pp. 191-192:

"To say . . . that Owen v Tate might have been brought to a different conclusion by subrogating the volunteer-surety to the bank's claim against the defendant may mean nothing more than that it was wrong not to find a restitutionary right directly available to the surety against the defendant."

\(^{28}\) This latter analysis seems to be borne out by the wording of the Mercantile Law Amendment Act 1856, s. 5 (the full text of this section is given at pp. 124-125, supra). Section 5 provides that a surety is entitled to a restitutionary remedy against the principal debtor whenever he pays the creditor, and it contains no proviso that this entitlement will be lost where the surety has entered the contract of guarantee voluntarily. This point is made by J.R. Lingard, Bank Security Documents, 2nd ed. (London, 1988), para.
2) Where S is prima facie a volunteer, but he pays RH either to protect his own interest in PL's property, or in circumstances of necessity

a) Where S's payment discharges PL's obligations automatically, should he be entitled to "reviving subrogation"?

i) Where S pays RH in order to protect his own interest in PL's property

Where S has an interest of his own in PL's property, and he pays off a charge-holder RH with a security over the property, it appears from an old line of English authority and a more recent series of Canadian cases that S's payment automatically discharges PL's obligation to RH, and S is then entitled to take over RH's extinguished security via "reviving subrogation".\textsuperscript{29} As has been discussed in Chapter 3, part (1), the award of this remedy to S in some of the

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"As a general rule, all persons having an interest in property subject to an incumbrance by which their interest may be prejudiced or lost have a right to disengage the property from such incumbrance by the payment of the debt or charge which creates it; and if such debt be one for which the ultimate liability rests upon another party, they will, upon their payment, be subrogated to the right of the creditor against the ultimate debtor, and against the property upon which the debt was a charge."
\end{enumerate}
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cases may be explained on the basis that S has paid under a mistake of fact. However, it is clear that S need not demonstrate that such an additional unjust factor underlay his payment in order to bring himself within the scope of the principle established by the case-law: the fact that he has paid in order to protect his own interest in PL's property constitutes sufficient grounds for the award of "reviving subrogation" to RH's extinguished charge. The principle underlying this rule seems to be that the courts view S's payment as one which is made under a form of practical compulsion: S is not himself legally bound to pay RH, but it may be said that by dint of his possession of an interest in PL's property, S would be so affected by RH's exercise of his rights against the property that he is effectively compelled to pay RH himself in order to protect his interest. It must be said, though, that it is not always clear in the cases that S has been compelled to pay RH in order to prevent RH from exercising his rights against PL's property: in some cases S pays where there is no suggestion

30 Cf. Tarn v Turner (1888) 34 Ch. D. 456, at 464-465, per Cotton, L.J., considering the position of the tenant of property subject to a mortgage:

"Here is a man who has a certain interest in the equity of redemption, and he may be prejudiced by the action of the mortgagee insisting on his rights as the legal owner of the property . . . [I]f the tenant likes to redeem he can do so."

And cf. Burrows, p. 210, who suggests that the unjust factor entitling S to a remedy is legal compulsion, in the sense that he pays "to avoid the exercise of disadvantageous legal remedies".

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that RH has intended to enforce his rights. Hence, the element of compulsion underlying S's payment to RH sometimes seems rather notional, and RH's possession of rights against the property at most a potential but uncrystallised threat to S's interest.\textsuperscript{31}

To give some examples of the award of "reviving subrogation" to a part-owner S in this context: in \textit{Countess of Shrewsbury v Earl of Shrewsbury},\textsuperscript{32} the Earl of Shrewsbury was the tenant in tail of an estate, but because he was restrained from alienating his interest he was treated for the purposes of the case as the tenant for life. During his lifetime he paid off a charge on the estate, with the result that after his death his personal representative was held to be entitled to assert a claim to acquire this charge via "reviving subrogation". Again, in \textit{Pitt v Pitt},\textsuperscript{33} Mrs. Pitt was a woman whose property vested in her husband

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"Though it is true that [S] has responded to extraneous pressures, they are, after all, of the kind which lenders would normally foresee, and not of the type that would normally inspire one to describe the payment as involuntary. A more realistic appraisal is simply that such payments are made in pursuit of self-interest."


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following her marriage. Prior to her marriage, Mrs. Pitt had executed a mortgage over the property in favour of Maddock; following the marriage, Pitt paid off part of the mortgage debt to Maddock, but before the mortgage was paid off in full Pitt died, leaving Mrs. Pitt a widow. Mrs. Pitt then brought an action claiming to be entitled by survivorship to redeem the mortgage, and was held entitled to do so, subject to the proviso that her husband's estate was entitled to stand in Maddock's place to the extent of the payments Pitt had made in respect of the mortgage debt.34

And again, in *Traders Realty Ltd. v Huron Heights Shopping Plaza Ltd.*,35 S was the mortgagee of PL's property who paid land taxes owed by PL to the local authority RH and was held to be entitled to acquire RH's lien over the property via "reviving subrogation", so as to defeat the claims against PL's property of two intervening chargees. The same principle has been applied in cases where S is the tenant

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34 There is a suggestion in Sir T. Plumer, M.R.'s judgment, at 183, that Pitt paid in the mistaken belief that he would outlive his wife and so become absolutely entitled to the property. However this in itself could not have justified the award to Pitt's estate of "reviving subrogation", since it constituted a misprediction, a form of mistake which does not constitute sufficient grounds for the award of a restitutionary remedy: Birks, pp. 147-148 and 278-279; Burrows, p. 98.

in tail in remainder of PL's property\(^{36}\) (although it does not arise where S is the tenant in tail in possession\(^{37}\)), where S is the co-owner with PL of property and he pays more than his share of a debt secured on the property,\(^{38}\)

\(^{36}\) Wigsell v Wigsell (1825) 2 Sim. & St. 364; Horton v Smith (1858) 4 K. & J. 624; Williams v Williams-Wynn (1915) 84 L.J. Ch. 801.

\(^{37}\) Wigsell v Wigsell, ibid., at 369, per Sir J. Leach, V.-C.:

"Where a tenant in tail in possession pays off a mortgage, and declares no intention that the charge shall continue for the benefit of the personal estate, then the charge ceases; because the estate is considered his own, inasmuch as he may make it his own by suffering a recovery. This principle has no application to a tenant in tail in remainder whose estate may be altogether defeated by the birth of issue of another person; and it must be inferred that such a tenant in tail means to keep the charge alive."


And cf. Alleway v Alleway (1964) 190 E.G. 21, where the plaintiff ("Nelson") masqueraded as his brother, the defendant ("George"), in order to buy a house at the cheap price to which George was entitled as the former possessor of a controlled tenancy. Nelson signed the contract in George's name and negotiated a 100% mortgage in George's name with the local council. The plan was that the brothers would then share the mortgage payments, and to this end, George paid over various sums to Nelson's wife, for payment to the mortgagee. The brothers then fell out, and Nelson sought a declaration that the house be transferred into his name. Wilberforce, J. granted Nelson the order he sought, but he also held that, subject to the outstanding mortgage, George would be entitled to acquire the mortgagee's extinguished rights via ("reviving") subrogation to the extent of his payments.
where S is PL's tenant\textsuperscript{39} and where S is PL's co-heir.\textsuperscript{40}

Aside from the fact that they appear at first sight to contradict the rule adopted in English law against the recovery of voluntary payments, a difficulty which may arguably be overcome by pointing to the element of practical compulsion which underlies S's payment, these cases raise a further issue which must be addressed: to wit, that some explanation is needed of the award to S of a proprietary remedy against PL. Since RH is legally entitled to receive S's payment, it cannot be said that S has retained a proprietary interest in his money sufficient to allow him a proprietary remedy on the basis of "proprietary base" reasoning. It is therefore necessary to fall back on some other explanation. As Burrows has pointed out,\textsuperscript{41} the argument that S intends to take RH's security at the time of paying RH will not do, since in many of the cases the finding of such an intention in S's favour is clearly fictional.\textsuperscript{42}

\textsuperscript{39} Locke v Evans (1823) 11 Ir. Eq. 52; Tarn v Turner (1888) 34 Ch. D. 456. Cf. Leno v Prudential Insurance Co. of America 46 S.E. 2d 471 (1948), and cases discussed in Annotation, "Lessee's Right of Subrogation in Respect of Lien Superior to His Lease", 1 A.L.R. 2d 286 (1948).

\textsuperscript{40} Crow v Pettingell (1869) 20 L.T. 342; Fraser v Fraser [1946] O.W.N. 791.

\textsuperscript{41} Burrows, pp. 210-211.

\textsuperscript{42} See e.g. Morley v Morley (1855) 5 De G.M. & G. 610, at 620, per Lord Cranworth, L.C.:

"[W]hen an incumbrance is paid off by the person having a partial interest . . . unless there is something to show a contrary intention, the presumption is, that he meant to do that which in law and in equity he might have done, namely, to keep it alive for his own interest, and that the omission was a mere oversight."

See too Countess of Shrewsbury v Earl of Shrewsbury (1790)
and the most that can be said of the cases is therefore that the remedy will not be awarded where S has expressly indicated that he does not want it.\(^4\) The only possible explanation of these cases therefore seems to be that they are analogous to the cases discussed in Chapter 2, part (2), where the proprietary remedy is awarded to a payor of another's liability under legal compulsion. It is argued there that these legal compulsion cases can only be explained on the basis that where S and PL are subject to RH's common demand and PL has executed a charge over his property in RH's favour, it would be unjust to exonerate PL's property from RH's claim at S's expense. By analogy with this argument, it might be said that where S is practically compelled to pay a charge-holder RH in order to protect his own interest in PL's property, it would be similarly unjust for PL's property to be exonerated from RH's charge at S's expense.\(^4\)

1 Ves. Jun. 227, at 234, per Lord Thurlow, L.C.

\(^4\) Parry v Wright (1823) 1 Sim. & St. 369, at 379, per Sir J. Leach, V.-C.

\(^4\) It should be noted by way of contrast with the cases described in this section that in Falcke v Scottish Imperial Insurance Co. (1886) 34 Ch. D. 234 (discussed supra, pp. 265-267), the Court of Appeal refused to allow the owner of the equity of redemption of an insurance policy who had paid premiums on the policy to acquire a lien over the policy in respect of these payments so as to defeat the claims of the mortgagees. In the words of Sutton, p. 93:

"[T]he position of mortgagor . . . was not a sufficient interest in the property to justify his acquiring a superior title to the mortgagee in the proceeds of sale, by reason only that he had expended money to preserve the property."

Cf. Otter v Lord Vaux (1856) 6 De G.M. & G. 638, where it
ii) Where S pays RH in circumstances of necessity, where
the courts have a policy-motivated desire to give interveners a remedy

Despite the traditional reluctance of the English courts
to allow the recovery of payments made under necessity,\textsuperscript{45} there is a significant body of case-law in which necessitous interveners of assorted kinds have been awarded a restitutionary remedy. On the basis of these cases various commentators have argued for the adoption of a general principle in favour of recovery for payors under necessity,\textsuperscript{46} and some recent cases have suggested that the courts

was held that a mortgagor could not pay off a mortgage over his property and then "keep it alive" for his own benefit against subsequent incumbrancers.

\textsuperscript{45} The most well-known and influential dictum against the award of a remedy to necessitous interveners occurs in Falcke v Scottish Imperial Insurance Co. (1886) 34 Ch. D. 234, at 248, per Bowen, L.J.:

"The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure."

may be moving towards the acceptance of such a generalised principle.47

Where a necessitous intervener S pays RH in respect of PL's obligations, and his payment discharges PL's obligations, the question arises whether S should be allowed to acquire RH's extinguished rights against PL via "reviving subrogation"? Where RH's rights were personal rights only there is no reason why S should need to acquire them via "reviving subrogation", since this will put him in no better position than bringing a direct claim for money paid to PL's use. Thus, in Samilo v Phillips,48 for example, Pylypchuk was forced to retire from running his family business after suffering a stroke, and his son Phillips took over from him. It later transpired that Pylypchuk was liable to pay back taxes, fines and penalties to the Income Tax Department, which Phillips paid on his behalf, Pylypchuk by this time having become mentally incompetent. In the British Columbia Supreme Court, Seaton, J. held that Phillips was entitled to be reimbursed for his payments on the ground of "necessitous intervention". He noted during the course of his judgment49 that Phillips' position was

49 Ibid., at 423.
analogous to that of a lender to a company acting ultra vires, or to an infant, entitled to recover his payment by means of what Goff and Jones described at the time of the case in the first edition of their book as "an equitable right akin to subrogation", but which is truly just "reviving subrogation". However, Seaton, J. does not appear to have thought it necessary to use "reviving subrogation" in order to allow Phillips to recover from Pylypchuk’s estate. He seems to have been content simply to give Phillips a direct right of action against his father's estate. And it is submitted that since no question of giving Phillips a secured claim arose in the case, this was the correct approach to take.

In contrast, where a necessitous intervener S has paid off a charge over PL’s property, the possibility arises that he may be entitled to acquire the charge-holder RH’s security via "reviving subrogation", an acquisition which clearly would improve his position. That a necessitous intervener S may be entitled to RH’s security after paying RH is suggested by two further Canadian cases. The first,  

\[50\] As to this, see the remarks made supra, p. 37, n. 19.

\[51\] Ibid., at 423-424.

\[52\] Several American cases should also be noted in which PL/RH agrees to provide board and nursing care for an invalid, in exchange for which PL/RH is given the benefit of rights over a piece of property (these rights may originally have been vested either in the invalid himself, or in some third party). PL/RH then fails to provide the board and care he has agreed to provide, and the invalid is instead looked after by an intervener S. In these circum-
Re Okotoks Milling Co., Ltd. was similar in many ways to Re Cleadon Trust Ltd.: the directors of a company personally paid a creditor's claim against the company and subsequently sought to prove for their payments in the company's liquidation. In Re Okotoks, however, there was no suggestion that the directors had acted improperly under the company's articles, and the circumstances of their payments were such that these might have been characterised as having been made under necessity: one of the company's creditors was pressing for payment, and the directors paid in the bona fide belief that they were acting in the best interests of the company and its other creditors. The full facts of Re Okotoks were as follows: the directors paid off one of the company's creditors which held a charge over the company's property, and they then requested this creditor to assign its charge to another group of creditors as collateral security for their loans. The company later went into liquidation and the liquidator sold off the assets that were subject to the charge, realising an excess after the latter group of creditors had been paid. In the Alber-

stances, S has been held to be entitled to acquire PL/RH's rights over the property via subrogation: Huffmond v Bence 27 N.E. 347 (1891); Henry v Knight 122 N.E. 675 (1919); Vance v Atherton 67 S.W. 2d 968 (1934). These cases are discussed in Annotation, "Right of Third Person Not Named in Bond or Other Contract Conditioned for Support of, or Services to, Another, to Recover Thereon", 11 A.L.R. 2d 1010 (1949), pp. 1016-1018.

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ta Supreme Court, Stuart, J. held that the directors were be entitled to a lien over this excess, on the grounds that they would have been entitled to take a transfer of the charge themselves at the time of paying off the original charge-holder, had they chosen to do so.

In Drager v Allison, the defendants entered an agreement to purchase a house, under which they were to pay the purchase price by instalments. The plaintiff, who was the defendants' father, agreed to guarantee the defendants' payments to the vendor. Without the defendants ever having defaulted on a payment, the plaintiff stepped in and paid the vendor the full price of the house, for the reason that he wished to save the defendants from paying the interest charges for which they were liable under the terms of the agreement. The plaintiff subsequently claimed to be entitled to acquire the vendor's lien over the property via ("reviving") subrogation. At first instance Thomson, J. held in the plaintiff's favour, a decision which was overruled by the Sasketchawan Court of Appeal, whose own decision was then overruled in turn by the Supreme Court of Canada. The basis of the Supreme Court's decision in the plaintiff's favour was that although the plaintiff could not be said at the time of paying to have paid as the defendants' surety, since he paid before the defendants had

ever defaulted on their payments to the vendor, once the moment had arrived at which the defendants would have been liable to pay but for the plaintiff's intervention, then the plaintiff would be entitled to "reviving subrogation", as though he had paid as surety after the defendants' default. With respect, though, this reasoning seems highly suspect, since it depends upon a fictional interpretation of the plaintiff's motive for paying. It is submitted that the court should rather have held that the plaintiff was entitled to acquire the vendor's lien over the property on the ground that his payment to the vendor constituted an instance of necesitous intervention.\textsuperscript{56}

b) Where S's payment does not discharge PL's obligations although made in necesitous circumstances, should S be entitled to "simple subrogation"?

As has been said above, there are two exceptional situations in which S pays RH in necesitous circumstances and his payment does not extinguish RH's rights, raising the possibility that S should be entitled to acquire RH's rights via "simple subrogation".

The first situation of this type arises under the terms of the Bills of Exchange Act 1882, s. 68. According to s. 68(1):

\textsuperscript{56} For the same view, see Maddaugh and McCamus, p. 703, n. 136, and accompanying text.
"Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn."

And according to s. 68(5):

"Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party."

A few comments should be made about these rules. First, it should be noted that any person may intervene and pay a bill supra protest; the intervener need not himself be a party to the bill. Thus, s. 68 clearly provides for the award of "simple subrogation" to any party who, though a stranger, pays a bill under necessity for the benefit of another. Secondly, it should be noted that the interven-

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57 For further discussion, see Chalmers and Guest, pp. 552-553.
er may pay in respect of the liability of any party liable on the bill, and may sue this party and any antecedent (though no subsequent) party to the bill to recover his payment. Hence, for example, if he pays for the honour of the acceptor, he can sue the acceptor but the drawer and indorser are discharged; if he pays for the honour of the drawer, he can sue the drawer or the acceptor but the indorsers are discharged. Thirdly, it should be noted that according to Sir R. Malins, V.-C., in Re Overend, Gurney & Co., once a bill is paid supra protest it ceases to be negotiable. Hence, the award of "simple subrogation" to the intervener under s. 68 cannot be justified by reference to the same argument that is advanced above in Chapter 2, part (2)(b)(ii), to justify the award of "simple subrogation" to a drawer or indorser who pays a bill (viz., the continuing viability of the bill as a negotiable instrument). As a result, it seems arguable that "simple subrogation" is not really needed where a bill has been paid by a necessitous intervener supra protest, and that the intervener could more straightforwardly be given a direct claim against any one of the party for whose honour he has paid and that party's antecedents on the bill.

The second situation falling within the scope of this

59 Chalmers and Guest, p. 553, n. 62, suggest that the intervener may be unable to sue the acceptor where the bill has been accepted for the accommodation of the drawer.

60 (1868) L.R. 6 Eq. 344, at 367.
sub-section arises where an insurer pays its insured although it is not legally obliged to do so. This situation is most likely to arise where an insurer is unaware of the fact either that the loss in respect of which the insured claims is not covered by the policy, or that the insured is in breach of some term of the policy, as a result of which the insurer is entitled to refuse to pay. In a situation of this kind, if the insurer pays nonetheless, it may well be argued that the insurer should be entitled be "simply subrogated" to its insured's claims against a third party on the ground that it has paid under a mistake of fact. One conceivable objection to this analysis is that the insurer may run into the difficulty that its payment has been made in some circumstances not under a mistake of fact but under a mistake of law. But even if this difficulty is not encountered, it is submitted that it may in any case be advanced as an alternative justification of the insurer's entitlement that the courts wish as a matter of general policy to encourage insurers to pay their insureds even though they are not legally obliged to do so. This policy is closely tied to the courts' general assumption, discussed in Chapter 2, part (2)(b)(i) above, that the burden of an insured loss should be made to fall wherever possible on a third party who is liable for the loss rather

61 But note that the bar against the recovery of payments made under a mistake of law seems unlikely to continue for much longer: see pp. 213-214, supra.
than upon the insurer or insured.\textsuperscript{62}

The leading case in this area, \textit{King v Victoria Insurance Co. Ltd.},\textsuperscript{63} concerned a dispute over damage caused to a shipment of wool when punts belonging to and under the control of the defendants collided with the lighter on which the wool was stored. The plaintiff insurers paid the owner of the wool for the loss, wrongly\textsuperscript{64} believing it to be covered by an insurance policy on the wool, and then sought to be ("simply") subrogated to the owner's rights against the defendants. The defendants contended, \textit{inter alia}, that the wool was not at the time of the collision and damage covered by the policy, with the result that the insurers were under no legal liability to the owners to pay the owners in respect of the loss and damage incurred. The defendants argued that it followed from this that the insurers' payment had been a voluntary payment and that the insurers for this reason could not be entitled to acquire the insureds' right of action against the defendants via ("simple") subrogation.

Speaking for the Judicial Committee of the Privy Council, Lord Hobhouse refused to accept this argument, and he held

\textsuperscript{62} See the discussion at pp. 162-165, \textit{supra}.
\textsuperscript{63} [1896] A.C. 250.
\textsuperscript{64} The Supreme Court of Queensland at any rate thought the insurer's belief that it was liable on the policy to have been mistaken: \textit{ibid.}, at 253, \textit{per} Lord Hobhouse. The Judicial Committee did not express an opinion on the point, since they thought the insurers entitled to a remedy whether or not they were actually liable to pay: \textit{ibid.}, at 255, \textit{per} Lord Hobhouse.
that the insurers would be entitled to subrogation whether or not they had been legally bound to pay the insured. He took the following view of the matter:

"[I]f, on a claim being made, the insurers treat it as within the contract, by what right can a stranger say that it is not so? The payment would not be made if no policy existed; and it seems to their Lordships an extravagant thing to say that a payment under such circumstances is a voluntary payment made by a stranger, and that it would be at least an excess of refinement to hold that it is not a payment on the policy, carrying with it the legal incidents of such a payment."

He concluded that:

"[A] payment made by insurers in consequence of a policy granted by them and in satisfaction of a claim by the insured, is a claim made under the policy, which entitles the insurers to the remedies available to the insured."

Thus, the effect of Lord Hobhouse's judgment is that

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65 Ibid., at 256.
66 Ibid., at 256.
wherever a valid contract of insurance exists between an insurer and an insured,\(^6\) any payment the insurer makes in the belief that it is bound to pay under the terms of the policy will entitle it to "simple subrogation". As has been said, in the writer's view this rule may be justified by reference not only to the unjust factor of mistake, but alternatively by reference to the fact that the courts wish as a matter of general policy to encourage insurers to pay their insureds notwithstanding that they are not strictly bound to do so under the terms of the insurance policy.\(^8\)

\(^6\) Cf. John Edwards & Co. v Motor Union Insurance Co. Ltd. [1922] 2 K.B. 249 where the insured took out a p.p.i. policy, held by McCardie, J. to be a contract by way of gaming or wagering, and therefore void under the Marine Insurance Act 1906, s. 4. Following a collision between the insured's vessel and another, the insurer made the insured a payment under the terms of the policy. At 254, McCardie, J. held that this payment did not entitle the insurer to subrogation, on the grounds that:

"[T]he whole basis of the subrogative doctrine is founded on a binding and operative contract of indemnity . . . it is from such a contract only that the equitable results and rights . . . derive their origin."

\(^8\) Cf. Goff and Jones, p. 529, citing in comparison Boney v Central Mutual Insurance Co. of Chicago 197 S.E. 122 (1938) and St. John's Hospital v The Town of Capitol 220 N.E. 2d 333 (1960), and in contrast Canwest Geophysical Ltd. v Brown [1972] 3 W.W.R. 23 (where an insurer which gratuitously added death benefits to a motor policy, under which it then paid the widow of an insured driver killed in an accident, was denied subrogation to the widow's rights against the third party responsible for the accident).

A second, more technical argument why an insurer should be entitled to subrogation in the circumstances described is given by Derham, p. 107:

"[U]ntil an insurer elects to avoid the policy, there is still a valid and subsisting contract. The insured can sue the insurer for payment under the policy, and unless the insurer specifically pleads non-disclosure, it is compellable to indemnify its insured. Therefore any payment by the insurer would still be a payment
It may finally be said here that in some circumstances the courts will award "simple subrogation" to insurers not merely out of a policy-motivated desire to encourage insurers to pay, but also where there is some actual evidence that the insurers have acted under moral compulsion. Support for this proposition can be drawn from Nahhas v Pier House (Cheyne Walk) Management Ltd. Here, the plaintiff lived in a block of flats managed by the defendants. The defendants employed as a porter in the block a man with thirty-three convictions and eleven prison sentences for theft. The porter stole some of the plaintiff's jewellery, and it was held that the defendants were tortiously liable to the plaintiff for this loss because their recruitment procedures had been negligent. The plaintiff's jewellery was covered on her father's insurance policy. However, the insurers had been told that she would only ever keep up to £3,000 worth of jewellery in her flat, and the actual value of the jewellery stolen was £23,250. For this reason, the insurers refused to admit liability on the policy, and were prepared only to make an ex gratia payment of £3,000.

At this stage, the plaintiff's father's insurance brokers stepped in and agreed to pay the plaintiff themselves, provided that the plaintiff co-operated with them in pursuing

under the policy, and the fact that it is aware of grounds entitling it to avoid its liability should not render it a volunteer."


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the defendants in her own name, but for the brokers' benefit. The brokers agreed to indemnify her for the costs of bringing the action, and the effect of their agreement was thus that the brokers would be "simply subrogated" to the plaintiff's rights against the defendants. The brokers' reasons for entering into this arrangement seem to have been at least partly self-interested, since the plaintiff's father was the chairman of a large public company with which they wished to preserve good relations (their business relations with the plaintiff's father were apparently worth £50,000 a year to them in commissions). However, Mr. Denis Henry, Q.C., sitting as a deputy judge of the Queen's Bench Division, seems also to have been impressed by the brokers' claims that they wished to spare the plaintiff worry and stress at a difficult time (she had to go into hospital). He therefore held that whilst the arrangement reached between the plaintiff and the brokers was distinguishable from the normal case of an insurer exercising rights of subrogation (which he took to be founded on the principle that the "prudent [should not be made to] subsidise the wrongdoer"), the brokers should here be entitled to "simple subrogation" as agreed on the grounds that:

70 Ibid., at 334. Cf. the discussion at pp. 162-165, supra, where it is questioned whether the courts are invariably right to characterise third parties as wrongdoers on whom the burden of paying an insured loss should fall.

71 Ibid., at 334.
"[T]he right policy is that wrongdoers should pay and that third parties motivated by a genuine benevolent and/or commercial regard for the plaintiff . . . should not be discouraged from helping victims at a time when they need that help most."
APPENDIX 1: THE ETYMOLOGY OF "SUBROGATION"

The word "subrogation" derives ultimately from the Latin verb rogare, "to ask". According to the eighteenth-century encyclopedist Ephraim Chambers, the "ancient Romans" during the time of the Republic called:¹

"...the laws themselves Rogationes, in regard the people made them, upon being ask'd by the Magistrates. And as laws made by the people could not be changed without their consent, and without being ask'd anew, if they thought good to have the law wholly abolish'd, Lex abrogabatur; if only a part of it were to be abolished, Lex derogabatur; and if any Clause or Amendment were added to it, Lex Subrogabatur."

The verb subrogare was thus originally used by the Romans to denote the action of substituting a new, amended law for an old law; it meant "to replace an old law with a new law."

The verb subrogare and the noun subrogatio which was derived from it subsequently came to be used by the Romans to denote different types of substitution. Again according to


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"The new Magistrates were also Subrogated in the Place of the old ones; for during the Time of the Republic, no Magistrate could be, but by Consent of the People, nor, of consequence, but by law; since whatever People thought good, was Law. This is what occasioned Salmasius to say, that Subrogare and Substitutere per Legem, were Reciprocals."

Buckland agrees that the term subrogatio was used in Roman constitutional law as a term to signify the choice of an official to replace, or sometimes to act as colleague with, another; and to this day, the first definition given by the Oxford English Dictionary for the verb "to subrogate" is "to elect or put in the place of another; to substitute in an office". Buckland adds that:

"[Subrogatio]... is also employed, by Ulpian (Reg. 1. 3.), to denote the supplementing of one act by another. It is not until the time of Justinian that it certainly appears in private law... In an enactment

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2 Ibid.
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 come later can be "subrogated", being formally notified as to what has been done in their absence. Another text, credited to Paul, but, so far as these words are concerned, in all probability due to Tribonian (D. 27. 1. 31. pr.), is still somewhat remote from the modern sense. A man who is burdened with three guardianships, and is appointed by the magistrate to a fourth, is not bound to execute it. The three are an excuse. But the appointment is not a nullity. If one of the first three children dies, the fourth guardianship at once becomes operative: the text remarks that it is automatically subrogated."

From its specific origins in the popular law-making process of the Roman republic, the Latin word subrogatio thus came later on to be used in a looser sense, though still in a legal context, to denote substitutions of various kinds. This is reflected in the definition of the verb subrogare which is given in the Oxford Latin Dictionary:6

"To elect or cause to be elected as a successor or

substitute. b (in general) to substitute."

That the Latin word *subrogatio* was used to denote substitutions in a general sense is presumably the reason that the French word *subrogation* was later used in a legal context to denote a different kind of substitution again, not of a new law for an old law, nor of a new official for an old official, but of a surety for a creditor after the surety paid the creditor in respect of the principal debt. The creditor was regarded as ceding his rights and privileges to the surety who paid the debt, and although the creditor's rights and privileges against the debtor were technically extinguished by the payment to the creditor, they were regarded as being kept alive fictionally with the result that the third party might take the benefit of them. The earliest known instances of the French word *subrogation* being used in this sense can be dated to a declaration of Henri IV in May 1609, and an "arrêt des subrogations" decreed by the Parliament of Paris on 6th July 1690.7 In the eighteenth century, Pothier and other French jurists8 used

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the word in their writings on the law of obligations to de-
note the fictional prolongation of the life of a creditor's
rights for the benefit of a third party; it is used in this
sense in the Code Civil, promulgated in 1804, which deals
with "paiement avec subrogation" in articles 1249-1252; and
it continues to be used primarily in this sense in French
law to this day.9

It is unknown why the French writers drew on the Latin
word subrogatio to describe this process as subrogation,
though it seems likely that they were prompted to use the
word because the idea of substitution was inherent in the

Jurisprudence . . . (Paris, 1785), Tome XVI, s.v. "Subrog-
4ation".
9 C19 works on subrogation in French law are: N. Bous-
quet, Explication du Code Civil (Avignon, 1805), pp. 315-
320; G. Massé, Le Droit Commercial . . . (Paris, 1846),
pp. 228-244; Gauthier, Traité de la Subrogation de Pers-
onnes (Paris, 1853); F. Laurent, Principes de Droit Civil
Français, 2ème ed. (Paris, 1876), Tome XVIII, pp. 5-172.
More recent studies are: J. Mestre, La Subrogation Person-
elle (Paris, 1979); V. Ranouil, La Subrogation Reelle en
Droit Civil Francais (Paris, 1985); A. Weill and F. Terré,
986-1005. A C19th English work which draws heavily on
the French writers, and so gives an account of "subrogation"
very similar to theirs, is H.T. Colebrooke, Treatise on
Colebrooke spent much of his life as a magistrate and judge
in India, and wrote widely on Hindu law, mathematics and
philosophy. His book on the law of obligations is a theore-
etical work, and so far as the writer has determined, his
account of the law of "subrogation" was never cited in an
English court.

For accounts of the law of subrogation in Louisiana,
which is derived from the French law and resembles it in
many respects, see: S. McDermott, Jr., "Comment: Fundament-
al Principles and Effects of Subrogation in French and
Louisiana Law", (1951) 25 Tulane L.R. 358; S. Litvinoff,
Latin *subrogatio*, even though the Latin term was actually used by the Romans in different contexts. Confusingly, the Roman law contained a process of fictional revival and transfer of a creditor's discharged rights similar to that described by the French writers as *subrogation*, but which never appears to have been described by the Romans as *subrogatio*. Under Roman law, when a surety paid the credit-


Likewise, under Scots law, which also draws on the Roman law in this area, the rule prevailed after some initial controversy that a cautioner on payment of a guaranteed debt was entitled to demand an assignation of the creditor's rights against the principal debtor. The cautioner's payment was considered not to discharge the creditor's rights, but rather, to represent the price for their sale to the cautioner: *Nisbet v Lesly* (1664) 1 Stair 211; *Lesley v Gray* (1665) 1 Stair 247, M. 2111; *Dame Margaret Hume v Crawford* (1665) 1 Stair 393, M. 2112.; *Arnold v Gordon* (1671) 1 Stair 728; *Rig v Cautoners for the Laird of Broomhall* (1676) M. 3353, *Anderson v Blackwall & Stirling* (1680) M. 3354; *Wood v Gordoun* (1695) M. 3355; *Wait v Panton* (1697) M. 3356; *Creditors of John Fullarton v Creditors of Hugh Fullarton* (1751) M. 1381; *Sligo v Menzies* (1840) 2 D. 1478. See too Lord Stair, *The Institutions of the Law*
or in respect of a guaranteed debt, he was entitled to claim *beneficium cedendarum actionum*. That is, he could require the creditor to cede all of his rights against the debtor or other sureties. If the surety expressly required the cession on or before making his payment to the creditor, the creditor was considered to have received the surety's payment not in discharge of the debt, but as the price for the sale to the surety of the ceded action.\(^{11}\) Hence,

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\(^{11}\) Cf. Jenner v Morris (1861) 3 De G.F. & J. 45, at 51-52, per Lord Campbell, L.C.:  
"It has been laid down from ancient times that a court of equity will allow the party who has advanced the money which it is proved to have been actually employed in paying for necessaries furnished to the deserted wife, to stand in the shoes of the tradespeople who furnished the necessaries, and to have a remedy for the amount against the husband.  
"I do not find any technical reason given for this; but it may possibly be that equity considers that the tradespeople have for valuable consideration assigned to the party who advanced the money the legal debt which would be due to them from the husband on furnishing the necessaries, and that, although a chose in action cannot be assigned at law, a court of equity recognises the right of the assignee." (Emphasis added)  
It cannot be said whether Lord Campbell derived this analy-
the debt was fictionally considered not to have been discharged by the surety's payment. However, despite the obvious similarity between this doctrine and that termed "subrogation" by the French lawyers, there is no evidence to suggest that the Romans ever associated the ideas of *beneficium cedendarum actionum* and *subrogatio*, and it remains obscure why the French lawyers of the eighteenth century should have conflated the two.

Having begun as a term of French law in the context of principal and surety, *subrogation* came later to be used in the context of French insurance law, to denote a process whereby an insurer is substituted to the position of its insured in order to pursue its insured's rights against a third party. The French law concerning *subrogation* in the context of insurance differs in certain important respects from the comparative English law, but it is unnecessary from the Roman law, but the reasoning is obviously the same.


"[S]o far as can be seen, the name [i.e. "subrogatio"] and the thing [i.e. the cession of actions] had little connection with each other in the Roman law."


"In English law, the doctrine of subrogation first entered gradually into the substance of insurance law and then at length became a recognised part of the general common law whereas in French law, subrogation entered first in the general law of contracts and then into the law of insurance."

Khoury provides a bibliography of French writers on subrogation in marine insurance law at pp. xi-xii.
ary to enter into a detailed discussion of these differences here.\textsuperscript{14} For present purposes, the significance of the French use of the term subrogation in the context of insurance law lies simply in the fact that the term subrogation seems to have first passed into the vocabulary of the English courts as "subrogation" through the medium of an insurance law case from Canada heard by the Privy Council in 1851: Quebec Fire Assurance Co. v Augustin St. Louis and John Molson.\textsuperscript{15} This case turned on a point of the French law of subrogation in the context of an insurance contract as it then existed in Lower Canada, a region which was subject at that time to French civil law. The French law required an insurer expressly to demand subrogation of its insured before it paid on a policy, and the case turned on whether or not the plaintiff insurers had done so. Without entering into the complexities of the case,\textsuperscript{16} it may be simply remarked here that following the Quebec Fire Assurance case, the Anglicised term "subrogation" was adopted in further insurance cases heard by the English courts, to describe a similar doctrine in English insurance law which itself in all probability evolved out of the doctrine of

\textsuperscript{14} For a comparative account, see Khoury, cited supra, n. 13.

\textsuperscript{15} (1851) 7 Moo. P.C. 286.

abandonment, but which is itself fundamentally distinct from abandonment,\textsuperscript{17} according to which an insurer becomes entitled upon paying its insured to acquire its insured's subsisting rights of action against third parties in respect of the insured loss.

The subsequent evolution of the law of subrogation in the context of insurance, and the widespread misuse of the word in this context that was begun in \textit{Darrell v Tibbitts}\textsuperscript{18} and

\textsuperscript{17} The distinction between abandonment and subrogation is discussed at p. 90, n. 130, \textit{supra}. Essentially, an insurer is entitled to make a profit out of the insured's property after the insured has abandoned it to the insurer, but an insurer may not recover more than it has actually paid the insured via subrogation to the insured's rights of action against third parties.

\textsuperscript{18} (1880) 5 Q.B.D. 560.
Castellain v Preston\textsuperscript{19} are described in Chapter 2, part 2(b)(i). From its first appearance in the insurance cases, the word "subrogation" has since been extended in the case-law to encompass the further instances of substitution by operation of law that are described in the thesis.

\textsuperscript{19} (1883) 11 Q.B.D. 380.
APPENDIX 2: CONTRACTUAL SUBROGATION AND ASSIGNMENT

The following account will briefly set out three situations in which the entitlement to acquire another's rights of action is conferred by contract: (1) where an insured agrees to allow his insurer to take over his rights against a third party; (2) where a senior and junior creditor agree under a subordinated debt agreement that the senior will acquire the junior's rights against their common debtor until his debt is repaid in full, after which the junior will acquire the rights of the senior; (3) where a mortgagee agrees that a third party should acquire his rights against the mortgagor. As a matter of terminology, it would be wrong to say that all three situations constitute examples of contractual subrogation rather than assignment. This is because although contractual subrogation and assignment are very similar, most notably in the fact that there is no necessary limit to the quantum of recovery by a party who has acquired rights of action by either means,¹ they differ in the important respect that a party who has been "simply

¹ That there need be no limit to the quantum of recovery by a party that has acquired rights of action via contractual subrogation is suggested in J. Birds, "Contractual Subrogation in Insurance", (1979) J.B.L. 124, p. 131. In this respect, the position of a party who has acquired rights of action via contractual subrogation may differ sharply from that of a party who has acquired rights of action via legal subrogation, since the latter is entitled to recover no more than the amount which he has paid: see Chapter 1, part (7)(b), supra.
subrogated" to another's rights of action under a contractual term is entitled to use the other's name in litigation, whereas a party who has taken an assignment of another's rights of action must pursue these rights in his own name. The importance of this distinction is most marked in the area of insurance law, where insurers generally wish to pursue litigation against third parties in the name of their insureds because they think this will improve their chances of recovery. But in the general interest of term-


"The idea of letting insurance companies use disguises so as to influence the outcome of a case is an obscenity which should not be tolerated in a civilized legal system."

However, if it is accepted as a matter of principle that insurers should be entitled to shift the burden of paying for an insured loss onto a third party through whose fault the loss has been caused (as to this, see the discussion supra, pp. 162-165), and if this principle is likely to be jeopardised in practice by discrimination against insurers in court, then the practice seems defensible. Cf. Dean v Lucas and Howland (1956) 4 D.L.R. (2d) 366, at 371, per Gordon, J.A.: "[T]he jury should not be influenced, as they undoubtedly would be, by the knowledge that one of the parties to the action was insured." It remains to be tested in an empirical study, though, whether insurance companies are right to assume that their appearance in court will prejudice their chances of recovery.


"The insurance companies have an interest in concealing their identities because the revelation of their identities would disclose that there were at least two policies to cover one risk. [His emphasis] This becomes particularly embarrassing when insurance brokers and the Financial Times reveal that it is not uncommon for one insurance company to underwrite the potential loss
inological accuracy, it should in any case be stated that whilst the first two situations described here may be characterised as examples of contractual subrogation, the third simply constitutes an example of assignment.3

1) Insurers

Many insurance contracts contain a provision stipulating that the insurer is entitled to acquire its insured's rights against third parties in respect of any insured

of both sides of a bargain."

Under American law, many states enforce a "real party in interest" rule, requiring insurers to bring subrogated actions against third parties in their own names, as the parties really interested in the outcome of the action: Hasson, 1985 article cited supra, p. 420; Derham, pp. 73-74; T.S. Brown and M.J. Goode, "Conflicts of Interest in Subrogation Actions", (1986) 22 Tort & Ins. L.J. 16, pp. 23-26. To avoid the operation of this rule, it is a common tactic for an insurer to enter a loan receipt agreement with its insured, under which instead of paying the insured under the policy, it advances as a loan a sum equal to the losses claimed against the third party, and in return is given exclusive control and direction of the insured's action: Comment, "The Loan Receipt and Insurers' Subrogation: How to Become the Real Party in Interest Without Really Lying", (1975) 50 Tulane L.R. 115. This tactic has been given a mixed reception by the American courts: see cases cited by Keeton, cited supra, p. 157, n. 5, by Brown and Goode, cited supra, p. 26, nn. 47 and 48, and in Annotation, "Insurance: Validity and Effect of Loan Receipt or Agreement between Insured and Insurer for a Loan Repayable to Extent of Insured's Recovery from Another", 13 A.L.R. 3d 42 (1967); and see too Derham, Chap. 9.

3 American law distinguishes between "legal subrogation" and "conventional subrogation", the latter corresponding to contractual subrogation in English law. For discussion of "conventional subrogation" in insurance law, see S.L. Kimball and D.A. Davis, "The Extension of Insurance Subrogation", (1962) 60 Michigan L.R. 841, pp. 860-868; and for discussion of "conventional subrogation" in general under Louisiana law, see S. Litvinoff, "Subrogation", [1990] 50 Louisiana L.R. 1143, pp. 1152-1156 and 1160-1163.
loss. It is clear that insurers are entitled to take an assignment of their insureds' rights of action if they so wish, but as has been said this brings with it the disadvantage that they must sue the third parties in their own names, something which they are generally reluctant to do. Hence, the subrogation clauses contained in insurance contracts generally stipulate that the insured must lend his name to any action brought by the insurer against a third party in respect of the insured loss.

As has been discussed in Chapter 2, part (2)(b)(i), an indemnity insurer which pays its insured in respect of an insured loss is entitled by operation of law to be "simply subrogated" to its insured's rights of action against a third party in respect of the same loss. The question therefore arises, why an insurer should wish nonetheless to include a clause in its contract with the insured, providing for the insurer to be "simply subrogated" to the insured's rights of action? The principal answer to this quest-

4 Examples of contractual terms conferring "simple subrogation" rights on insurers are set out and discussed in Birds, cited supra, n. 1. See too The Encyclopedia of Forms and Precedents, 5th ed. reissue by the Hon. Sir P. Millett, Vol I., s.v. "Acknowledgments and Receipts" (London, 1993), Form 32. for further discussion, see Durham, Chap. 13. And cf. City of Prince Albert v Underwood McLellan & Associates Ltd. (1968) 3 D.L.R. (3d) 385, where a surety under a performance bond paid a contractor's employer and the employer agreed that the surety should be "simply subrogated" to its rights against the contractor.


6 MacGillivray and Parkington, para. 1162.
is subject to various restrictions, e.g., the insurer can be "simply subrogated" to the insured's action against a third party only after the insured has been fully indemnified under the policy, and the insurer is not entitled to recover more than the amount of its payment to its insured. By specifying in its contract with the insured that these restrictions will not apply to its contractual right of "simple subrogation" an insurer can therefore measurably improve its position, and whilst it is most probably obliged under the general principle of uberrimae fides to pay due regard to its insured's interests when exercising its contractual right to "simple subrogation", there is no

7 Besides the reason given in the text, an insurer might alternatively wish to include a subrogation clause in the insurance contract if it was a non-indemnity insurer and so disentitled to subrogation by operation of law (as to this, see discussion supra, p. 142, n. 78). Birds, cited supra, n. 1, pp. 132-133, argues that in principle it should be possible for a non-indemnity insurer to do this. Cf. Michigan Medical Service v Sharpe 64 N.W. 2d 713 (1954).

8 Commercial Union Assurance Co. v Lister (1874) L.R. 9 Ch. App. 483. And see discussion at p. 92, supra.

9 Cf. Yorkshire Insurance Co. Ltd. v Nisbet Shipping Co. Ltd. [1962] 2 Q.B. 330 (which was not itself a "simple subrogation" case: see p. 171, n. 126, supra).

10 Birds, cited supra, n. 1, pp. 134-136, citing by analogy Groom v Crocker [1939] 1 K.B. 194 (where an insurer breached its duty to its insured when it unjustifiably admitted the insured's negligence when defending an action brought against the insured by a third party); The Distillers Company Bio-Chemicals (Australia) Pty. Ltd. v Ajax Insurance Co. Ltd. (1974) 48 A.L.J.R. 136, at 147, per Stephen, J. (insurers must pay regard to their insureds' interests when exercising their right to control admissions of liability by the insureds). See too Patteson v Northern Accident Insurance Co., Ltd. [1901] 2 I.R. 262; McKnight v
reason as a matter of principle why an insurer should not be entitled to improve its position in this way. In James, L.J.'s words:

"It is open to the parties to a contract of indemnity to contract on the terms of their choice . . . ."

2) Subordinated debt agreements

Subordinated debt agreements can take various forms, but in essence they provide for a subordinated (junior) creditor to forgo his right to enforce principal and interest payments on his debt until a senior creditor's debt is repaid in full. The simplest kind of subordinated debt agreement provides that in the event of the debtor's insolvency, the junior creditor will not prove against the debtor's estate, so that the dividends to which the senior creditor can lay claim will be correspondingly increased. According to some authorities, where the senior and junior

Davis [1968] N.Z.L.R. 1164, at 1171, per Turner, J.


creditors are unsecured creditors, such an agreement would be void for infringement of the pari passu principle now enshrined in the Insolvency Act 1986, s. 107,\textsuperscript{13} although Oditah has persuasively argued that this kind of agreement does not infringe the pari passu principle so long as the rights of other unsecured creditors are not affected by it.\textsuperscript{14} Of course, if the senior and junior creditor are both secured creditors the pari passu principle will not apply to them, and such an agreement should therefore be effective.\textsuperscript{15} But in any case, this kind of agreement brings with it the further obvious disadvantage that by forbearing from enforcing his right to prove against the debtor's estate, the junior creditor will increase not only the size of the senior creditor's dividends, but the size of the dividends awarded to all the other creditors as well. For this reason, where the debtor has other creditors with claims against his estate a more effective form of subordinated debt agreement is a "double dividends" agreement, under which both senior and junior creditor agree to

\begin{itemize}
\item \textsuperscript{14} F. Oditah, Legal Aspects of Receivables Financing (London, 1991), pp. 174-175.
\item \textsuperscript{15} Re Woodroffes (Musical Instruments) Ltd. [1986] Ch. 366, noted by L.S. Sealy, [1986] 45 C.L.J. 25.
\end{itemize}
prove in the debtor's bankruptcy, the junior creditor agrees to hold the dividends he receives on trust for the senior until the senior's debt is repaid in full, and the senior creditor agrees in turn that once his debt is repaid any further dividends he receives he will hold on trust for the junior creditor.\footnote{Carlson, cited supra, n. 12, pp. 987-988, and Wood, cited supra, n. 12, p. 85, both argue that the senior creditor need not expressly agree to hold his dividends on trust for the junior after his debt has been paid in full, for the junior to be entitled to be "simply subrogated" to his position, since this entitlement should arise in any case by operation of law to prevent the unjust enrichment of the senior creditor at the junior's expense.} Effectively, the senior creditor is first "simply subrogated" to the junior's position, and the junior then "simply subrogated" to the position of the senior. This kind of agreement certainly should not be invalidated for infringing the passi paru principle, nor will it allow the debtor's other creditors to reap a windfall at the junior and/or senior creditors' expense.

3) Mortgages

The following account will briefly set out the means by which a mortgagee can assign his rights against a mortgagor to a third party. This situation does not properly speaking constitute an example of contractual subrogation. However, it is considered here for the purposes of comparison with the examples of contractual subrogation discussed in parts (1) and (2) above, and also with the right of a mort-
gagor to compel a mortgagee to assign his security to a third party in lieu of redemption under the Law of Property Act, 1925, s. 95.17

Where PL owes RH a debt which is secured by a charge over PL's property, RH is free to assign this security to S in exchange for payment if he wishes to do so.18 Where RH has a mortgage over PL's property, either S or PL may pay RH to execute a deed of transfer in S's favour under the Law of Property Act 1925, s. 114. Alternatively, if S pays him and RH signs a receipt at the foot of the mortgage stating that he has received S's payment in respect of PL's secured debt, this receipt will be sufficient to transfer the charge to S under the Law of Property Act 1925, s. 115(2):

17 As to this, see Chapter 4, part (1)(a), supra.
18 Re Tahiti Cotton Co. (1874) L.R. 17 Eq. 273, at 279, per Lord Jessel, M.R.; France v Clark (1884) 26 Ch. D. 257, affirming (1883) 22 Ch. D. 830. Cf. Cheah Theam Swee v Equiticorp Finance Group Ltd. [1992] 1 A.C. 472, where the Privy Council held that two mortgagees of the same property were entitled to vary the order of priority of their mortgages without the mortgagor's consent.

If S pays RH to assign his security, and RH then fails to do so, S should never need to resort to "simple subrogation" as a means of acquiring RH's charge, for the reason that once RH is paid in accordance with the terms of the contract this in itself is sufficient to effect an equitable assignment of RH's security to S: Tailby v The Official Receiver (1883) 13 App. Cas. 523, at 547-548, per Lord Macnaghten. See too G. Jones and W. Goodhart, Specific Performance (London, 1986), pp. 134-135. S might conceivably have to seek an injunction to restrain RH from interfering with his security, but otherwise he need do nothing further.
"Provided that where by the receipt the money appears to have been paid by a person who is not entitled to the immediate equity of redemption, the receipt shall operate as if the benefit of the mortgage had by deed been transferred to him; unless —

(a) it is otherwise expressly provided; or
(b) the mortgage is paid off out of capital money, or other money in the hands of a personal representative or trustee properly applicable for the discharge of the mortgage; and it is not expressly provided that the receipt is to operate as a transfer."

It seems most likely that it is not open to PL to take an assignment of RH's mortgage over his property under s. 115(2), even where he intends subsequently to assign the mortgage to S, e.g. because S has lent him the money to pay RH on such an understanding. Where there are no subsequent incumbrancers over PL's property, PL will be entitled to the immediate equity of redemption, and hence unable to bring himself within the scope of the section. And where there are incumbrancers on PL's property subsequent to RH, so that PL can claim to be one "not entitled to the immediate equity of redemption", he still cannot take a transfer from RH under s. 115(2), because this appears to be prohib-
"Nothing in this section confers on a mortgagor a right to keep alive a mortgage paid off by him, so as to affect prejudicially any subsequent incumbrancer; and where there is no right to keep a mortgage alive, the receipt does not operate as a transfer."

Sub-section (3) was inserted to preserve the old common law rule, set down in Otter v Lord Vaux,\(^1\) against mortgagors keeping mortgages alive for their own benefit against subsequent incumbrancers. It might perhaps be argued though, that where PL wishes to keep the mortgage alive not for his own benefit, but for S's benefit, sub-s.(3) should not apply. If this is correct, it might then become an arguable point of fact whether substituting S for RH constituted an action which would "affect prejudicially" the subsequent incumbrancers.

\(^{1}\) (1856) 6 De G.M. & G. 638, followed in Re W. Tasker & Sons, Ltd. [1905] 2 Ch. 587 (where a company purported to keep alive and then reissue debentures it had paid off, and the Court of Appeal held that it could not do so, and that the reissue therefore constituted the creation of a new charge, with the result that the holders of the reissued debentures could not rank \textit{pari passu} with the remaining original debenture-holders).
APPENDIX 3: SHERIFFS AND ESCAPED DEBTORS

It was for a long time the law in England that a creditor who won a judgment against his debtor could have a writ executed against him, requiring the debtor's imprisonment until the debt was paid. In the event of a debtor who had been taken in execution making an escape, the creditor could sue the sheriff from whose custody the debtor had escaped. The sheriff in turn could then come against the

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1 For a history of imprisonment for debt from its first origins in the 13th century, see A.L. Freedman, "Imprisonment for Debt", (1928) 2 Temple L.Q. 330. An account of the consequences for a gaoler of escapes from his custody, under the criminal as well as the civil law, is given in R.B. Pugh, Imprisonment in Medieval England (Cambridge, 1968), Chap. 11.

The law discussed in this section lost its practical importance in 1869: a Select Committee issued in 1864 to report on the workings of the Bankruptcy Act 1861 recommended that all imprisonment for debt should be abolished (Parliamentary Papers (1865) Vol. XII: Reports from Committees (8), pp. 589-603, esp. at p. 591), in response to which recommendation "An Act for the Abolition of Imprisonment for Debt, for the punishment of fraudulent debtors, and for other purposes" was enacted in 1869. Its title notwithstanding, the 1869 Act did not abolish all imprisonment for debt outright. Section 5 contained a saving "power of committal for small debts", under which many people continued to be imprisoned for another one hundred years, until the enactment of the Administration of Justice Act 1970. For comment, see G.R. Rubin, "Law, Poverty and Imprisonment for Debt, 1869-1914", Part A, Chap. 5 in Law, Economy and Society, eds. G.R. Rubin and D. Sugarman (Abingdon, 1984); W.R. Cornish and G. de N. Clark, Law and Society in England 1750-1950 (London, 1989), p. 230.

2 The law concerning escapes from imprisonment under mesne process lies outside the scope of the present discussion. A debtor who escaped from imprisonment under mesne process differed in one important respect from a debtor who escaped from imprisonment under execution: the value of the former to the creditor had yet to be determined by the courts, whereas the value of the latter was decided.
absconding debtor to recover whatever he had been obliged
to pay the creditor (provided, of course, that he could
recapture the debtor, and provided also that the sheriff
had not colluded in the debtor's escape, in which case the
law would not subsequently assist him). It appears that a
further example of "simple subrogation" being awarded to a
payor under legal compulsion may have arisen in the context
of these rules. To explain how it may have arisen, it is
necessary first to describe the nature of the creditor's
actions against the sheriff, and then to consider the nat­
ure of the sheriff's subsequent actions against the escaped
debtor.

1) The creditor's actions against the sheriff

Where a creditor had a debtor arrested in execution, and
the debtor subsequently escaped from the sheriff's custody,
the common law gave the creditor an action on the case ag­
ainst the sheriff, to recover tortious damages for the she­
riff's negligence. Before 1842, in addition to this comm-

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on law action, the creditor could alternatively bring an action against the sheriff for debt, a right which was conferred on him under a series of statutes. The creditor's right to bring an action for debt against the sheriff was abolished by the Prisons Act 1842, s. 31, which provided that henceforth the creditor could have an action on the case only. Whether the creditor brought an action on the case or an action for debt, it made no difference to the

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4 The creditor was not obliged to bring one action or the other in specific circumstances; he was always free to choose the one that he wanted: Hertford v Gernon (1600) Cro. Eliz. 767; Whiting v Reynel (1623) Cro. Jac. 657.

5 The right was first conferred by the Statute of Merchants 1285, and by the Second Statute of Westminster 1285, subsequently by the Re-Appointment of Sheriffs Act 1377, the Escape of Debtors Act 1696, s. 2, and the Escape of Debtors from Prison Act 1702, s. 3. The purchase by gaolers of royal protections against actions for debt was prohibited by the Protections Act 1405.


6 The sheriff's liability to an action in tort was restated in the Sheriffs Act 1887, s. 16.
substantial question of the sheriff's liability to the creditor whether or not the sheriff had colluded in the debtor's escape. However, as will be discussed below, the question of whether or not the sheriff could subsequently bring an action against the debtor was affected by this issue.

For the purposes of this discussion, the most important difference between the action on the case and the action for debt was as follows. Where the creditor brought an action on the case to recover tortious damages against the sheriff, the effect of the sheriff's payment was not to extinguish the debtor's obligation to the creditor. Thus, it was open to the creditor to have the debtor retaken and imprisoned until the original debt was paid, even though he had recovered damages for the escape from the sheriff in the interim. By contrast, where the creditor brought an action against the sheriff for debt, and the sheriff paid, the effect of the sheriff's payment would be to extinguish

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7 Bonafous v Walker (1787) 2 T.R. 126, at 129, per Buller, J.:

"[A]t common law an action on the case lay only against the sheriff or gaoler for an escape, in which case the creditor might recover damages for the officer's misconduct; but still he had a right to recover the debt against the original debtor." (Emphasis added)

See too Jones v Pope (1678) 1 Wms. Saund. 37, at 38, n. (2); Arden v Goodacre (1851) 11 C.B. 371, at 376-377, per Jervis, C.-J.

It might be thought that this put the creditor into an unduly strong position, until it is remembered that he might only be awarded nominal damages against the sheriff for the escape, where for example the sheriff was able to show that he had recaptured the debtor in the meantime.
the debtor's obligation. This was because the effect of the statutes giving the creditor an action of debt against the sheriff was not to give the creditor a new action against the sheriff, but rather to substitute the sheriff for the debtor as the defendant in the creditor's original action against the debtor. Thus, according to Grose, J. in Bonafous v Walker:

"[T]he true construction of these statutes [is] that, where a prisoner escapes out of execution, the gaoler is put in the same situation in which the original debtor stood, and is obliged to pay what the original debtor would have been obliged to pay."

It followed logically from this that once the sheriff had paid what was in truth the debtor's debt, then the debt was...

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8 See the unnamed case brought before the Exchequer Chamber in 1475, reported in Selden Society, Vol. 64: Select Cases in the Exchequer Chamber (1945), at p. 34:

"[I]f one who is condemned, escapes out of execution, the gaoler may well retake him at any time afterwards that he can find him, and he shall be said to be in execution just as before. But if the party brings his writ of debt against the gaoler, and recovers and has execution against him, then the one condemned can have scire facias to be dismissed."

R.B. Pugh, Imprisonment in Medieval England (Cambridge, 1968), p. 245, says of this case that:

"Any risk that the creditor would "have it both ways" was thus removed."

9 (1787) 2 T.R. 126, at 132. See too Buxton v Home (1692) 1 Show. K.B. 174, at 174, arguendo:

"The debt is as it were transferred; the sheriff is answerable in debt, and he is now become debitor ex delicto . . ."

M. Dalton, Officium Vicecomitum: The Office and Authority of Sheriffs (London, 1623)
S.R. Derham, Subrogation in Insurance Law (Sydney, 1985)
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D. Greer, Compensation for Criminal Injuries (London, 1991)

2) The sheriff's action against the escaped debtor

As has been said, it made no difference to the creditor's right to bring an action against the sheriff, whether the sheriff had or had not colluded in the debtor's escape. However, this issue made a crucial difference to the question of whether or not the sheriff should subsequently be allowed to sue the debtor. Where the sheriff had colluded in the debtor's escape (and the escape was therefore a "voluntary" one in the terminology of the cases), the rule prevailed that he could not subsequently recover from the debtor in respect of any loss which he had occasioned as a result of having had to pay the creditor. The courts' refusal to help sheriffs in these circumstances derived, obviously enough, from the fact that they wished to discourage sheriffs from letting their prisoners go free. Only where the debtor had escaped without the sheriff's consent (and the escape was therefore "negligent" in the terminology of the cases) was the sheriff given any remedies against him.

court would take into consideration all evidence of the debtor's circumstances when undertaking their assessment of damages payable by the sheriff. Thus, for example, in Macrae v Clarke (1866) L.R. 1 C.P. 403, it was held to be a relevant fact that the escaped debtor had a father who was "wealthy and one hundred years old".

It seems to have been a common practice for sheriffs to let imprisoned debtors go free in exchange for a promise of future payment and an undertaking to "save the sheriff harmless" against any action which the creditor might bring against him. The courts steadfastly refused to enforce such promises at law. See e.g. Dive v Maningham (1551) 1 Plow. 60; Rogers v Reeves (1786) 1 T.R. 418.

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i) "Negligent escapes"

If the debtor escaped without the sheriff’s permission, and the sheriff was then obliged to pay either damages or the original debt to the creditor, then the sheriff could subsequently bring an action on the case for misfeasance against the debtor, to recover as tortious damages the amount he had been obliged to pay.\(^{14}\)

Where the sheriff had been obliged to pay the original debt there is no reason in principle why he should not have been able alternatively to bring an action against the debtor for money paid to the debtor’s use. The only authorities found on the question of whether the sheriff might bring an action for money paid are cases in which the debtor’s escape had been voluntary, and the sheriff was denied

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In The Sheriffs of Norwich v Bradshaw (1587) Cro. Eliz. 53 (sub nom. Yarram and Bradshawe’s Case (1587) Godb. 125), the plaintiff sheriffs were curiously held to be entitled to recover damages from an escaped debtor before the sheriffs themselves had been obliged to pay anything to the creditor, despite the debtor’s counsel’s argument (at Godb. 126) that:

"[I]t is uncertain whether ever [the sheriffs] shall be sued or not; and so uncertain how much they shall be damnedified. . . ."
the right to bring an action for money paid for that rea-
on. Where the sheriff was innocent of any collusion in
the escape, however, he should in principle have been able
to bring an action for money paid, under compulsion of law.
It seems most likely, though, that in practice this action
was not used because it would not have allowed the sheriff
to recover from the debtor the costs of recapture in addi-
tion to the amounts he had paid to the creditor; in con-
trast, the sheriff certainly could recoup such amounts as
tortious damages.\footnote{See cases cited below, at p. 395, n. 23.}

Turning to the question of "simple subrogation", it must
be conceded that there is only sparse authority for the
proposition that a sheriff who was obliged to pay damages
to a creditor following the negligent escape of a debtor
was allowed to bring a subrogated action against the debtor
in the creditor's name. Even so, it is worthy of record
that there are some \textit{obiter dicta} to this effect in an ins-
urance case, \textit{Mason v Sainsbury}.\footnote{Thus in \textit{Bastard v Trutch} (1835) 5 N. & M. 109, for
example, the amount of the debt which the sheriff had been
obliged to pay the creditor was £182 6s, but the amount
which the sheriff was subsequently able to recover from the
debtor totalled £225 5s. The difference between these two
sums represented the sheriff's "expenses attending the
escape and retaking".}\footnote{\textit{Bastard v Trutch} (1835) 5 N. & M. 109. The amount
of the debt which the sheriff had been obliged to pay the
creditor was £182 6s, but the amount which the sheriff was
subsequently able to recover from the debtor totalled £225 5s.
The difference between these two sums represented the
sheriff's "expenses attending the escape and retaking".}

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The difference between these two sums represented the
sheriff's "expenses attending the escape and retaking".}
st a third party liable for an insured loss. Wallace, A.-G., who appeared in the case as counsel for the plaintiff insured (in reality, for the insurers who were bringing an action in the insured's name), drew an analogy between the position of an insurer who had paid its insured and the position of a sheriff who had paid damages to the creditor of an escaped debtor. He stated the law to be that:\textsuperscript{18}

"In actions of escape, if the jury give the whole debt [i.e., the amount of the whole debt in damages], the sheriff shall sue the original debtor in the plaintiff's [i.e., the creditor's] name."

Buller, J. held that the insurers in Mason v Sainsbury were entitled to bring an action in the insured's name against the third party responsible for the insured loss, and it appears from his judgment that he was persuaded by Wallace, A.-G.'s analogy, since he remarked that:\textsuperscript{19}

"In the case put of the escape, the recovery is not a satisfaction, and the sheriff may sue."

And similarly, Willes, J., who held to the same effect, remarked that:\textsuperscript{20}

\textsuperscript{18} Ibid., at 62-63, arguendo.
\textsuperscript{19} Ibid., at 65.
\textsuperscript{20} Ibid., at 64.
"I cannot distinguish this from the case of the escape."

As has been discussed, where a sheriff was held liable in an action for debt brought by the creditor, his payment of the original debt would extinguish it, whilst in contrast, the creditor's rights against the debtor were not extinguished where the sheriff was compelled merely to pay damages in an action on the case. For this reason, the remarks made by the counsel and judges in Mason v Sainsbury must be taken to refer to the situation where the sheriff had paid damages, rather than the original debt, to the creditor. 21

ii) "Voluntary escapes"

As a matter of general policy, the courts refused to assist a sheriff wishing to recover from an escaped debtor the money he had been obliged to pay the creditor, where the sheriff had colluded in the debtor's escape. Thus, he was not permitted to bring an action in tort in respect of a

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21 It should be noted that according to Wallace, A.-G.'s formulation, the sheriff's right to take over the creditor's action against the debtor arose only once the sheriff had paid the full amount of the original debt in damages. A similar rule prevails in insurance law, where an insurer may acquire its insured's rights by "simple subrogation" only once the insured has been fully compensated for his loss by the insured's payment: Commercial Union Assurance Co. v Lister (1874) L.R. 9 Ch. App. 483.
voluntary escape; nor was he allowed to bring an action for money paid to the debtor's use.

For the same reason, it was held in Gillott v Aston\(^2\)\(^4\) that a sheriff who had voluntarily allowed a debtor to escape, and who had then been obliged to pay damages for the escape to the creditor, was not entitled to be "simply subrogated" to the creditor's subsisting action against the debtor. Here, a sheriff allowed a debtor in his custody to go free, and the creditor then brought an action against him, and recovered damages. Subsequently, the debtor was retaken, and an action brought against him by the creditor for the original debt. On the face of things, this action was quite legitimate: as has been discussed, the creditor was entitled to sue the debtor on the original debt even though he had already recovered damages from the sheriff. However, the debtor's counsel alleged, and the creditor's counsel then admitted,\(^2\)\(^5\) that in fact the creditor's action had been brought with a view to indemnifying the sheriff. This altered the matter entirely. Patteson, J. held that on these facts:\(^2\)\(^6\)

\(^{22}\) M. Dalton, Officium Vicecomitum: The Office and Authority of Sheriffs (London, 1623), p. 58.


\(^{24}\) (1842) 2 Dow. N.S. 413.

\(^{25}\) Ibid., at 413.

\(^{26}\) Ibid., at 415.
"I must take this to be a writ sued out by the sheriff in the plaintiff's name, but for his own benefit... I take it that the plaintiff has nothing to do with this writ, though nominally it is sued out by him, and the motion must be made against him in the cause; if the writ were sued out at his instance, because he had not got his debt, no doubt the case would be different; but the sheriff obviously is not entitled to proceed as he has done."

In short, he would not allow the sheriff to avoid the policy bar against sheriffs' recovering from debtors whom they had allowed to escape by this devious means. He also criticised the creditor's role in the whole business:

"[K]nowing that these proceedings were taken in his name, [the creditor] should have applied to prevent them from being continued."

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27 Ibid., at 415.
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