

The Normative Basis of Subrogation and Comparative Law: Select Explanations in the Common Law, Civil Law and in Mixed Legal Systems of the Guarantor's Right to Derivative Recourse*

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* The author wishes to express his sincere gratitude to Professor Dr. Reinhard Zimmermann, of the Max-Planck-Institute at Hamburg, and of Regensburg University, for his excellent support and encouragement. The author likewise thanks Professor Lionel D. Smith of McGill for most helpful critical comments on an earlier draft of this Article.

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I. INTRODUCTION AND SCOPE OF THE ARTICLE

A. *Setting the Scene*

1. Common Law, Civil Law, and the Law of Unjust(ified) Enrichment

In the common law world interest in the law of unjust enrichment has, of late, increased. The law of unjust enrichment is the branch of law concerned with the reversal of an enrichment unjustly acquired by one party at the expense of another. It is also called law of restitution. Scholarly research and writing in this area have flourished. The same is true for the case law. It seems settled that unjust enrichment deserves its place as a ground for liability alongside contract and tort. What is called now law of restitution, started mainly in the US, where it culminated in the ground-breaking Restatement of the Law of Restitution¹ in 1937. The (new) doctrine spread over to England. There it has received, after some time of hesitation, lately a very warm welcome. Over the last decades it has seen a great amount of literature being produced. The Restatement (3d) of Restitution and Unjust Enrichment by the American Law Institute

1. ALI (ed.), Restatement of the Law of Restitution, Quasi-Contract and Constructive Trusts 1937 [hereinafter Restatement of the Law of Restitution].

promulgated in 2010 might well increase the interest in the theory of unjust enrichment law in the US.²

In the civil law world liabilities arising from “unjustified enrichment”, French “enrichissement sans cause”, or German “ungerechtfertigte Bereicherung” have (always) been widely accepted. The same is true for the third legal family, i.e., mixed legal systems. In particular the laws of Louisiana and Quebec that incorporated the Civil Code of France (“Code Napoléon”) in modified versions, acknowledge it. As do the systems of Scotland and South Africa.

It is no surprise, therefore, that the law of restitution (to use the traditional name) has received a great deal of attention from comparative lawyers. A lot of fascinating research has been conducted comparing the systems at large, and comparing specific rules within the systems.

2. Lord Diplock’s Dictum in the House of Lords: *Orakpo v Manson Investments Ltd* (1978)

In the common law world one peculiar doctrine of the law of suretyship has been embraced by the unjust enrichment school of thought, in particular: the *doctrine of subrogation*. This rule of equity deals with the three-party situation between recourse-seeking guarantor, paid creditor, and principal debtor. Subrogation, in short, entitles the guarantor after having paid the creditor, to take over all the rights the creditor enjoyed against the principal, and to use them for his recourse interest.

In the context of the law of unjust enrichment the following dictum by the Lord *Diplock* in the case of *Orakpo v Manson Investments Ltd* is quoted most often. The case was decided by the House of Lords in the late 1970s. The quotation reads:

[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 law³

Lately in England also, the *guarantor’s* right to subrogation has been considered to be one of the “remedies in particular cases” which are

2. The attention given in the Restitution Rollout Conference, and the interesting articles based on the conference, published in the fall issue of volume 68 of the *Washington and Lee Law Review* 2011 are indicative of the renewed acknowledgement of this branch of the law.

3. *Orakpo v Manson Investments Ltd* [1978] AC 95, 104 (HL) (emphasis and brackets added).

explicable in unjust enrichment terms. The prime expert on the topic of subrogation, Professor *Charles Mitchell*, e.g., writes on subrogation generally:

It is the writer's view that subrogation should be seen as a restitutionary remedy, and hence that S, a party seeking to be subrogated, should be required to demonstrate that some other party or parties have been unjustly enriched at his expense before the remedy should be made available to him.⁴

And on the surety's right in particular:

Where S's [the surety's] payment has discharged RH's [the creditor's] rights, the question of who is enriched by S's payment is easily answered. PL [the principal debtor] alone is enriched, by the fact that he no longer owes any obligation to RH. Hence, in every case where RH's rights are discharged by S's payment and S is allowed to acquire these by "reviving subrogation", the award of the remedy should be seen as a measure directed against PL's enrichment at S's expense.⁵

This theory tries to replace the classical explanation of subrogation developed in the equitable jurisprudence, mainly in cases like *Craythorne v Swinburne*,⁶ *Aldrich v Cooper*,⁷ and *Hodgson v Shaw*.⁸ The restitutionary theory is meant to describe the *normative basis* of subrogation. It gives an answer to the question, *why* subrogation is provided for, and what its *particular purpose* is.

Notwithstanding the popularity of this restitutionary approach in England it needs to be noted, that not every common law jurisdiction in like manner subscribes to this new theory. Australian courts,⁹ and legal scholars,¹⁰ in particular, have expressed disagreement.

Lord *Diplock's* statement in *Orakpo* suggests, that civil law systems, maybe, give the same answer. It suggests, that they treat subrogation as a remedy directed against unjust enrichment.

4. Mitchell, [1992] LMCLQ 483, 493.

5. *Id.* p. 494; see also Mitchell, *The Law of Subrogation*, 1994, pp. 10 seq, 51 seqq, 54 seqq; Mitchell/Watterson, *Subrogation: Law and Practice*, 2007, para 1.06, 6.03 ff [hereinafter Mitchell, *The Law of Subrogation*]; Mitchell, in: Burrows (ed.), *English Private Law*, II, 2d ed. 2007, para 18.216 ff [hereinafter Mitchell, *English Private Law*]; C. Mitchell/P. Mitchell/St. Watterson (eds.), *Goff & Jones, The Law of Unjust Enrichment*, 8th ed. 2011, para. 39-01 ff.

6. *Craythorne v Swinburne* (1807) 14 Ves Jun 160; 33 ER 482.

7. *Aldrich v Cooper* (1802) 8 Ves Jun 382; 32 ER 402.

8. *Hodgson v Shaw* (1834) 3 My & K 183, 190 seq; 40 ER 70, 73.

9. *Bofinger v Kingsway Group Ltd.* [2009] HCA 44 at 85 ff.

10. Among the critics Mr. Justice Gummow of the High Court of Australia has to be mentioned, who while writing extra-judicially cast doubt on the enrichment related explanation of subrogation as early as 1990. See Gummow, in: Finn (ed.), *Essays on Restitution*, 1990, pp. 47, 69 seq, quoted below, text to footnote 205.

In fact, the doctrine of subrogation in favour of a surety does have its counterparts in civil law countries. Civil law systems offer similar legal figures privileging the recourse-seeking guarantor by making the creditor's rights available to him. And civil law systems traditionally acknowledge the principle against unjust enrichment in a more liberal way than the common law does. It, therefore, suggests itself, to take Lord *Diplock* seriously. It is to be inquired, if, in fact, civil law systems classify their version of subrogation as part of the law of unjust enrichment. This suggestion is the starting point of this article. The justifications given for subrogation in select civilian systems will be explored.

B. *What Is Derivative Recourse, and Why Is It Attractive?*

Subrogation is one application of derivative recourse. It is a peculiar remedy to satisfy the recourse interest of the surety after payment. Subrogation entitles the guarantor to take over all the rights of the creditor against the principal, mainly securities, and to use these rights acquired from the creditor for recourse. Because the guarantor derives his position *vis-à-vis* the principal from the creditor, this route to reimbursement might be named *derivative recourse*, or (in German) "Derivativregreß."¹¹ This term distinguishes subrogation from the original right of reimbursement the guarantor has against the principal debtor. Most often, the surety possesses such an original right of recourse. Such a right might be of statutory origin, such as in art. 3047 Louisiana Civil Code. It might also be contractual, restitutionary, or, e.g., in German law, based on *negotiorum gestio*.

Why then is there need for another means to recourse? There are several reasons why the guarantor may desire to exercise the rights which the creditor formerly enjoyed. Maybe the debtor is insolvent and the right of the creditor enjoys a special priority, which the direct right lacks. Or the creditor had already obtained judgment against the principal, and

11. Cf. JA Dieckmann, *Der Derivativregreß des Bürgen gegen den Hauptschuldner im englischen und deutschen Recht. Eine rechtsvergleichend-historische Untersuchung*, Dissertation Regensburg (2003) 1 seq et passim [hereinafter Dieckmann, *Der Derivativregreß des Bürgen*]; JA Dieckmann, *Scots Influence on English Law: The Guarantor's Right to Derivative Recourse (Subrogation)*, (2004) 8 Edinburgh L. Rev. 329 [hereinafter Dieckmann, *Scots Influence on English Law*]; Sonja Meier, *Gesamtschulden: Entstehung und Regress in historischer und vergleichender Perspektive*, 2010, p. 389 et passim. Kuhlmann, *Rückgriffsgrundlagen bei Gesamtschuld, Bürgschaft und Schadensversicherung in Deutschland, England und Schweden*, Dissertation Berlin, 2005, pp. 287 seqq prefers "Derivativrückgriff"; some authors use "Zessionsregress"; cf. Medicus, in: Medicus/Seiler (eds.), *Festschrift für Max Kaser zum 70. Geburtstag*, 1976, pp. 391 seqq.

the surety wants to avail himself of it. One of the clearest examples is where there is a security given by the principal debtor to the creditor. Most instances of claimants seeking subrogation involve the transfer of securities. If the guarantor is able to take advantage of such a security, his prospects of reimbursement are significantly better.

C. *The Varieties of Derivative Recourse, and Comparative Law*

The law of subrogation, and its civil law counterparts, is in many ways a matter of diversity.

1. Instances of Subrogation

In English law there are several different situations, in which a remedy called subrogation is available. Not only sureties are benefited by this doctrine. Likewise civil law systems do not only grant the surety derivative recourse. Several other instances of *cessio legis* are known, e.g., in German law.¹² Not only the surety, but other co-obligants and interested parties paying someone else's debt are offered subrogation rights under the provisions of the Code Napoléon.¹³ This variety is outside the scope of the present article, which deals with guarantees only.

2. Varieties in Legal Technique, Content, Language

The surety's right to derivative recourse is not restricted to the common law world. Forms of derivative recourse were granted in classical Roman law,¹⁴ in the *ius commune*¹⁵ on the European continent, from whence it was received into the different civil codes of Prussia,¹⁶

12. See von Koppenfels-Spies, *Die cessio legis*, 2006.

13. Cf. only Art. 1251 French Code Civil; Art. 1825 seqq Louisiana Civil Code (rev. 1985) [henceforth, if not otherwise stated, references are to the code revisions effective in 1985].

14. Paul. D. 46, 1, 36; Paul. D. 18, 4, 6; Mod. D. 46, 3, 76; Kaser, *Das römische Privatrecht*, I, 2d ed. 1971, § 155 II 5; Wesener, *Labeo* 11 (1965) 341, 347 seq; Hasenbalg, *Die Bürgschaft des gemeinen Rechts*, 1870, p. 397; K. Roth, *Das Rückgriffsrecht des Bürgen*, 1903, pp. 28 seq; Buckland/McNair, *Roman Law and Common Law, A Comparison in Outline*, 2d ed. 1952, p. 327; Dieckmann, *Der Derivatvregreß des Bürgen*, *supra* note 11, pp. 41 seqq.

15. ROHG 4, 325, 332 (Imperial Supreme Court in Commercial Matters); ROHG 21, 209, 213; ROHG 19, 383, 386 = Seufferts Archiv 32 Nr 138, p. 168; RGZ 3, 183, 184 (Imperial Supreme Court); RGZ 4, 185, 190 seq; RGZ 18, 235, 237, 239; Hasenbalg, *supra* note 14, pp. 401 seqq; Mühlenbruch, *Die Lehre von der Cession*, 3d ed. 1836, pp. 412 seq; Puchta, *Pandekten*, 10th ed. 1866, § 405; Windscheid, *Lehrbuch des Pandektenrechts*, II, 9th ed. 1906, § 481, 2 n.7, 8; Goldschmidt, *ZHR* 14 (1870) 397, 415 seqq; Goldschmidt, *JhJb* 26 (1888) 345, 374 seqq, 380; Dieckmann, *Der Derivatvregreß des Bürgen*, *supra* note 11, pp. 78 seqq.

16. Allgemeines Landrecht für die preußischen Staaten (ALR) I 14 §§ 338 seqq (Prussian General Land Law); Königliches Obertribunal ([Prussian] Royal Superior Court), vol 60, p. 102 seqq; ROHG 18, 70, 75; Förster/Eccius, *Preußisches Privatrecht* II, 7th ed. 1896, § 144 V, p. 408

France,¹⁷ Baden,¹⁸ Austria,¹⁹ and Germany²⁰ alike. It is also known in the mixed legal systems of Quebec,²¹ Louisiana,²² South Africa,²³ and Scotland.²⁴ All these systems provide a form of derivative recourse that is functionally equivalent to the English doctrine of subrogation.

Equitable subrogation and its civilian counterparts are interesting objects for comparative law. Although they have a lot in common, they differ in detail. There are several varieties. Legal techniques used in order to bring about derivative recourse differ.²⁵ Not identical are the exact content and scope of the variants.

The same is true for the vocabulary. *Ius commune*, and Scots law use the term “beneficium cedendarum actionum”, which was unknown in classical Roman law. The Prussian law called its form of derivative recourse “Eintrittsrecht”²⁶ (“right to step into”). The French Civil Code uses the expression distinguishing between “subrogation légale” and “subrogation conventionnelle.” The Louisiana Civil Code translates this distinction as “subrogation by operation of law” and “conventional subrogation.” The statutory terms in current German law is dryly “Übertragung einer Forderung kraft Gesetzes” (transfer of a claim by

and I, 7th ed. 1896, § 99 I b, p. 637; Schollmeyer, *Der gesetzliche Eintritt in die Rechte des Gläubigers*, 1877, p. 62.

17. Art. 2029, 1251 Code Civil, Cabrillac/Mouly, *Droit des suretés*, 2d ed. 1993, No. 231; Martey/Raynaud/Jestaz, *Droit civil, Les suretés la publicité foncière*, 2d ed. 1987, No 602; p. 76.

18. Sätze 1251, 2029 Badisches Landrecht (Baden land law, i.e., law applicable in the land of Baden), see K. Kah, *Das badische Landrecht*, 1860, pp. 381 seqq; W. Behaghel, *Das badische bürgerliche Recht und der Code Napoléon mit besonderer Rücksicht auf die Bedürfnisse der Praxis*, Zweiter Band, 1892, pp. 72 seqq; Baden Court of Appeal (Großherzoglich Badisches Oberhofgericht) *Jahrbücher des Großherzoglich Badischen Oberhofgerichts*, 13. Jahrgang neue Folge, 1854, XVIII, E, pp. 153 seqq. The Großherzogtum Baden took over the French civil code in a translated, and amended version. The land law governed in the province of Baden from 1810 to 1900.

19. § 1358 Allgemeines Bürgerliches Gesetzbuch (ABGB); Schwimann-Mader, *ABGB VII*, 2d ed. 1997, § 1358 para. 9 seqq; Baier, *ÖJZ* 1967, 538; Reischauer, *ÖJZ* 1982, 287, 288 seqq.

20. §§ 774 I, 412, 401 I BGB; BGHZ 110, 41, 43; BGHZ 130, 101, 107; Staudinger-Horn, 13th ed. 1997, § 774 para. 1 seqq; MK-Habersack, 5th ed. 2009, § 774 para. 1 seqq.

21. Art. 1651 seqq Civil Code of Quebec.

22. Art. 1825 seqq, 1829, 3047, 3048 Louisiana Civil Code (eff. 1985); art. 697 Louisiana Code of Civil Procedure; Litvinoff, (1990) 50 *La. L. Rev.* 1143 seqq.

23. Visser, *Unjustified Enrichment*, 2008, p. 146 seq; Jacques H. du Plessis, *The South African Law of Unjustified Enrichment*, 2012, pp. 322 ff.

24. *Sligo v Menzies* (1840) 2 D 1478, 1485 seqq; *Thow's Trustee v Young* (1910) SC 588, 596; Gloag/Irvine, *Law of Rights in Security*, 1897, pp. 803 seq; Gloag/Henderson, *The Law of Scotland*, 10th ed. 1995, 20.15 seq; Clark, in: *Stair Memorial Encyclopedia, The Laws of Scotland*, III, 1994, para. 929.

25. For a detailed comparative account see Dieckmann, *Der Derivativreß des Bürgen*, *supra* note 11, pp. 497–506.

26. RGZ 3, 34, 42, 44; Schollmeyer, *supra* note 16, pp. 62, 76 n.1.

virtue of statute), and “gesetzlicher Forderungsübergang” (assignment of claim by operation of statute). English law speaks of the “assignment”²⁷ of the security, and uses the expression the guarantor stands “in the place of,”²⁸ or “in the shoes of”²⁹ the creditor. The term “subrogation” only became used in the Common Law world during the 19th century (mainly and first in the US),³⁰ but it is now the accepted term also in England.³¹

D. Scope of the Article: The Variety of Explanations of the Normative Basis in Comparative Law

Of all the varieties of derivative recourse the most peculiar one is the *variety of explanations of its normative basis*. There are various views as to *why* derivative recourse is granted, and what its purpose is. This latter variety is the subject matter of the present survey. The

27. *Ex parte Crisp* (1744) 1 Atk 133, 135; 26 ER 87, 88; *Hodgson v Shaw* (1834) 3 My & K 183, 195; 40 ER 70, 75; *Newton v Chorlton* (1853) 10 Hare 646, 656, 660 seq; 68 ER 1087, 1091, 1093; *Duncan, Fox, & Co, & Robinson & Co v North and South Wales Bank* (1880-81) 6 App Cas 1, 19 (HL); *China & South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536, 545 (PC).

28. *Wright v Morley* (1804) 11 Ves Jun 12, 22 seq; 32 ER 992, 996; *Boulton v Stubbins* (1810) 18 Ves Jun 20, 21; 34 ER 225; *Newton v Chorlton* (1853) 10 Hare 646; 68 ER 1087; *Gedye v Matson* (1858) 25 Beav 310, 311; 53 ER 655; *Midland Banking Co v Chambers* (1869) 4 Ch. App. 398, 400; *In re Sass. Ex parte National Provincial Bank of England, Ltd* [1896] 2 Q.B. 12, 15.

29. *Hodgson v Shaw* (1834) 3 My & K 183, 193; 40 ER 70, 74; *Newton v Chorlton* (1853) 10 Hare 646, 656; 68 ER 1087, 1091; *In re Parker. Morgan v Hill* [1894] 3 Ch. 400, 404; *Barclays Bank Ltd v T.O.S.G. Trust Fund Ltd* [1984] AC 626 (CA) 635, 643, 644, per Oliver LJ; *Am. Sur. Co. v Bethlehem Nat'l Bank* (1941) 314 U.S. 314, 318 (U.S. Supreme Court), per Frankfurter J; *Powell's Executors v White* (1840) 11 Leigh 309, 322; Virginia Reports (1730-1880) 636, 641 (Virginia Court of Appeals). Andrews/Millett, *Law of Guarantees*, 5th ed. 2008, para. 11.017; Putnam, *Suretyship*, 1981, p. 88; McGuinness, *The Law of Guarantee*, 2d ed. 1992, para. 7.17; Birks, *An Introduction to the Law of Restitution*, 1985/1989, p. 94.

30. Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, I, 2d ed. 1839, § 499, pp. 402 seqq; Dixon, *Substituted Liabilities. A Treatise on the Law of Subrogation*, 1862; Harris, *A Treatise on the Law of Subrogation*, 1889; Sheldon, *The Law of Subrogation*, 1882; *Lumpkin v Mills* (1848) 4 Georgia Reports 343, 344 (Supreme Court of Georgia); *Mathews v Aikin* (1848) 1 NY 595, 597, 599, 604 f (New York Court of Appeals).

31. *In re Butler's Wharf Ltd* [1995] 2 BCLC 43, 50, 52; *Castellain v Preston* (1883) 11 QBD 380 (CA) 387 seq, 390 seq, 393; *King v Victoria Ins. Co Ltd* [1896] AC 250, 254 (JC); *Yorkshire Ins. Co Ltd v Nisbet Shipping Co Ltd* [1962] 2 Q.B. 330, 339 seq; *Hobbs v Marlowe* [1978] AC 16, 37 (HL); *Orakpo v Manson Invs. Ltd* [1978] AC 95, 104 (HL); *Esso Petroleum Co Ltd v Hall Russell & Co Ltd; The Esso Bernicia* [1989] 1 AC 643 (HL, Sc) 661, 663, 665, 668; *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) 330, 334 seq, 338; Jenks' *English Civil Law*, I, 4th ed. 1947, para. 640; Putnam, *supra* note 29, pp. 82 seqq; Andrews/Millett, *supra* note 29, para. 11.017 seqq; O'Donovan/Phillips, *The Modern Contract of Guarantee*, English ed. 2003, para. 12-254 seqq; Goode, *Commercial Law*, 2d ed. 1995, p. 836; Goff/Jones, *The Law of Restitution*, 7th ed. 2007, para. 3-001 seqq, 133 seqq; Mitchell, *The Law of Subrogation*, *supra* note 5, pp. 10 f, 51 ff, 54 ff; Mitchell/Watterson, *supra* note 5, para. 1.06, 6.03 ff; Mitchell, *English Private Law*, *supra* note 5, II, 2d ed. 2007, para. 18.216 ff; Ali, *Marshalling of Securities, Equity and the Priority Ranking of Secured Debt*, 1999, para. 4.34 seqq.

different positions as to the normative basis of derivative recourse in respective legal systems shall be examined.

The unjust enrichment approach has not been the orthodox view in the common law world for a very long time. In the US generally, and not restricted to subrogation, unjust enrichment has been acknowledged as a basis for liabilities alongside contract, and tort, ever since the writings of eminent lawyers like Dean *Ames*, *William A. Keener*, and *Roscoe Pound*. To a certain degree *Joseph Story* already acknowledged its existence. In England the detection of the unjust enrichment principle has to be dated later. The historical development of the restitutionary thesis of subrogation is of interest, and will be described briefly.

The breakthrough of the unjust enrichment approach came in the aforementioned Restatement of Restitution of 1937. It is no surprise, that the Restatement (3d) of Restitution and Unjust Enrichment which was adopted by the American Law Institute in May 2010, likewise accepts the unjust enrichment theory. The Restatements do not take into serious consideration the alternative explanation which, e.g., Louisiana law offers.

The purpose of the present article is mainly to show the diversity of explanations. The legal systems looked at are *ius commune*, English law, Louisiana law, Scots law, and current German law. Again: The article is only concerned with the *guarantor's* right to subrogation. Other instances of subrogation are not included. As a preliminary two forms of derivative recourse shall be explained briefly: the English and the German version. This serves the purpose of proving that both legal families share the category of derivative recourse providing for functionally equivalent rules. The article then proceeds to set out the different explanations subrogation and its equivalents in select jurisdictions.

The survey features a peculiar legal figure provided for by “purely” civilian systems, as well as mixed legal systems and by the common law jurisdictions alike.

II. DERIVATIVE RECOURSE IN ENGLISH AND GERMAN LAW—IN A NUTSHELL

A. *Derivative Recourse in English Law: Case Law, Corrected by Statute Law*

1. (Deficient) Case Law

Although the first form of derivative course in England can be traced back to Magna Charta,³² its main source is the case law of the English Courts of Chancery. Subrogation has its foundation in equitable principles. The second legal source in England is the statutory provision of Mercantile Law Amendment Act 1856, s.5. The first prerequisite of subrogation in England is the existence of a surety relationship. A third-party payor is not entitled to subrogation.³³ The creditor must be fully paid the debt secured.³⁴ Partial payment will not suffice. The surety need not know of the existence of the security.³⁵ A contractual provision between creditor and guarantor is not necessary.

The legal position most often desired by the guarantor is to obtain securities granted by the principal. The main legal consequence of subrogation is that the creditor is obliged to transfer any such security held in respect of the guaranteed debt.³⁶ The guarantor is entitled to every

32. On which, see *United States v Ryder* 110 U.S. 729, 733 (1884); McKechnie, *Magna Carta, A Commentary on the Great Charter of King John*, 1914, p. 223; Crackanthorpe QC *arguendo* in *Re Lord Churchill. Manisty v Churchill* (1888) 39 Ch. D 174, 175; Dieckmann, *Der Derivatvregreß des Bürgen*, *supra* note 11, pp. 109 seqq.

33. Friedmann, (1983) 99 LQR 534, 556; Mitchell, *The Law of Subrogation*, 5, p. 163; Anon., (1937-38) 24 Va. L. Rev. 771; *Prairie State Nat'l Bank of Chi. v United States* (1896) 164 U.S. 227 (U.S. Supreme Court) 231 mN; *Campbell Auto Fin. Co v Warren* [1933] 4 DLR 509, 516 (Ontario Court of Appeal).

34. *Ex parte Rushforth* (1804) 10 Ves Jun 409, 420; 32 ER 903, 907, per Lord Eldon LC; *In re Sass. Ex parte Nat'l Provincial Bank of England, Ltd* [1896] 2 Q.B. 12, 15; *In re Fenton. Ex parte Fenton Textile Ass'n, Ltd.* [1931] 1 Ch. 85/95, 115 (CA); *Barclays Bank Ltd v T.O.S.G. Trust Fund Ltd* [1984] AC 626, 643 (CA); [1984] AC 664 (HL) 675, per Lord Templeman; *China & South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536, 545 (PC); *Jenkins v Nat'l Sur. Co.* (1928) 277 U.S. 258, 266 (U.S. Supreme Court); Andrews/Millett, *supra* note 29, para. 11.18; Langmaid, (1934) 47 Harvard L. Rev. 976, 999; W. Williams, (1887-88) 1 Harvard L. Rev. 326, 329; Sheldon, *supra* note 30, § 127, p. 146, § 128, p. 147.

35. *Craythorne v Swinburne* (1807) 14 Ves Jun 160, 162; 33 ER 482, 483; *Mayhew v Crickett* (1818) 2 Swans 185, 191; 36 ER 585, 587; *Newton v Chorlton* (1853) 10 Hare 646, 649 seq; 68 ER 1087, 1088 seq; *Pearl v Deacon* (1857) 24 Beav 186, 191; 53 ER 328, 330; *Watts v Shuttleworth* (1860) 5 H & N 235, 249; 157 ER 1171, 1177; *Wulff v Jay* (1872) LR 7 Q.B. 756, 764; *Ward v Nat'l Bank of N.Z.* (1883) 8 App Cas 755, 765 (PC).

36. *China & South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536, 545 (PC); *Duncan, Fox & Co, & Robinson & Co v N. & S. Wales Bank* (1880-81) 6 App. Cas. 1, 19 (HL).

“benefit of securities.”³⁷ Subrogation, however, is not restricted to securities.

The surety is also entitled to demand transfer of a judgment obtained by the creditor against the principal.³⁸ Finally, derivative recourse also embraces the principal debt itself. The surety can take over the right to proof,³⁹ and any privilege of the claim.⁴⁰ Furthermore, the surety enjoys the “right to pay off and sue.”⁴¹ The guarantor is thus enabled to pay the creditor, take over his position and seek recourse. Subrogation may serve as the basis for recourse,⁴² when there is no other remedy available.

A side effect of derivative recourse are the rules concerning “discharge through loss of securities” and through giving time. If the creditor loses a security, it cannot be taken over by the surety. In order to prevent the deterioration of derivative recourse, the surety is discharged

37. *Wright v Morley* (1804) 11 Ves Jun 12, 22 seq; 32 ER 992, 996; *Yonge v Reynell* (1852) 9 Hare 809, 818; 68 ER 744, 746; *Newton v Chorlton* (1853) 10 Hare 646, 649, 650 seq, 656 seq; 68 ER 1087, 1088 seq, 1091; *Pearl v Deacon* (1857) 24 Beav 186, 191 seq; 53 ER 328, 330; *Strange v Fooks* (1863) 4 Giff 408, 412, 414 seq, 415 seq; 66 ER 765, 767 seqq; *Rainbow v Juggins* (1880) 5 QBD 422, 426 (CA); *Duncan, Fox & Co, & Robinson & Co v N. & S. Wales Bank* (1880-81) 6 App. Cas. 1, 15 (HL); *In re Sherry London & Cnty. Banking Co v Terry* (1883) 25 Ch. D 692, 701 (CA); *Taylor v Bank of New S. Wales* (1886) 11 App Cas 596, 603 (PC).

38. *Phillips v Dickson* (1860) 8 CB (NS) 391, 396; 141 ER 1217, 1219; *Dale v Powell* (1911) 105 LT 291, 292, 293; *Embling v McEwan* (1872) 3 VR (L) 52, 53 (Supreme Court Victoria); Andrews/Millett, *supra* note 29, para. 11.21.

39. *Thornton v McKewan* (1862) 1 H & M 525, 529 seq; 71 ER 230, 232; *Midland Banking Co v Chambers* (1869) 4 Ch. App. 398, 400, 402; *Gray v Seckham* (1872) 7 Ch. App. 680, 684; *In re Sass. Ex parte Nat'l Provincial Bank of Eng., Ltd* [1896] 2 Q.B. 12, 15; *In re Fenton, Ex parte Fenton Textile Ass'n, Ltd* [1931] 1 Ch. 85, 93, per Luxmoore J; *Barclays Bank Ltd v T.O.S.G. Trust Fund Ltd* [1984] AC 626 (CA) 643 seq, per Oliver LJ; *In re Butler's Wharf Ltd* [1995] 2 BCLC 43, 50; *Ex parte Marshall* (1752/53) 1 Atk 129, 131; 26 ER 85, 86; *Ex parte Turner* (1796) 3 Ves Jun 243; 30 ER 991; *Ex parte Gifford* (1802) 6 Ves Jun 805, 807; 31 ER 1318, 1319; *Ex parte Rushforth* (1804) 10 Ves Jun 409, 414, 420; 32 ER 903, 905, 908; *Payley v Field* (1806) 12 Ves Jun 435, 443 seqq; 33 ER 164, 168; Andrews/Millett, *supra* note 29, para. 13.8.

40. *In re M'Myn. Lightbown v M'Myn* (1886) 33 Ch. D 575, 578; *In re Lord Churchill, Manisty v Churchill* (1888) 39 Ch. D 174, 176 seq; *In re Lamplugh Iron Ore Co, Ltd* [1927] 1 Ch. 308, 311 seq; *United States v Nat'l Sur. Co.* (1920) 254 U.S. 73, 75 (U.S. Supreme Court); Andrews/Millett, *supra* note 29, para. 11.021.

41. *See Pooley v Harradine* (1857) 7 El & Bl 431, 441 seq; 119 ER 1307, 1311; *Newton v Chorlton* (1853) 10 Hare 646, 652; 68 ER 1087, 1089; *Duncan, Fox & Co, & Robinson & Co v N. & S. Wales Bank* (1880-81) 6 App. Cas. 1, 18 (HL); *In re Melton. Milk v Towers* [1918] 1 Ch. 37, 59 f (CA); *Rouse v Bradford Banking Co* [1894] 2 Ch. 32, 75 (CA); *Drager v Allison* 19 DLR (2nd) 431, 435 seq, per Cartwright J (Supreme Court of Canada); Putnam, *supra* note 29, p. 80; Loyd, (1917) 66 U. Penn. L. Rev. 40, 64; Harris, *supra* note 30, § 18, p. 24; Arnold, (1925-26) 74 U. Penn. L. Rev. 36, 50; see, however, the critique offered by Cardozo, *The Nature of the Judicial Process*, 1921, reprint 1967 p. 152 seqq.

42. *Parsons & Cole v Briddock* (1708) 2 Vern 608; 23 ER 997 (on which see *Wright v Morley* (1804) 11 Ves Jun 12, 22 seq; 32 ER 992, 996 per Sir William Grant MR); *Hodgson v Shaw* (1834) 3 My & K 183, 195; 40 ER 70, 75.

pro tanto from his obligation under the guarantee in such a case.⁴³ So, “laches”⁴⁴ frees the guarantor from his obligation to pay. The same happens when the creditor gives time to the principal.⁴⁵ For extending time for payment might infringe the surety’s right to pay off and sue in the creditor’s name.

2. The Deficiency Correcting Statute: Mercantile Law Amendment Act 1856, s. 5

Equitable subrogation is supplemented by a statutory provision codifying the law, and correcting a technical mischief that occurred in the case law of the early 19th century in England.

Although equity enabled the surety to take over securities at some point in the development of the law the surety’s position was weakened due to a very technical application of the law. The surety’s payment was considered to *discharge* the main claim, and a discharged claim, it was held, could not be taken over. The leading case of the era on the decline

43. *Swire v Redman* (1876) 1 QBD 536, 541 seq, per Cockburn CJ; *Taylor v Bank of New S. Wales* (1886) 11 App. Cas. 596, 599 seqq (PC); *China & South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536, 544 seqq (PC); *Pearl v Deacon* (1857) 24 Beav 186, 191; 53 ER 328, 330; *Watts v Shuttleworth* (1860) 5 H & N 235, 247 seqq; 157 ER 1171, 1176 seq; *Pledge v Buss* (1860) John 663, 666 seqq; 70 ER 585, 586 seq; *Strange v Fooks* (1863) 4 Giff 408, 412, 414 seq, 415 seq; 66 ER 765, 767 seqq; *Wulff v Jay* (1872) LR 7 Q.B. 756, 762 seq; *Rainbow v Juggins* (1880) 5 QBD 422 (CA) 426, per Brett LJ; *Forbes v Jackson* (1882) 19 Ch. D 615, 622; *In re Sherry. London & County Banking Co v Terry* (1883) 25 Ch. D 692 (CA) 702, per Earl of Selborne LC, 705, per Lord Coleridge LCJ; *Taylor v Bank of New S. Wales* (1886) 11 App. Cas. 596, 599 seqq (PC); *Dale v Powell* (1911) 105 LT 291, 294; *China & South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536, 544 seqq (PC); *Law v E. India Co* (1799) 4 Ves Jun 824, 829 seq; 31 ER 427, 430; *Mayhew v Crickett* (1818) 2 Swans 185, 189, 191; 36 ER 585, 587; *Capel v Butler* (1825) 2 Sim & St 457, 462; 57 ER 421, 423; *Williams v Price* (1824) 1 Sim & St 581, 587; 57 ER 229, 231 seq; *Ex parte Mure* (1824) 2 Cox 63, 74 seqq; 30 ER 30, 35; *Gen. Steam Navigation Co v Rolt* (1860) 6 CB (NS) 601, 604 seq; 141 ER 591, 593; *Williams v Frayne* [1937] 58 CLR 710, 718, per Latham CJ, 738, per Dixon J, 741, per McTiernan J (High Court of Australia); *Nat’l Bank of N.Z. Ltd v Chapman* [1975] 1 NZLR 480, 485 (Supreme Court). Andrews/Millett, *supra* note 29, para. 9.41 seqq, 11.18; Glanville Williams, *Joint Obligations*, 1949, p. 125.

44. *Wulff v Jay* (1872) LR 7 Q.B. 756, 762, 763; *Newton v Chorlton* (1853) 10 Hare 646, 660; 68 ER 1087, 1093; *Polak v Everett* (1876) 1 QBD 669, 675 (QBD); McGuinness, *supra* note 29, para. 7.14; Langan, *The Principles of Subrogation and Contribution*, 1967, p. 40.

45. *Swire v Redman* (1876) 1 QBD 536, 541 seq, per Cockburn CJ; *Pooley v Harradine* (1857) 7 El & Bl 431, 434, 438, 441 seq; 119 ER 1307, 1308, 1310 seq; *Strong v Foster* (1855) 17 CB 201, 219, 221; 119 ER 1047, 1054 seq; *Polak v Everett* (1876) 1 QBD 669, 673 f (QBD), *aff’d*, (1876) 1 QBD 678 (CA); *Rouse v Bradford Banking Co* [1894] 2 Ch. 32 (CA) 75, per A.L. Smith LJ; [1894] AC 586 (HL) 592 seq, per Lord Herschell LC; *Perry v Nat’l Provincial Bank of Eng.* [1910] 1 Ch 464 (CA) 471, per Cozens-Hardy MR; *Mahant Singh v U Ba Yi* [1939] AC 601, 606 f (JC) per Lord Porter; *Rees v Berrington* (1795) 2 Ves Jun 540, 543 seq; 30 ER 765, 767; *Samuell v Howarth* (1817) 3 Mer 272, 278; 36 ER 105, 107; *Eyre v Bartrop* (1818) 3 Madd 221, 225; 56 ER 491, 492; *Watts v Shuttleworth* (1861) 7 H & N 353, 355; 158 ER 510, 511; Andrews/Millett, *supra* note 29, para. 11.003; Harris, *supra* note 30, § 18, p. 24; Cardozo, *supra* note 41, p. 152 seqq.

of subrogation is *Copis v Middleton*.⁴⁶ This mischief was corrected by the legislative intervention, using comparative law as a means. The technical problem was overcome by adjusting the English law to the more precise rule in the law of Scotland, that had dealt with the problem of concurrence of solution differently. Mercantile Law Amendment Act 1856, s. 5 reads:

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 to a trustee for him, every judgment, specialty or other security 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 person 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.

A similar mischief, it seems, has not appeared in most jurisdictions in the US. Apparently the juridical cul-de-sac would have been avoidable. The technical problem of concurrence of solution was overcome in the US case law⁴⁷ without need for statutory intervention.⁴⁸

46. *Copis v Middleton* (1823) Turn & R 224; 37 ER 1083; see also *Gammon v Stone* (1749) 1 Ves Sen 339; 27 ER 1068, *Woffington v Sparks* (1754) 2 Ves Sen 569; 28 ER 363.

47. *Powell's Executors v White* (1840) 11 Leigh 309, 328 seqq; Virginia Reports (1730-1880) 636, 643; *Lumpkin v Mills* (1848) 4 Georgia Reports 343, 347 (with a critical assessment of the English cases). For a criticism of the English case law see the comments by Anon., (1925-26) 35 Yale LJ 484, 485 n 5 ("ill-advised rule"), Anon., (1922-23) 21 Michigan LR 795 ("absurd results"); Sheldon, *supra* note 30, § 135, p. 156 ("[T]echnical reasoning [was] never entirely satisfactory."); Williston, *The Law of Contracts*, II, 1929, § 1268.

48. Cf. only *United States v Ryder* 110 US 729, 734 (1884); *Lumpkin v Mills* (1848) 4 Georgia Reports 343 (Supreme Court of Georgia); *Powell's Executors v White* 11 Leigh 309; Virginia Reports (1730-1880) 636 (Virginia Court of Appeals, 1840).

*B. Derivative Recourse in Modern German Law: Statute Law,
Corrected by Case Law*

1. (Deficient) Statutory Provisions

The functional equivalent to subrogation in Germany centers around the statutory provision of § 774 subsection 1 BGB, that translates:

As far as the guarantor satisfies the creditor, the creditor's claim against the principal debtor is transferred to him. The transfer cannot be put forward to the detriment of the creditor. Defences of the principal debtor based on a legal relationship between him and the guarantor remain unaffected.

Upon the guarantor's payment the principal claim is transferred automatically. In procedural terms, the claim fully becomes the guarantor's, who may sue in his own name. He can also take over a judgment the creditor had obtained against the principal, § 727 ZPO.⁴⁹ Most advantageous for any recourse-seeking surety are securities. Along with the principal claim the guarantor acquires *ipso iure* the security rights Hypothek, Pfandrecht, and Schiffshypothek (mortgage on land, pledge, and mortgage on ships). This consequence is laid down in § 401 subsection 1 BGB. All these rights are "accessory"; they "follow" the claim whenever it is transferred. Automatic transfer of the principal debt leads to transfer of the securities to the guarantor by operation of law.⁵⁰

§ 401 BGB translates:

Transfer of accessory, and privileged rights

- (I) Along with the claim assigned are mortgages on land, mortgages on a ship, or pledges, existing for them, and rights from a guarantee procured for it, transferred to the new creditor.
- (II) A privilege attached to the claim, in case of execution or insolvency proceedings, may be invoked by the new creditor.

2. Deficiency Correcting Case Law

So far, so good. Unfortunately, from the mere look at the codal provisions in the statute book a true statement of the law cannot be inferred. For in German law, most of today's securities are *not* accessory but abstract from the claim they secure; the statute is insufficient. As a matter of fact, in modern times these abstract securities are used much more often, and are widely preferred.⁵¹ Non-accessory rights like, e.g.,

49. Civil Procedure Ordinance.

50. RGZ 60, 191, 193; RGZ 75, 271, 273; BGHZ 110, 41, 43; BGHZ 130, 101, 107; Staudinger-Horn, *supra* note 20, § 774 paras. 19-20; Reinicke/Tiedtke, *Bürgschaftsrecht*, 2d ed. 2000, para. 357; Dieckmann, *Der Derivativreß des Bürgen*, *supra* note 11, pp. 349 seqq.

51. On the main reasons see Stürner, FS Serick, 1992, 377, 381.

Sicherungsgrundschuld,⁵² do not follow the main debt. Hence, if the guaranteed claim is also secured by a Sicherungsgrundschuld, the paying guarantor does not acquire the latter in direct application of §§ 774, 412, 401 BGB.

The omission of the statutory rules is corrected by case law extending derivative recourse to abstract security rights. The prevailing view of the cases is, that on his being paid the creditor has to convey these rights to the surety.⁵³ The different lines of argument are referred to below.

A similar rule to the rule of discharge through loss of securities is contained in § 776 BGB. When the creditor knowingly gives away a security, the guarantor is discharged in the amount.⁵⁴

3. The Systematic Context Within the Civil Code

a. The Law of Suretyship, and Assignment of Claims

The systematic context of the rules on derivative recourse is for once the law of suretyship within the second book of the BGB on the law of obligations. However, the *cessio legis* of § 774 BGB has to be read together with the rule of § 412 BGB. The latter paragraph renders applicable most provisions for assignment of claims to any *cessio legis*. So all legal consequences that take place in the case of an assignment also take place in favour of the paying guarantor. Section 774 I BGB is a true “assignment by operation of law.”

b. The Law of Unjustified Enrichment (Bereicherungsrecht)

The *functional*⁵⁵ equivalent to the law of restitution is *Bereicherungsrecht*, or *Recht der ungerechtfertigten Bereicherung*. German law has developed a very detailed law of unjustified enrichment.

52. The Sicherungsgrundschuld is an abstract mortgage on land. It is a most flexible security vehicle, and widely used. *See generally* Clemente, *Recht der Sicherungsgrundschuld*, 4th ed. 2008; and J.A. Dieckmann, *NZM* 2008, 865, 866.

53. BGHZ 42, 53, 56 seq; BGHZ 78, 137, 143; BGHZ 92, 374, 378; BGHZ 110, 41, 43; BGHZ 130, 101, 107; BGHZ 136, 347, 352; BGHZ 144, 52, 54 seq; BGH *WM* 2000, 1141, 1144.

54. BGHZ 78, 137, 143; BGHZ 136, 347, 352; BGHZ 144, 52, 54 seq; BGH *WM* 1960, 371, 372 seq; BGH *WM* 2000, 1141, 1144; Staudinger-Horn, *supra* note 20, § 776 para. 10; Dieckmann, *Der Derivativregeß des Bürgen*, *supra* note 11, pp. 441 seq, 398 seqq.

55. The *nominal* equivalent to the law of restitution, *Restitutionsrecht*, or *Rücküberstattungsrecht*, is the law concerned with restitution property acquired from Jewish citizens under the Unrechtsregime of Nazi Germany. Statutory provisions are, e.g., Gesetz Nr. 9 der US Militärregierung (US REG), *see* Walter Schwarz, *Rücküberstattung nach den Gesetzen der Alliierten Mächte*, 1974, and *idem*, *Das Bundesrücküberstattungsrecht*, 1981.

The Civil Code provides for it in a number of paragraphs. These codal provisions are accompanied by a gloss of case law applying and interpreting it. It is noteworthy that the surety's right to derivative recourse is *not* dealt with in the sections on the law of unjust enrichment within the Civil Code. These are regulated, mainly, in the specific part of the law of obligations in the Civil Code. The provisions of §§ 812-817, 822 BGB lay down different grounds of restitution. Whereas §§ 818-821 BGB refer to the legal consequences that all claims based on one of these grounds have in common.⁵⁶ The core of the unjustified enrichment is the general enrichment claim which is expounded in § 812 I 1 BGB. It reads:⁵⁷ "A person who acquires something by the performance of another or in any other way at his expense without legal ground, is obliged to give [it] up." Besides this core of unjust enrichment there are a number of unjust enrichment claims in other areas of the law.⁵⁸ In many other situations, especially in the context of contracts that have failed, the rules of §§ 812 seqq BGB are also applied by means of reference.⁵⁹

Of all the rules involved in derivative recourse⁶⁰ *none* belongs to the German law of unjust enrichment. Of all the rules on the law of unjust enrichment, *none* is needed for bringing about derivative recourse.

At least as far as German law is concerned, from a systematic standpoint Lord *Diplock's* tentative suggestions in *Orakpo*⁶¹ cannot be supported.

56. For details in the English language, see R. Zimmermann/du Plessis, [1994] RLR 14 seqq; Dickson, [1987] 36 IECL 751 seqq; Dickson, [1995] 54 CLJ 100 seqq; Gordley, *Foundations of Private Law*, 2006, pp. 419 seqq; Dannemann, *The German Law of Unjustified Enrichment and Restitution. A Comparative Introduction*, 2009.

57. Roscoe Pound's translation reads: "A person who through an act performed by another, or in any other manner, acquires something at the expense of the latter without legally rightful (rechtlich) ground is bound to restore it to him." *Jurisprudence*, Volume V, 1959, p. 252 seq.

58. Such as, e.g., the "öffentlich-rechtlicher Erstattungsanspruch" (restitutionary claim under public law regime), on which see Jewell, *Change of Position*, in: Birks/Rose (ed.), *Lessons of the Swaps Litigation*, 2000, p. 272 seqq; Ossenbühl, *Staatshaftungsrecht*, 5th ed. 1998, p. 415 seqq; Staudinger-W. Lorenz, 14th ed. 1999, n.73 seqq before §§ 812 seqq; or the "steuerrechtlicher Erstattungsanspruch" (restitutionary claim under tax law regime), or § 25 Bundesbodenschutzgesetz (*cf.* Frenz, *Bundesbodenschutzgesetz*, 2000, § 25 para. 3, 18; Bickel, *Bundesbodenschutzgesetz*, 2d ed. 2001, § 25 para. 1).

59. *Cf.* Soergel-Hadding/Mühl, 12th ed. 2007, n.7 before § 812; Hadding, *Festschrift für Mühl*, 1981, pp. 225 seqq.

60. §§ 774 I, 412, 401 BGB, § 727 ZPO; 43, 44 InsO.

61. *Orakpo v Manson Invs. Ltd* [1978] AC 95, 104 (HL).

c. Summary

In substance, structure, and scope the English and the German forms of derivative recourse are similar. Only minor differences exist. This short overview has, however, shown the structural identity of subrogation, and *cessio legis*.

Bearing in mind that the civil law is thought of as being based on codification, and the common law is thought of as being based on mere case law, it seems a certain irony of legal history, that the statutory provisions of the German code proved to be insufficient, and had to be amended by case law, whereas the English case law proved to be insufficient, and had to be corrected by a statutory provision.

After having set out two paradigm versions of the substantive law of derivative recourse for the benefit of the guarantor, the article can now turn to the diverse explanations of the normative basis.

III. THE VARIETY OF EXPLANATIONS OF THE NORMATIVE BASIS OF DERIVATIVE RECOURSE

After having set out the two forms of derivative recourse in England and Germany the attention shall now be directed to its justification. Firstly, the different views on the European continent and in Scotland will be exposed. In the second part the classical position in English case law will be looked at. The third part is devoted to the latest explanation—the restitutionary thesis.

A. *Views in the Civil Law: Ius Commune, Current German Law, Louisiana Law, and Scots Law*

1. Ius Commune

a. Silence of the Sources

The sources of Roman law are silent as to the principle underlying its form of derivative recourse *beneficium cedendarum actionum*. This observation is no surprise, for it is only in accordance with the statement that generally the Roman jurists had no tendency to formulate the principles underlying the decisions.⁶² The detection of the underlying principles was left to later times.

62. See Otto Lenel, *Gesammelte Schriften*, vol. 2, 1990, pp. 351, 364; Alan Rodger, (1993) *Irish Jurist*, 1, 14 seq.

b. The Comparison with the Contract of Sale

In the sources of Roman law, one finds the formulation, the fideiussor (guarantor) would “buy” the creditor’s rights when paying.⁶³ Obviously, this was not meant to create the contractual obligations deriving from the contract of sale, *emptio venditio*. However, that argument⁶⁴ was used in order to overcome the problem of concurrence of solution.⁶⁵ The guarantor’s payment should not have the effect to *extinguish* the main debt. *Solutio* would have been counterproductive. So the payment was said to *resemble* the payment of the purchase price to the creditor having bought the *actio*, or *actiones*.

This kind of comparison of derivative recourse with the purchase of the rights by the guarantor is not unheard of even in the common law world. Even there one still finds traces of similar reasoning.⁶⁶

c. Ius Commune, and Its Particular Equitable Considerations

The justification for *beneficium cedendarum actionum* given in 19th century Germany centers on *aequitas*, “Billigkeit”, “equity.” A decision of the Imperial Supreme Court in Commercial Matters (Reichsoberhandelsgericht, ROHG)⁶⁷ in 1876 on this form of derivative recourse may serve as a paradigm:

Aequitas demands, that the creditor, who has been fully satisfied, and who, therefore, has not the least interest left in the rights he holds in respect of the secured claim in question against other persons but the guarantor, leave these rights to the paying guarantor, in order to enable him, or facilitate, to

63. Julian, D. 46, 1, 17 (“Fideiussoribus succurri solet, ut stipulator compellatur ei, qui solidum solvere paratus est, vendere ceterorum nomina.”); *see also* Paul. D. 46, 1, 36; Mod. D. 46, 3, 76; Pap. D. 27, 3, 21; 50, 15, 5 pr; Ulp. D. 15, 1, 30, 3; C. 5, 58, 1 (Sev. et Ant.).

64. On which see the apt comments by Lord President Rodger who calls the fiction an “ingenious, if somewhat tortured, reasoning” (*Caledonia North Sea Ltd v London Bridge Eng’g Ltd* 2000 SLT 1123, 1143); and Story who comments dryly: “The reasoning may seem a little artificial, but it has a deep foundation in natural justice.” Story, *supra* note 30, § 500, p. 412.

65. *See* JA Dieckmann (2004) 8 Edinburgh LR 329, 339 seq; Dieckmann, *Der Derivativregeß des Bürgen*, *supra* note 11, pp. 49 seqq.

66. *Cf. Cheesebrough v Millard* (1815) 1 John Ch. R 408, 412. [409, 413] (per Chancellor Kent); Dixon, *supra* note 30, pp. 51 seq, 60; Sheldon, *supra* note 30, § 87, p. 102 (“[I]t is in the nature of a purchase by the surety from the creditor.”); Spencer, *The General Law of Suretyship*, 1913, § 140, p. 191; Rowlatt, *The Law of Principal and Surety*, 3d ed. 1936, S. 208; Langdell, (1887-88) 1 Harv. L. Rev. 55, 69; Harris, *supra* note 30, § 15, p. 20, § 161, p. 121; Anon., *supra* note 33, p. 776; Watts, [1989] LMCLQ 7, 9. *See also* the note and cases cited in George Tucker Bispham (ed.), *Fifth American edition*, 1868, of John Adams, *The Doctrine of Equity. A Commentary on the Law as administered by The Court of Chancery*, at page 528.

67. The Imperial Supreme Court in Commercial Matters was the predecessor of the Imperial Supreme Court (Reichsgericht). Both were situated in Leipzig, and not in the capital Berlin.

have recourse against those who besides him were liable to the creditor primarily or accessorially, and thus to make good fully or partly the loss in property, that has come upon him in consequence of the guarantee undertaken, as far as possible.⁶⁸

In an earlier decision of ROHG *beneficium cedendarum actionum* is labelled “benefaction due to equity” (“Rechtswohltat [. . .] aus Billigkeit”).⁶⁹ The *aequitas* topos is found in legal writing on the topic⁷⁰—most notably in *Savigny’s* work,⁷¹ and in an article published by *Goldschmidt*⁷²—as well as in the case law of the courts.⁷³ *Fritz Schulz* later summarized the argument aptly: “mihi prodest et tibi non nocet”⁷⁴ (“it serves me and does not prejudice you”).

A slight reference to unjust enrichment is made by *Savigny* in his work on *Obligationenrecht*.⁷⁵ But *Savigny* also regards as the decisive topos the equitable consideration that the creditor may cede his (satisfied) rights without suffering any harm himself, and thus helping the justified recourse interest of the guarantor. Generally, it is safe to assert, that the *beneficium cedendarum actionum* was not counted among the unjust enrichment actions. Not even the detailed monographic survey on the enrichment principle in Roman law by *Wilhelm Sell*,⁷⁶ who includes among other remedies the *lex Rhodia de iactu* (contribution for general average), makes an exception in this respect.

68. ROHG 19, 383, 386 = Seufferts Archiv 32 Nr 138, p. 168 (tentative translation of the author).

69. ROHG 4, 325, 337.

70. Hasenbalg, *supra* note 14, pp. 66, 402, 447 seq, 454, 456 n.45 (“Billigkeitsfundament”, foundation of equity); LaRoche, *Der Regress des Bürgen nach gemeinem deutschem Rechte . . .*, 1892, p. 15; Keil, *Die Lehre von dem beneficium cedendarum actionum nach gemeinem und preussischen Recht*, 1880, pp. 13, 36 n.7; Tielsch, *Zur Lehre vom beneficium cedendarum actionum*, 1899, pp. 15, 26, 30; Brockhues, *Rechte und Pflichten des zahlenden Bürgen bezüglich der . . . Pfänder*, 1896, p. 13; Fritz Schulz, *Rückgriff und Weitergriff*, 1907, p. 17; Dernburg, *Das Obligationenrecht Preußens*, 4th ed. 1889, § 245, p. 754 n.7.

71. Savigny, *Das Obligationenrecht*, I, 1851, pp. 242 seq.

72. Goldschmidt, ZHR 14 (1870) 397, 416 (writing extra-judicially).

73. ROHG 4, 325, 332; ROHG 21, 209, 213; ROHG 19, 383, 386 = Seufferts Archiv 32 Nr 138, p. 168; RGZ 18, 235, 238; RG Seufferts Archiv 54 Nr 150, p. 285.

74. Schulz, *supra* note 70, p. 89.

75. Savigny, *supra* note 71, p. 242 in connection with pp. 229, 243; supported by Vischer, ZfSchweizR nF 29 (1888) 1, 67.

76. Wilhelm Sell, *Ueber den Grundsatz des römischen Rechts, daß Niemand mit oder aus dem Schaden eines Andern sich bereichern dürfe*, in: idem, *Versuche im Gebiete des Civilrechts, Erster Theil*, 1833, 1 seqq.

The French jurist *Pothier* explains the right to derivative recourse in his work on the law of obligations with reference to equity. *Evans* translates as follows:⁷⁷

This obligation of the creditor to cede his actions is founded upon the rule of equity, that as we are obliged to love all mankind, we are obliged to give them every thing which they have an interest in having, when we can do so, without detriment to ourselves. A debtor in solido having then a just interest to have a cession of the actions of the creditor against his co-debtors, in order to compel them to bear a part of a debt for which they are equally liable with him, the creditor cannot refuse it to him. For the same reason he cannot refuse it to a surety, or generally to any others, who, being liable to the debt, have an interest to be discharged from it wholly or in part, by those for whom or with whom they are debtors.

So *Pothier* who was widely read in the US, and also in England, and whose works had a great influence on the codification in France, does not explain *beneficium cedendarum actionum* as being based on enrichment ideas.

2. Current German Law

a. The Drafting of the German Civil Code

The *travaux préparatoire* of the Civil Code only slightly reveal why the legislature thought it right to provide for derivative recourse. The reason for this nearly complete silence is probably: At no point was it ever questioned whether the guarantor should be entitled to it. Almost⁷⁸ all of the main codifications in force before the enactment of the BGB afforded it, as did *ius commune*.

The first commission on the German Civil Code referred to the old comparison of Roman law to the contract of sale. This intention of the guarantor to “buy” the creditor’s rights was recanted;⁷⁹ he was said to have a presumed intention to acquire them. But also the equitable considerations of the ROHG, and *Goldschmidt’s* article were referred to.⁸⁰

77. William David Evans, *A Treatise on the Law of Obligations, or Contracts*, by M. Pothier, translated from the French. . . , Vol. I, 1826, at p. 320 [Part III, Chapter I, Article VI, § 2, para. 520].

78. With the rare exception of the Bavarian Codex Maximilianeus Bavaricus Civilis. See on the reasons Kreittmayer, *Anmerkungen über den Codex Maximilianeus Bavaricus Civilis*, 1821, n.1 at IV 10 § 14, 15, p. 572.

79. Mot. II, p. 674, Mugdan II, p. 376.

80. Mot. II, p. 673 seq, Mugdan II, p. 376: RGZ 3, 183; ROHG 21, 209; Goldschmidt, ZHR 14 (1870) 397, 402 seqq.

b. Modern Construction of the Statute

In modern law the arguments from the time of *ius commune* are not used any more. Neither the courts in their judgments nor legal authors would argue along these lines. Under current German law the view expressed most often on the *ratio legis* of the provision of § 774 BGB is: the original right to reimbursement the guarantor enjoys (under his contract with the debtor, or under the rules of *negotiorum gestio*) shall be secured,⁸¹ and his recourse shall be facilitated.⁸² The purpose of derivative recourse is mainly to give the surety security for his reimbursement.

c. Explanations for the Extension of Derivative Recourse
Beyond the Civil Code

More interesting, however, for the present purpose of this article is the reasoning by which abstract security rights which are *not* included in the statutory provisions are dealt with. There are different lines of argument. As shown above there is a substantial gap in the statutory provisions that have only taken into account accessory securities.

i. The Arguments—In a Nutshell

The Imperial Supreme Court (Reichsgericht) based the right of the guarantor to have abstract securities transferred on the contract between him and the creditor.⁸³ It referred to the presumed intentions of the parties. Modern court decisions, mainly of the Bundesgerichtshof (Federal Supreme Court), prefer an analogy to the statutory rules (§§ 774 I, 412, 401 BGB).⁸⁴ So BGHZ 78, 137 bases the obligation of the creditor for a transfer on an “analogous application of the basic idea of §§ 774, 401 BGB.”⁸⁵

In the decision BGHZ 92, 374 the court first states that dependant rights, especially accessory securities, pass to the guarantor together with

81. BGH WM 1990, 34, 35; Staudinger-Horn, *supra* note 20, § 774 para. 3; Reinicke/Tiedtke, NJW 1981, 2145, 2147 seq; Reinicke/Tiedtke, WM 1987, 485, 488 seqq; Reinicke/Tiedtke, *supra* note 50, paras. 345, 357 seq; Castellvi, WM 1995, 868; Larenz/Canaris, Lehrbuch des Schuldrechts, II/2, 13th ed. 1994, § 60 IV.2, p. 15.

82. BGHZ 92, 374, 383; BGHZ 139, 214, 219; Preuß, ZHR 160 (1996) 163, 173; Von Koppenfels-Spies, *supra* note 12, p. 10.

83. RGZ 89, 193, 195; RGZ 91, 277, 280; RG Warn 1930 Nr 11, pp. 22, 24 = LZ 1930, Sp 982, 983; RG Seufferts Archiv 76 Nr 84 = LZ 1921, Sp 141. Similarly: RG DR 1941, 2609.

84. BGHZ 42, 53, 56 seq; BGHZ 78, 137, 143; BGHZ 92, 374, 378; BGHZ 110, 41, 43; BGHZ 130, 101, 107; BGHZ 136, 347, 352; BGHZ 144, 52, 54 seq; BGH WM 2000, 1141, 1144; *see also* Krefl, WM 1997 Sonderbeilage Nr 5, pp. 1, 39, 40.

85. BGHZ 78, 137, 143.

the principal claim. Independent securities, such as Sicherungsgrundschuld and others, are not transferred automatically. The court then adds: “the creditor, however, may be obliged to transfer them to the guarantor analogously to §§ 774, 412, 401 BGB.”⁸⁶ To a similar effect the more recent decision BGHZ 136, 347 reads: “The creditor is—in analogous application of §§ 774, 412, 401 BGB—obliged, to transfer independent security rights, that do not pass by operation of law, to the paying guarantor.”⁸⁷ So, the argument, in short, is that all securities have to be treated alike—be they accessory or abstract. Most authors nowadays agree with the later court decisions and advocate the analogy.⁸⁸ This seems—*de lege lata*—the preferable opinion. The analogy is supported by the main purpose ascribed to § 774 I BGB: the guarantor’s recourse shall be secured and facilitated by derivative recourse.

Some authors⁸⁹ see the basis—not dissimilar to the Reichsgericht’s argument—in the contract of suretyship itself. Some hold derivative recourse is but a function of the accessoriness of the guarantor’s liability.⁹⁰ Others argue the obligation of the guarantor to transfer security rights is to be founded in the two relationships between creditor and guarantor on the one hand, and guarantor and principal debtor on the other.⁹¹

ii. No Equivalent to the “Restitutionary Thesis”

One very important aspect has to be considered here. It is the relationship of derivative recourse to the rules on unjust enrichment, or rather: their non-relationship. Although it is well established, that one who has unjustly gained an enrichment at someone else’s expense has to give up the acquired thing, *an equivalent to the restitutionary thesis is not argued for in Germany*. Only few authors even *mention* the principle of unjust enrichment in the context of derivative recourse.⁹²

86. BGHZ 92, 374, 378.

87. BGHZ 136, 347, 352.

88. Bayer/Wandt, JuS 1987, 271, 272, 275; Sostmann, DNotZ 1995, 260, 269 seq; for a detailed discussion Dieckmann, *Der Derivatvregreß des Bürgen*, *supra* note 11, pp. 421 seqq.

89. Huber, Die Sicherungsgrundschuld, 1965, p. 159 seq; Becker-Eberhard, Die Forderungsgebundenheit der Sicherungsrechte, 1993, p. 566 seqq.

90. Finger, BB 1969, 206, 208; Habersack, AcP 198 (1998) 152, 153; Von Koppenfels-Spies, *supra* note 12, p. 392 seqq (doubtful, for a criticism of this view see Castellvi, WM 1995, 868, 870; Kim, Zessionsregreß bei nicht akzessorischen Sicherheiten, 2004, pp. 144 seq; Dieckmann, *Der Derivatvregreß des Bürgen*, *supra* note 11, pp. 395 seqq.

91. Herzfeld, JR 1958, 453, 455.

92. von Caemmerer, FS Rabel, 1954, I, pp. 333, 362 seq; H.-A. Kunisch, Die Voraussetzungen für Bereicherungsansprüche in Dreiecksverhältnissen, 1968, p. 36 seqq; for a

Subject to discussion is only the relationship between the direct right to recourse based on § 812 BGB (Rückgriffskondiktion), and *cessio legis*.⁹³ It is asked whether these are compatible with each other or mutually exclusive. The main view seems to be that an enrichment remedy is not available when there is a *cessio legis*. For the claim is not extinguished, the principal is not enriched. No author states, that the actual purpose of any given *cessio legis* is a “restitutionary” one (to use the English vocabulary).

Of the many divergent answers to the question *why* abstract, non-accessory securities should be included in derivative recourse (even though the code does not deal with them), *none* of the authors refers to unjust enrichment at all. This is in perfect accordance with the reasoning of the courts in decisions on derivative recourse. The courts unanimously do not treat the question as one of unjust enrichment law, either.⁹⁴

The non-existence of an unjust enrichment argument in the tripartite relationship (guarantor, principal debtor, creditor) is even more noteworthy if one takes into consideration the following observation. The codal provisions of the BGB are accompanied by a huge gloss of case law⁹⁵ and literature⁹⁶ on multi-party enrichment claims. One would anticipate that at least one case decided in the courts, or one legal writer would come to the conclusion that the problems of derivative recourse could be solved with enrichment tools. None, in fact, has.⁹⁷ German law does not consider the guarantor’s right to derivative recourse a remedy based on notions of unjust enrichment.

critical analysis see Dieckmann, *Der Derivativreß des Bürgen*, *supra* note 11, pp. 445 seqq; see also Kuhlmann, *supra* note 11, pp. 287 seqq. Descriptively see Dannemann, *supra* note 56, pp. 17 seq, 117 seq.

93. Schims, *Der gesetzliche Forderungsübergang. Wirkweise und Funktion für den Regress bei drittseitiger Schuldsicherung*, 2006, p. 106 seqq.

94. See only BGHZ 42, 53, 56 seq; BGHZ 78, 137, 143; BGHZ 92, 374, 378; BGHZ 110, 41, 43, 45; BGHZ 130, 101, 107; BGH WM 1994, 1161, 1163; BGHZ 136, 347, 352; BFHE 87, 99, 100; BFHE 104, 109, 113 seq; RGZ 89, 193, 195; RGZ 91, 277, 280.

95. BGHZ 5, 281; BGHZ 47, 370; BGHZ 66, 362; BGHZ 66, 372; BGHZ 67, 75; BGHZ 122, 46; BGHZ 113, 62.

96. See, e.g., Staudinger-W. Lorenz, *supra* note 58, § 812 para. 36 seqq; von Caemmerer, *Bereicherungsansprüche und Drittbeziehungen*, JZ 1962, 385; von Caemmerer, *Irrtümliche Zahlung fremder Schulden*, Festschrift Hans Dölle, 1963, p. 135; Canaris, *Der Bereicherungsausgleich im Dreipersonenverhältnis*, Festschrift Karl Larenz, 1973, p. 799; Flume, *Der Bereicherungsausgleich im Mehrpersonenverhältnis*, AcP 1999 (199) 1.

97. For the cases see only BGHZ 5, 281; BGHZ 47, 370; BGHZ 66, 362; BGHZ 66, 372; BGHZ 67, 75; BGHZ 122, 46; BGHZ 113, 62.

3. Louisiana Law

The mixed legal system of Louisiana may be treated together with the purely civilian jurisdictions, because its version of derivative recourse is evidently derived from “civilian” sources, in the form of the French Civil Code.

a. Statutory Provisions on Subrogation

The Louisiana variant of derivative recourse is—like its French model—called subrogation. Louisiana law, too, treats subrogation as a legal technique to provide for privileged recourse for particular creditors. Following the distinction drawn in the French Civil Code Louisiana law provides for the two forms of conventional subrogation and legal subrogation. The latter is also called “subrogation by operation of law.” The general rules are contained in La. Civ. Code arts. 1825-1830, of which the main provisions read:

Art. 1825. Definition

Subrogation is the substitution of one person to the rights of another. It may be conventional or legal.

....

Art. 1829. Subrogation by operation of law

Subrogation takes place by operation of law:

- (1) In favor of an obligee who pays another obligee whose right is preferred to his because of a privilege, pledge, mortgage, or security interest;
- (2) In favor of a purchaser of movable or immovable property who uses the purchase money to pay creditors holding any privilege, pledge, mortgage, or security interest on the property;
- (3) In favor of an obligor who pays a debt he owes with others or for others and who has recourse against those others as a result of the payment;
- (4) In favor of a successor who pays estate debts with his own funds; and
- (5) In the other cases provided by law.

The rule is, that not every third-party payor is entitled to subrogation, La. Civ. Code art. 1855, but only persons explicitly named, or clearly defined. One of the privileged payors within the meaning of La. Civ. Code art. 1829(3), is the *surety*.⁹⁸ The surety’s right of subrogation is also

98. *Martin v La. Farm Bureau Cas. Ins. Co.*, 638 So. 2d 1067, 1069 (1994); *First City Bank v 740 Esplanade Ave.*, 611 So. 2d 715, 717 (1992). For the precursor provision of La. Civ. Code (1870), art. 2161(3) see *Hartford Accident & Indem. Co. v Byles*, 280 So. 2d 624, 626 seq (1973); *F. Weber v Press of H.N. Coray, Inc.*, 144 So. 2d 581, 593 (1962); *C.I.T. Corp. v Rosenstock*, 205 So. 2d 81, 84 (1967).

laid down in the special provisions of La. Civ. Code art. 3047, 3048, which read:

Art. 3047. Rights of the surety

A surety has the right of subrogation, the right of reimbursement, and the right to require security from the principal obligor.

Art. 3048. Surety's right of subrogation

The surety who pays the principal obligation is subrogated by operation of law to the rights of the creditor.

The same side effect of derivative recourse as the common law rule of discharge through loss of securities, and § 776 BGB is acknowledged in Louisiana, too. If the creditor releases a security the surety would acquire *via* subrogation, the latter is discharged. La. Civ. Code art. 3062.⁹⁹

The wording of the general, as well as of the special provisions (still) follows the example set by the Code Napoléon¹⁰⁰ notwithstanding minor changes over the years. However, the general provision of La. Civ. Code art. 1829 is now contained in a chapter devoted to the *transfer of obligations*.¹⁰¹ Before the revision of the code in the year 1985, the law resembled even more closely its French model, placing subrogation in the context of the act of payment of a debt.¹⁰² The particular provisions on the surety's right were contained in the law of suretyship.

The code is clear as to *who* is granted subrogation. The code does not, however, give any reasons *why* subrogation is provided for.

b. Case Law and Legal Literature

A silence similar to the code itself can be discerned in the court opinions on subrogation. When applying the law they usually do not mention a justification or purpose of the rule.¹⁰³ The clear wording of the statutory provisions may be a reason why the courts do not explain in any specific way their normative basis. When the Supreme Court of

99. La. Civ. Code (1870) art. 3061; *Glass v McLendon*, 66 So. 2d 369, 370 (1953); *Simmons v Clark*, 64 So. 2d 520, 523 (1953); *C.I.T. Corp. v Rosenstock*, 205 So. 2d 81, 83 (1967).

100. McDermott, (1951) 25 Tul. L. Rev. 358, 359.

101. On this effect of the revision of the code, see Litvinoff, *supra* note 20, p. 1178.

102. La. Civ. Code (1870) art. 2159 seqq.

103. *First City Bank v 740 Esplanade Ave.*, 611 So. 2d 715, 717 (1992); *St. James Bank & Trust Co. v S & H Enters., Inc.*, 532 So. 2d 915, 916 (1988); *Hartford Accident & Indem. Co. v Byles*, 280 So. 2d 624, 626 seq (1973); *Martin v La. Farm Bureau Cas. Ins. Co.*, 638 So. 2d 1067, 1069 (1994); *F. Weber v Press of H.N. Coray, Inc.*, 144 So. 2d 581, 593 (1962); *C.I.T. Corp. v Rosenstock*, 205 So. 2d 81, 83 seq (1967); *Cox v Heroman & Co.*, 298 So. 2d 848, 854 seq (1974).

Louisiana finds that “the intention of subrogation is to protect such persons who perform certain acts,”¹⁰⁴ this is hardly more than a description of what the law does. It does not amount to an explanation of the underlying policy. The absence of attempts at justifications and rationalizations resembles the phenomenon in modern German law. There, likewise, the courts hardly devote space in their judgments on the purpose of § 774 BGB.

Unambiguous statutes appear to exempt judges to justify or rationalize the purpose of the rules they apply.

In the prime survey on subrogation in Louisiana law Professor *Litvinoff* explains that the law provides for subrogation, in order to encourage performance by a third person for another, when he is himself bound to or does so for the protection of an important interest of his own or of the obligor.¹⁰⁵

One of the starting points of the present article was to take Lord *Diplock*'s view seriously, and inquire whether civil law jurisdictions regard their version of subrogation as among the unjust enrichment remedies. One is safe to deny this for Louisiana law.

In Louisiana—unlike in the common law world—it has not been doubted that rules based on unjustified enrichment form part of the law. Already the Louisiana Civil Code of 1825 included an article on contract interpretation explicitly defining equity in terms of “the moral maxim of the law that not one ought to enrich himself at the expense of another.”¹⁰⁶ As early as 1827 the Louisiana Supreme Court refers to *Pomponius*' famous maxim in the case of *Police Jury v Hampton*.¹⁰⁷ *Minyard v Curtis Products, Inc.*¹⁰⁸ gave full acceptance to the unjust enrichment reasoning. Still, however, subrogation is *not* connected to unjustified enrichment thinking.

From the *systematic* point of view this becomes clear that Louisiana law does not consider subrogation a tool for the reversal of an unjustified enrichment. This is true for the modern law, as well as for the earlier versions of the codification. The rules on “payment of a thing not due,”¹⁰⁹ are not connected to those on subrogation.

104. *Safeway Ins. Co. of La. v State Farm Mutual Automobile Ins. Co.*, 839 So. 2d 1022 (2003).

105. Litvinoff, *supra* note 20, p. 1164.

106. Cf. Kull, (2005) 25 OJLS 297, 313 seq.; see also La. Civ Code art. 1965 (1870); *Minyard v Curtis Prods., Inc.*, 251 La. 624, 205 So. 2d 422, 431 seq (1967).

107. *Police Jury v Hampton* (1827), 5 Mart. (ns) 389. For further cases see Kull, (2005) 25 OJLS 297, 314 n.54.

108. *Minyard v Curtis Prods., Inc.*, 251 La. 624, 205 So. 2d 422 (1967).

109. La. Civ. Code art. 1757, 2294 seqq (1985); La. Civ. Code arts. 2301–2313 (1870)].

It is no surprise, therefore, that the new rules on the codification of unjust enrichment proposed by the Louisiana State Law Institute in 1994 do not even *mention* subrogation.¹¹⁰

The literature on the principle of unjustified enrichment as exemplified by the rules on “payment of a thing not due”, and the doctrine of *Minyard v. Curtis Products, Inc.*¹¹¹ does not treat subrogation as a particular application of this legal concept.¹¹² This holds true for other cases as well.¹¹³ Further proof for this allegation is the decision of the Fifth Circuit Court of Appeal in *Wilhite v. Schendle*.¹¹⁴

Plaintiff and defendant were both former directors of a bank, which was closed by the authorities. A settlement agreement for damages of \$750,000 with the Resolution Trust Corporation was signed by both parties, as well as by other officers and directors of the bank. The plaintiff paid the whole \$750,000 alone, and then sought contribution.

The court distinguishes¹¹⁵ between five potential headings of liability: (1) contribution, (2) conventional subrogation, (3) legal subrogation, La. Civ. Code art. 1829(3), (4) unjust enrichment applying *Minyard v. Curtis Products, Inc.*,¹¹⁶ and (5) the theory of “payment of a thing not due” (La. Civ. Code art. 2310). It is obvious that the Fifth Circuit does not consider legal subrogation an application of the theory of unjust enrichment. On the contrary, after having dealt with subrogation as one theory of recovery for the plaintiff,¹¹⁷ it turns to

110. The draft is published also in (1994) 60 Tul. L. Rev. 213 seqq.

111. *Minyard v Curtis Prods., Inc.*, 251 La. 624, 205 So. 2d 422 (1967).

112. Nicholas, (1962) 36 Tul. L. Rev. 605; Tate, (1976), 50 Tul. L. Rev. 883; Tate, (1977) 51 Tul. L. Rev. 446; Martin, (1994) 60 Tul. L. Rev. 181.

113. *Cf.* only *First City Bank v 740 Esplanade Ave.*, 611 So. 2d 715, 717 (1992); *St. James Bank & Trust Co. v S & H Enters., Inc.*, 532 So. 2d 915, 916 (1988); *Hartford Accident & Indem. Co. v Byles*, 280 So. 2d 624, 626 seq (1973); *Martin v La. Farm Bureau Cas. Ins. Co.*, 638 So. 2d 1067, 1069 (1994); *F. Weber v Press of H.N. Coray, Inc.*, 144 So. 2d 581, 593 (1962); *C.I.T. Corp. v Rosenstock*, 205 So. 2d 81, 83 seq (1967); *Cox v Heroman & Co.*, 298 So. 2d 848, 854 seqq (1974); *S. Farm Bureau Cas. Ins. Co. v J. Sonnier*, 406 So. 2d 178 (1981); *S. Pac. Transp. Co. v Chabert*, 973 F.2d 441, 444 seqq (1992); *Travelers Indem. Co. of Ill. v W. Am. Specialized Transp. Co.*, 317 F. Supp. 2d 693, 700 (2004).

The slight reference in the insurance law case of *Motors' Insurance Corporation v Employers' Liability Assurance Corp. Ltd.*, 52 So. 2d 311, 313 (1991), is an exception. The citation of a Kentucky decision, obviously, is odd. The case revolves on *conventional* subrogation (*Motors' Insurance Corporation* 313).

114. *Wilhite v Schendle* 92 F.3d 372 (1996).

115. *Id.* p. 374 (“Wilhite contends that Schendle should be required to contribute under any of several theories of Louisiana Law, including: applying of the laws of solidary liability to the Settlement Agreement; subrogation; “unjust enrichment;” and “payment of a thing not due.” (emphasis added)).

116. *Minyard v Curtis Prods., Inc.*, 251 La. 624, 205 So. 2d 422 (1967).

117. *Sub* II Discussion B. Subrogation 2. Legal Subrogation of the opinion.

another “theory” in the next distinct paragraph.¹¹⁸ Subrogation, and unjust enrichment are treated as *separate legal categories*. To use the words of the court, subrogation and unjust enrichment are respectively an “alternative theory of recovery.”¹¹⁹

4. Scots Law and Lord Kames’ Contribution

The law of Scotland deserves its place under the rubric of “views in the civil law”, notwithstanding its status as a mixed legal system. The Scots form of derivative recourse is Roman in essence. The most ingenious, and thoughtful explanation of the basis of derivative recourse is the line of argument put forward by the Scottish judge, and philosopher Lord *Kames*, on the Scots law version of *beneficium cedendarum actionum*.

a. Essays upon Several Subjects in Law (1732)

Lord *Kames* develops his reasoning as to the normative basis of derivative recourse for the first time in his article “*beneficium cedendarum actionum*” published in the *Essays upon Several Subjects in Law* in the year 1732. *Kames*’ starting point is the following situation:

When a Creditor has different Persons or Subjects bound to him for Security and Payment of his Debt, it naturally arises to be a Question, how far he has it in his Power to exerce his Right arbitrarily, by loading one and freeing another . . . and when he does so, if there is any Relief competent to the Person or Subject over burdened.¹²⁰

Kames’ answer is:

It appears in the first Place agreeable to Principles of *Justice* and *Humanity*, that Creditors having bound to them different Persons or their Effects, should not be allowed ARBITRARILY to load one and exempt others. There are two good Reasons for this, one *a priori*, the other *a posteriori*. The one *a priori* is drawn from this Law of Nature, *That every Man is confined in the Way of using his Property so as to be least hurtful to others*. He is allowed to prefer himself; but his own Interest being out of the Question, he has no longer Liberty to go on to take any Step *in aemulationem vicini*. . . . [I]t is plain, that the Law, which is no Respector of Persons, never acts *arbitrarily*, but deals to every one with an equal Hand.

118. *Sub II* Discussion C. “Unjust Enrichment” of the opinion.

119. *Wilhite v Schendle*, 92 F.3d 372, 377 (1996).

120. *Kames*, *Beneficium cedendarum actionum*, in: *Essays upon Several Subjects in Law*, 1732, p. 19.

The Consideration *a posteriori* is drawn from the numberless Inconveniences that might ensue if Creditors were indulged in this arbitrary Proceeding: It would naturally introduce underhand fraudulent Pactions betwixt the Creditor, who holds the Ballance, and some one or other of the Debtors, in order to throw the Burden upon others.

According to *Kames* derivative recourse reacts to this complex situation by giving the paying co-debtor the right to demand an assignation (i.e. assignment) from the creditor.¹²¹ There are two main effects: with debtors of the same rank, a proportional correction is rendered. In *Kames*' words: "whereby *Equality* is preserved amongst all concerned, and no *Person* or *Subject* bears a greater or less Burden than his Situation obliges him to."¹²²

A second effect is that when one debtor is the principal, the other is entitled to demand transfer of all the rights against that principal.

*"When two Persons or Subjects, are bound unequally, the one principally, the other in subsiduum, the proportional Allocation cannot obtain. But the subsidiary Obligant is intitled to a total Assignation against the Principal, and has a total Relief."*¹²³

The third effect for *Kames* is to regard the same reasoning as applicable to the relationship between catholic, and secondary creditors, i.e. the equivalent to the English doctrine of marshalling of securities.¹²⁴

b. Principles of Equity (1760/1825)

The second exposition of his views is contained in *Kames*' condensed work *Principles of Equity*.¹²⁵ In his *Principles* *Kames* explains the normative basis of derivative recourse by reference to the same *topoi*. The nature of the relationship between cautioner and creditor requires "benevolence"¹²⁶ on the latter's part.

[T]he claim of mutual relief among co-cautioners can have no foundation, other than the obligation upon the creditor to assign upon payment. This assignment in the case of a single cautioner must be total; in the case of several must be *pro rata*, because the creditor is equally connected with each of them.

121. *Id.* p. 20.

122. *Id.* p. 24.

123. *Id.* p. 38.

124. *Id.* p. 24 seqq. As to the law of marshalling in England see Ali, *supra* note 31; Langdell, *supra* note 66, p. 68 seq; Derham, (1991) 107 LQR 126, 127, 129 seqq; *Heyman v Dubois* (1871), LR 13 Eq 158; *Webb v Smith* (1885), 30 Ch D 192, 200 (CA).

125. The first edition was published in 1760. The edition used here is the reprint of 1825. The relevant parts commence in the 1767 edition on p. 85 (1825, p. 74).

126. *Kames*, Principles of Equity, reprint 1825, pp. 74 seqq.

Utility concurs to support this equitable claim: no situation with regard to law would be attended with more pernicious consequences, than to permit a creditor to oppress one cautioner and relieve others: judges ought to be jealous of such arbitrary powers; which will generally be directed by bad motives; often by resentment, and, which is still worse, more often by avarice.¹²⁷

Equity demands from the creditor: “[T]he utmost impartiality in him to his debtors.”¹²⁸

Finally, *Kames* again explains that the rules between catholic and secondary creditors are “of the same nature.”¹²⁹

c. The Line of Argument

To be stressed are the following parts of the argument. For *Kames* the function of derivative recourse is the *ex post correction* of the consequences of the creditor’s decision, as to which debtor to demand payment from. The creditor is in principle free to use his rights in any way his own interest demands. But one debtor cannot be pursued to the exclusion of the other. The law does not act arbitrarily. On the contrary it ensures equal treatment of all. Should the order presupposed by equity be disturbed, a correction is needed. *Equity effects this correction*. The allocation of burdens demanded by equity is proportionate between co-debtors (every one of them bearing the same share), and disproportionate between principal debtor and cautioner (the former bearing all). The creditor may choose freely whom to pursue, but in effect the correction prevents his arbitrariness from prevailing. The debtor charged is entitled to demand transfer of the creditor’s rights against co-debtors (co-cautioners) and the principal. This enables the cautioner to seek recourse from the person who—according to the order, or rank of liability—shall bear their appropriate share of the burden. From co-cautioners he may seek contribution. The purpose of derivative recourse then is either full reimbursement (against the principal), or pro tanto contribution (against co-debtors of equal rank). The rationale for beneficium cedendarum actionum is found (and founded) in the law of nature and the “equality” that it is perceived to demand.

127. *Id.* p. 77.

128. *Id.* p. 79.

129. *Id.*

d. The Systematic Context Within the Principles of Equity

The systematic context of *Kames'* exposition in the Principles of Equity¹³⁰ is noteworthy. *Kames* deals with derivative recourse in Book I (Powers of a court of equity derived from the principle of justice), and in Part I, chapter III on “Powers of a court of equity to remedy what is imperfect in common law, with respect to the natural duty of benevolence.” In respect of *benevolence* *Kames* differentiates between two classes: connections that make benevolence a duty when not prejudicial to our interest (section 1), and connections that make benevolence a duty even against our interest (section 2). The latter section is subdivided into three articles of which the first deals with “connections that entitle a man to *have his loss made up out of my gain*.”¹³¹ If Lord *Kames* had considered derivative recourse to be based on the enrichment principle, he would have treated it under the last mentioned heading of section 2. However, the part on beneficium cedendarum actionum is covered in section 1.

B. *Views in the Common Law: The Classical Position, and the Restitutionary Thesis*

1. The Classical Position of English Case Law, and Its Reception in Legal Writing

a. The Case Law of the Courts of Chancery

Attention shall now be directed to English law. The classical position of equity jurisprudence has several expressions. One is the speech of Lord Chancellor *Brougham* in *Hodgson v Shaw*.¹³²

The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of [the] creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high, and the right results more from equity than from contract or *quasi* contract. . . . Thus the surety paying is entitled to every remedy which the creditor has.¹³³

The significance of Lord *Brougham's* statement is demonstrated by a look at *Joseph Story's* writings. The Justice at the US Supreme Court,

130. *Id.* p. IX seqq.

131. Emphasis added.

132. *Hodgson v Shaw* (1834), 3 My & K 183, 190 seq; 40 ER 70, 73.

133. *Hodgson v Shaw* (1834), 3 My & K 183, 190 seq; 40 ER 70, 73 (the report reads [“a”]).

Dane Professor at the Harvard Law School, and most influential author on equity thinks so much of the statement that he gives it the honour of citing it *twice* verbatim in his *Commentaries on Equity Jurisprudence as administered in England and America*.¹³⁴ The courts likewise often¹³⁵ quote *Hodgson v Shaw*.¹³⁶

But there is another locus classicus of subrogation, prior in time even. Lord *Brougham* not only refers explicitly to this exposition on derivative recourse but he also incorporates parts of it into his own judgment, commenting: “I have purposely taken this statement of the right, because it is there placed as high as it ever can be placed”¹³⁷

Said statement is the *rthesis* of Sir *Samuel Romilly* in *Craythorne v Swinburne*:

The whole doctrine of principal and surety, with all its consequences, of contribution, & c., rests upon the established principles of a Court of Equity; not upon contract The contribution results from the maxim, that equality is equity: proceeding where the instruments are several, very much upon this; that a surety will be entitled to every remedy, which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor; not only through the medium of contract, but even by means of securities, entered into without the knowledge of the surety; having a right to have those securities transferred to him; though there was no stipulation for that; and to avail himself of all those securities against the debtor. This right of a surety also stands, not upon contract, but upon a principle of natural justice: the same principle, upon which one surety is entitled to contribution from another. The creditor may resort to either for the whole, or to each for his proportion; and, as he has that right, if he from partiality to one surety will not enforce it, the Court gives the same right to the other surety, and enables him to enforce it. Natural justice requires, that the surety, having become security with others, shall not have the whole thrown upon him by the choice of the creditor not to resort to remedies in his power; the effect of which would be an equal contribution.¹³⁸

Lord *Brougham* further noted: “The doctrine of the Court in this respect was luminously expounded in the argument of Sir Samuel Romilly in *Craythorne v. Swinburne* (14 Ves. 160); and Lord Eldon in giving judgment in that case, sanctioned the exposition by his full approval.”¹³⁹

134. Story, *supra* note 30, § 499 pr, p. 403 n.1, and § 499c, p. 407 n.1.

135. See only the following US cases: *Am. Sur. Co. v Bethlehem Nat'l Bank* (1941) 314 U.S. 314, 317; *Mathews v Aikin* (1848), 1 NY 595, 600 (New York Court of Appeals).

136. *Hodgson v Shaw* (1834), 3 My & K 183, 190 seq; 40 ER 70, 73.

137. *Hodgson v Shaw* (1834), 3 My & K 183, 191; 40 ER 70, 73.

138. *Craythorne v Swinburne* (1807) 14 Ves Jun 160, 162; 33 ER 482, 483.

139. *Hodgson v Shaw* (1834), 3 My & K 183, 191; 40 ER 70, 73.

Lord *Eldon*'s judicial approval of *Romilly*'s speech is often stressed also in later cases, e.g., in *Newton v Chorlton*¹⁴⁰ by Sir *Page Wood* VC, in *Duncan, Fox, & Co, & Robinson & Co v North and South Wales Bank*¹⁴¹ by Lord *Selborne* LC, and in *Morris v Ford Motor Co Ltd* by Lord *Denning* MR.¹⁴²

Lord *Eldon* also echoes parts of *Romilly*'s statement on the principle in his judgement in *Craythorne v Swinburne* as follows:

[T]he principle of Equity operates in both cases; upon the maxim, that equality is Equity: the creditor, who can call upon all, shall not be at liberty to fix one with payment of the whole debt; and upon the principle, requiring him to do justice, if he will not, the Court will do it for him.¹⁴³

. . . [T]hat all sureties are equally liable to the creditor; and it does not rest with him to determine, upon whom the burthen shall be thrown exclusively; that equality is equity; and, if he will not make them contribute equally, this Court will finally by arrangement secure that object.¹⁴⁴

Lastly, the reasons given by Lord *Eldon* in *Aldrich v Cooper*¹⁴⁵ may be referred to, where he sets out the doctrines of marshalling and subrogation while putting them into perspective. The basis of marshalling is identified by him as follows:

[The] creditor having two funds shall not by his Will resort to that, by going to which he will disappoint as just a creditor; who cannot resort to any other. The principle in some degree is, that it shall not depend upon the Will of one creditor to disappoint another.¹⁴⁶

The guarantor's right to securities is but one application of the same legal idea: "a species of marshalling being applied in other cases"¹⁴⁷ and:

So, in the case of the surety, it is not by force of the contract; but that equity, upon which it is considered against conscience, that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the Court, placing the surety exactly in the situation of the creditor. So, a surety may have the benefit of a mortgage¹⁴⁸

140. *Newton v Chorlton* (1853), 10 Hare 646, 648 seq; 68 ER 1087, 1088, per Sir *Page Wood* VC.

141. *Duncan, Fox & Co & Robinson & Co v N. & S. Wales Bank* (1880-81), 6 App Cas 1, 12 (HL), per Lord *Selborne* LC.

142. *Morris v Ford Motor Co Ltd* [1973], 2 All ER 1084, 1089 (CA), per Lord *Denning* MR.

143. *Craythorne v Swinburne* (1807), 14 Ves Jun 160, 165; 33 ER 482, 484.

144. *Craythorne v Swinburne* (1807), 14 Ves Jun 160, 171; 33 ER 482, 486.

145. *Aldrich v Cooper* (1802), 8 Ves Jun 382; 32 ER 402.

146. *Aldrich v Cooper* (1802), 8 Ves Jun 381, 389; 32 ER 402, 405.

147. *Aldrich v Cooper* (1802), 8 Ves Jun 381, 388 seq; 32 ER 402, 405.

148. *Aldrich v Cooper* (1802), 8 Ves Jun 381, 389; 32 ER 402, 405.

The expositions of the doctrine of subrogation in *Aldrich v Cooper*¹⁴⁹ and, most importantly, *Craythorne v Swinburne*¹⁵⁰ are often referred to in the cases.¹⁵¹

b. The Classical Position in the Legal Literature

The classical position on the normative basis of subrogation developed in the cases of the Court of Chancery. It has been accepted and taken over by the literature on the topic.¹⁵² *Hodgson v Shaw*,¹⁵³ *Aldrich v Cooper*,¹⁵⁴ and *Craythorne v Swinburne*¹⁵⁵ are treated as authoritative statements of the law. Even Sir *Samuel Romilly's* *rhesis* expounding the normative basis is quoted (partly) in learned legal treatises on the subject.¹⁵⁶

One finds the classical exposition also in the American works on subrogation published in the 19th century,¹⁵⁷ in early treatises on the law of suretyship,¹⁵⁸ as well as on equity jurisprudence.¹⁵⁹ Most prominent in

149. *Aldrich v Cooper* (1802), 8 Ves Jun 382; 32 ER 402.

150. *Craythorne v Swinburne* (1807), 14 Ves Jun 160; 33 ER 482.

151. *Hodgson v Shaw* (1834), 3 My & K 183, 191; 40 ER 70, 73; *Newton v Chorlton* (1853), 10 Hare 646, 648 seq; 68 ER 1087, 1088; *Watts v Shuttleworth* (1860), 5 H & N 235, 247; 157 ER 1171, 1176; *Pearl v Deacon* (1857), 24 Beav 186, 190; 53 ER 328, 330; *Duncan, Fox & Co & Robinson & Co v N. & S. Wales Bank* (1880-81), 6 App Cas 1 (HL) 12, per Lord Selborne LC, 19, per Lord Blackburn; *Ward v Nat'l Bank of N.Z.* (1883), 8 App Cas 755, 765 (PC); *Morris v Ford Motor Co Ltd* [1973], 2 All ER 1084, 1089 (CA); *Scholefield Goodman & Sons Ltd v Zyngier* [1984], VR 445, 452 (Supreme Court of Victoria); *Scholefield Goodman & Sons Ltd v Zyngier* [1986], AC 562, 571 f (PC); *McCull's Wholesale Pty Ltd v State Bank of New South Wales* [1984], 3 NSWLR 365, 378 (Supreme Court of New South Wales); *Mathews v Aikin* (1848), 1 NY 595, 600 (New York Court of Appeals).

152. Cf. only O'Donovan/Phillips, *supra* note 31, para. 12-254 seq, 12-259; Andrews/Millett, *supra* note 29, para. 11.001 n.5, 11.017; Goff/Jones, *supra* note 31, para. 3-025; Meagher/Heydon/Leeming, Meagher, Gummow and Lehane's Equity-Doctrines and Remedies, 4th ed. 2002, para. 9-235; Rowlatt, *The Law of Principal and Surety*, 4th ed. 1982, pp. 131 with n.4, 132 seq, 145; Penn/Shea/Arora, *The Law Relating to Domestic Banking*, I, 1987, para. 14.04 n.6; McGuinness, *supra* note 29, para. 17.14, 17.16; Maddaugh/McCamus, *The Law of Restitution*, 1990, pp. 161 seq, 166 seq, 159 n.3; Arant, *Handbook of the Law of Suretyship and Guaranty*, 1931, § 79, p. 358 n.40; Loyd, *supra* note 41, p. 60.

153. *Hodgson v Shaw* (1834), 3 My & K 183, 190 seq; 40 ER 70, 73.

154. *Aldrich v Cooper* (1802), 8 Ves Jun 382; 32 ER 402.

155. *Craythorne v Swinburne* (1807), 14 Ves Jun 160; 33 ER 482.

156. Goff/Jones, *supra* note 31, para. 3-02; Andrews/Millett, *supra* note 29, para. 11.017; Putnam, *supra* note 29, p. 83; Maddaugh/McCamus, *supra* note 152, pp. 166 seq; Meagher/Heydon/Leeming, *supra* note 152, para. 9-215; Langan, *supra* note 44, pp. 16 seq.

157. Dixon, *supra* note 30, p. 59 seqq; Sheldon, *supra* note 30, § 1, p. 1 seq, § 86, p. 101 seq.

158. Spencer, *supra* note 66, § 133; Baylies, *A Treatise on the Rights, Remedies and Liabilities of Sureties and Guarantors*, 1881, pp. 356 seqq; Brandt, *The Law of Suretyship and Guaranty*, vol. I, 3d ed. 1905, § 324; Childs, *Handbook of the Law of Suretyship and Guaranty*, 1907, pp. 277 seqq; Cook (ed.), Stearns, *The Law of Suretyship*, 3d ed. 1922, §§ 244 seqq.

this respect is probably the aforementioned treatment in *Joseph Story's Commentaries on Equity Jurisprudence*.¹⁶⁰

It has been submitted by the present author,¹⁶¹ that the classical position of English case law goes back to an adoption of Lord *Kames'* argument by the Chancery lawyers. The resemblance of the two lines of argument is striking. Both stress as the *function* of derivative recourse the *correction* of the choice of which debtor to burden. If the result of the choice is the burdening of the wrong debtor equity corrects. The effect is either to allocate the burden fully on the principal (reimbursement through subrogation), or *pro tanto* on the co-sureties (contribution). The instrument of choice is the transfer of the creditor's rights to the payor. Its basis is seen in equitable principles. It is no surprise, therefore, that *Kames* is cited, e.g., by Chancellor *Kent*,¹⁶² and that his term of "benevolence" makes some appearances in subrogation cases.¹⁶³ The adoption thesis has been explained in detail elsewhere,¹⁶⁴ and need not be repeated here.

2. The Restitutionary Thesis and Its Appearance

a. Introduction and Conceptual Caveat

The classical position on subrogation has been joined lately by the modern explanation in terms of unjust enrichment, to which the attention shall now be devoted. The view that derivative recourse in the form of subrogation belongs to the law of unjust enrichment, will be referred to as the restitutionary thesis ("Restitutionsrechtsthese"¹⁶⁵). The concepts "restitution", and "unjust enrichment" will be used synonymously. However, this usage occurs here *only* a matter of convenience. There are

159. Merwin, *The Principles of Equity and Equity Pleading*, 1895, § 607 seqq, pp. 324 seqq; Willard, *A Treatise on Equity Jurisprudence*, 1855, pp. 110 seqq.

160. Story, *Commentaries on Equity Jurisprudence*. . . , I, 2d ed. 1839, § 499, p. 402 seqq.

161. Dieckmann, *Der Derivatvregreß des Bürgen*, *supra* note 11, pp. 120, 127 seqq, 544; Dieckmann, *Scots Influence on English Law*, *supra* note 10, pp. 349 seqq.

162. Chancellor Kent explicitly cites *Kames* as an authority in the case of *Cheesebrough v Millard* (1815) 1 John Ch. R 408, 412 [409, 413] (Court of Chancery of New York).

163. *Cheesebrough v Millard* (1815) 1 John Ch R 408, 413 [409, 414]; *Hayes v Ward* (1819), 4 John Ch R 122, 130 (both Court of Chancery of New York); *Kyner v Kyner* (1837), 6 Watts 221, 225 (Pa); *In re Lentz's Account, Wallace's Appeal* (1847), 5 Pa 103; *Sterling v Brightbill* (1836) 5 Watts 229 (Pa); *Hampton v Phipps* 108 U.S. 260, 265 (1883); *Furia v Philadelphia* 180 Pa. Superior Ct. 50, 60 (1955); *Puget Sound Power & Light Co. v City of Seattle*, 5 F.2d 393, 397 (1925).

164. Dieckmann, *Der Derivatvregreß des Bürgen*, *supra* note 11, pp. 120, 127 seqq, 544; Dieckmann, *Scots Influence on English Law*, *supra* note 10, pp. 349 seqq.

165. Dieckmann, *Der Derivatvregreß des Bürgen*, *supra* note 11, pp. 7, 245 seqq, et passim.

doubts whether the law of restitution and the law of unjust enrichment are identical,¹⁶⁶ and, if not, how far they overlap. As to this, no view is expressed here.

The restitutionary thesis on equitable subrogation developed in the US. Its appearance in the time of the rise of the legal treatise—to use Professor *Simpson's* category¹⁶⁷—shall be recapitulated briefly.

b. The Treatise Literature in the US on Equity, Suretyship, and Subrogation

A lot of literature deals with the guarantor's right to subrogation. Works on equity jurisprudence describe it, as do works on the law of suretyship. The three major works by *Dixon*,¹⁶⁸ *Sheldon*,¹⁶⁹ and *Harris*¹⁷⁰ are devoted entirely to subrogation and its many applications in the 19th century. How do these works explain subrogation?

With hindsight one might assume that *Joseph Story* could be an author connecting the surety's equity to unjust enrichment reasoning. Why is that? *Joseph Story* was not insensitive to the enrichment idea. On the contrary, there can be no doubt, that *Story* was aware of the existence of the unjust enrichment principle. This becomes evident for from his decision in *Bright v Boyd*.¹⁷¹ In this case on mistaken improvements on another's land decided in 1841 *Story*—sitting as circuit judge—pronounces:¹⁷²

Upon the general principles of courts of equity, acting ex aequo et bono, I own, that there does not seem to me any just ground to doubt, that

166. Restatement of the Law of Restitution, *supra* note 1, § 1; Seavey/Scott, (1938) 54 L.Q.R. 29, 31 seq; Burrows, *Essays on Contract, Tort and Restitution*, 1998, pp. 45, 47 seqq, 58 seqq; 99 seq; Maddaugh/McCamus, *supra* note 152, p. 31 seqq; Mason/Carter, *Restitution Law in Australia*, 1995, para. 124 seqq; Cato, *Restitution in Australia and New Zealand*, 1997, p. 4 seq, 7; Tettenborn, *Essays in Honour of Gareth Jones*, 1998, p. 31 seqq; Mitchell, *supra* note 4, 493 seqq; Mitchell, *The Law of Subrogation*, *supra* note 5, pp. 4, 8 seqq et passim. Contra (now) Birks, [1997] *New Zealand L. Rev.* 623, 626 seq; Birks, *Essays in Honour of Gareth Jones*, 1998, p. 1 seqq; Birks, (1999) 28 *Univ. of W. Australia L. Rev.* 13, 17 seqq; Birks, (1999) 23 *Melbourne Univ. L. Rev.* 1, 5 seq [hereinafter Birks, Melbourne]; Birks, [1999] *Singapore JLS* 318, 319 seqq; Birks/Mitchell, in: Birks (ed.), *English Private Law*, II, 2000, para. 15.01 seqq; Birks, *Unjust Enrichment*, 2d ed. 2005, passim; Virgo, *Essays in Honour of Gareth Jones*, 1998, pp. 305, 307; Dietrich, *Restitution, A New Perspective*, 1998, passim. For a different view Abbot, (1896-1897) 10 *Harv. L. Rev.* 479 seqq, as to which see Learned Hand, (1897-1898) 11 *Harv. L. Rev.* 249 "Restitution or Unjust Enrichment."

167. A W B Simpson, *Univ. Chi. L. Rev.* 48 (1981) 632 seqq.

168. Dixon, *supra* note 30.

169. Sheldon, *supra* note 30.

170. Harris, *supra* note 30.

171. *Bright v Boyd*, 1 *Story* 478; 4 *F. Cas.* 127 (1841).

172. *Bright v Boyd*, 1 *Story* 478; 4 *F. Cas.* 127 (1841).

compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, ‘nemo debet locupletari ex alterius incommodo’; or, as it is still more exactly expressed in the Digest, ‘jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletioem.’ Dig. lib. 50, lit. 17,1.206. I am aware, that the doctrine has not as yet been carried to such an extent in our courts of equity.¹⁷³

And later:

I have ventured to suggest, that the claim of the bona fide purchaser, under such circumstances, is founded in equity. I think it founded in the highest equity; and in this view of the matter, I am supported by the positive dictates of the Roman law. The passage already cited, shows it to be founded in the clearest natural equity. “Jure naturae aequum est.”¹⁷⁴

As a legal writer *Story* likewise makes references to the principle in his *Commentaries on Equity Jurisprudence*.¹⁷⁵ Even if the instances are few, they do exist. How, then, does *Story* treat derivative recourse in his commentaries? On subrogation *Story* repeats the classical position carved out in *Aldrich v Cooper*¹⁷⁶ and *Craythorne v Swinburne*.¹⁷⁷ He *verbatim* quotes Lord Chancellor *Brougham*’s statement of the law in *Hodgson v Shaw*.¹⁷⁸ In the context of subrogation *Story* does not mention the unjust enrichment idea.¹⁷⁹

Likewise the three aforementioned American treatises on subrogation by *Dixon*,¹⁸⁰ *Sheldon*,¹⁸¹ and *Harris*¹⁸² do not yet refer to unjust enrichment when explaining derivative recourse. Nor does *Christopher C. Langdell* in his *Brief Survey of Equity Jurisdiction*¹⁸³ published in the

173. *Bright v Boyd*, 1 Story 478; 4 F. Cas. 127, 132 f (1841).

174. *Bright v Boyd*, 1 Story 478; 4 F. Cas. 127, 133 (1841).

175. *Story*, *Commentaries on Equity Jurisprudence* . . . II, 2d ed. 1839, § 1237, § 1256.

176. *Aldrich v Cooper* (1802), 8 Ves Jun 382; 32 ER 402.

177. *Craythorne v Swinburne* (1807) 14 Ves Jun 160; 33 ER 482.

178. *Hodgson v Shaw* (1834) 3 My & K 183, 190 seq; 40 ER 70, 73.

179. *Story*, *Commentaries on Equity Jurisprudence* . . . I, 2d ed. 1839, §§ 499 seqq, §§ 324 seqq. In respect of contribution of sureties, there is only one alluding hint in the introductory paragraph in § 493, that might be construed as indicating an unjust-enrichment like approach.

180. *Dixon*, *supra* note 30, pp. 5 seq, 46 seqq.

181. *Sheldon*, *supra* note 30, § 1, p. 1 seq, § 11, p. 10, § 86, p. 100 seq.

182. *Harris*, *supra* note 30, § 1, p. 1 seqq, § 162, p. 123, § 168, p. 127 seq.

183. *Langdell*, *supra* note 66, p. 68 seq. According to the testimony given by Dean Ames, *Langdell* was not taken to the subject of quasi-contract and unjust enrichment: “. . . and he could hardly restrain his impatience if one spoke to him of the doctrine of unjust enrichment”. See Ames, *Christopher Columbus Langdell*, in: Ames, *Lectures on Legal History*, 1913, pp. 467, 481. *But see* *Langdell*, *Classification of Rights and Wrongs*, in: *A Brief Survey of Equity Jurisprudence*, 2d ed. enlarged, 1908, 219, at 224.

first issue of the *Harvard Law Review*. The same is true of the early US American¹⁸⁴ treatises on Suretyship,¹⁸⁵ and Equity.¹⁸⁶

To sum up: The treatise literature in the 19th century does not mention the unjust enrichment topos in the context of subrogation.

c. First Traces of Unjust Enrichment Arguments

Early traces of restitutionary reasoning in connection with subrogation may be found in writings in the early 20th century. Some are contained in notes published in the *Harvard Law Review*.¹⁸⁷ Reference is also¹⁸⁸ made in John Norton Pomeroy Jr.'s *Treatise on Equitable Remedies*,¹⁸⁹ in writings of *Roscoe Pound*,¹⁹⁰ and in Fred Lawrence's *Treatise on the Substantive Law of Equity Jurisprudence*¹⁹¹.

d. The Restatement(s) by the American Law Institute:
Restitution v. Security?

A somewhat ambiguous, but still important, role is played by the Restatements published by the American Law Institute. Two of them deal with the surety's¹⁹² right to subrogation—the Restatement of the Law of Restitution of 1937, and the Restatement of the Law of Security of 1941.

184. Neither would the English works on the law of guarantees in the 19th century: Fell, *A Treatise on the Law of Mercantile Guarantees and of Principal and Surety in General*, 2d ed. 1820, p. 199 seq; Theobald, *A Practical Treatise on the Law of Principal and Surety*, 1832, para. 252 seqq; Pitman, *A Treatise on the Law of Principal and Surety*, 1840, p. 113 seqq; Burghe, *Commentaries on the Law of Suretyship*, 1849, p. 352 seqq.

185. Spencer, *supra* note 66, §§ 133 seqq; Baylies, *supra* note 158, pp. 356 seqq; Brandt, *supra* note 158, §§ 324 seqq; Childs, *supra* note 158, pp. 277 seqq; Cook, *supra* note 158, §§ 244 seqq; Joyce (ed.) Pingrey, *A Treatise on the Law of Suretyship and Guaranty*, 2d ed. 1913, §§ 152 seqq.

186. Merwin, *supra* note 159, § 607 seqq, pp. 324 seqq; Willard, *supra* note 159, pp. 110 seqq; Fetter, *Handbook of Equity Jurisprudence*, 1895, section 170.

187. See generally Anon., (1903-04), 17 Harv. L. Rev. 267, 268; Anon., (1912-1913) 26 Harv. L. Rev. 261, 262; Anon., (1912-13) 26 Harv. L. Rev. 380 seq; Anon., (1925-1926) 39 Harv. L. Rev. 381, 383.

188. Likewise in Lile's *Notes of Lectures on Equity Jurisprudence to Accompany Merwin's Equity*, 1921, p. 166.

189. Pomeroy Jr., *A Treatise on Equitable Remedies*, 2d ed. 1919, § 2343 (§ 920), in: Pomeroy/Pomeroy Jr. (ed.), *A Treatise on Equity Jurisprudence as Administered in the USA*, IV, 4th ed. 1919.

190. Roscoe Pound, (1919-20) 33 Harv. L. Rev. 420, 421; see also later Roscoe Pound, *Jurisprudence*, vol. I, 1959, p. 415.

191. Lawrence, *A Treatise on the Substantive Law of Equity Jurisprudence*, II, 1929, §§ 621, 622, 722, 747.

192. The Restatement Third, Property (Mortgages) also has a section on a form of subrogation, § 7.6. It is, however, outside the scope of this Article.

Both offer definitions of subrogation, though with slightly different wording. They are considered in turn.

- i. Restatement of the Law of Restitution, Quasi-Contract and Constructive Trusts (1937), and Restatement Third, Restitution and Unjust Enrichment (promulgated May 2010)

There is no denying the fact, that the break-through in unjust enrichment reasoning in respect of subrogation within the Common Law world eventually came about in 1937. Most prominently¹⁹³—and probably most influentially—the Restatement of the Law of Restitution explained subrogation as a remedy of unjust enrichment.¹⁹⁴ It is contained in § 162, alongside of constructive trust, § 160, and equitable lien, § 161. The section reads:

§ 162. Subrogation.

Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder.

Even when one must conclude—following Professor *Kull*¹⁹⁵—that the Restatement relied on work done earlier in the US, it has to be seen as a milestone.

Unfortunately the Restatement does not offer a satisfactory explanation as to how the side effect of subrogation concerning the surety's discharge by loss of securities can be fitted into the unjust enrichment theory.

The Restatement Third, Restitution and Unjust Enrichment promulgated in May 2010 also considers subrogation as a remedy based on the principle of unjust enrichment.¹⁹⁶

193. On the influence of the Restatement in England cf. Goff/Jones, *The Law of Restitution*, 1966, p. V; Gummow in his preface to Jackman, *The Varieties of Restitution*, 1998; Birks, *Essays in Honour of Gareth Jones*, *supra* note 166, pp. 1, 2 seqq; Birks, Melbourne, *supra* note 166, p. 3; Martinek, *RabelsZ* 47 (1983) 284, 294 seqq; Lord Wright MR (1937-38) 51 Harv. L. Rev. 369: "I feel some hope that the Restatement will induce English lawyers to produce a reasoned treatise on the subject, and to classify, analyze and rationalize the large mass of authority in English case law. They will find an admirable model and example in the Restatement."

194. The systematic place of § 162 within the Restatement is as follows: Part II (on "Constructive trusts and analogous equitable remedies"), chapter 9 (on "General principles"), Topic 1. (on "Equitable remedies").

195. Kull, (2005) 25 OJLS 297 seqq, stressing especially the influence of Ames.

196. ALI (ed.) *Restatement Third, Restitution and Unjust Enrichment*, 2010, Volume I, § 1 com g, § 24 (at pp. 344 ff), and com g (pp. 355 ff); volume II, § 57, pp. 352 ff.

- ii. Restatement of the Law of Security (1941) and Restatement of the Law Third, Restatement of the Law of Suretyship and Guaranty (1996)
 - aa. Restatement of the Law of Security (1941)

Only four years after the work on Restitution, the American Law Institute published the Restatement of the Law of *Security*. The wording of the section on subrogation deviates from its sibling. The Restatement deals with subrogation in chapter 5 where the relationship of the rights of surety and creditor are explained. The definition given does not mention the purpose of reversing unjust enrichment. It reads:

§ 141. Subrogation.

Where the duty of the principal to the creditor is fully satisfied, the surety to the extent that he has contributed to this satisfaction is subrogated

- (a) to the rights of the creditor against the principal, and
- (b) subject to the rule stated in Clause (d), to the interests which the creditor has in security for the principal's performance in which the creditor has no continuing interest, and
- (c) to the rights of the creditor against persons other than the principal whose negligence or wilful conduct has made them liable to the creditor for the same default, and
- (d) to the rights of the creditor against co-sureties and to the creditor's interest in security held by them, but in such case the co-surety's personal liability is limited to the amount which will satisfy his duty to contribute his share of the principal's default.

It is interesting to see that the formulation does not support the unjust enrichment theory—at least not explicitly. Only in the *comment* there is a side remark quoting § 162 of the Restatement of Restitution.

The non-reference to any unjust enrichment theory in the section on subrogation is especially noteworthy. For in the provision on the surety's right to reimbursement, the Restatement of the Law of Security *does* in fact rely on an unjust enrichment argument. Under § 104 on Reimbursement, the guarantor is entitled to the "extent of his reasonable outlay", when his obligation is incurred with the consent of the principal. If, however, there is no debtor's consent to the undertaking of the suretyship in the first place, the right to reimbursement is granted only to the extent "that the principal has been unjustly enriched", § 104 (2). The "requested" surety is entitled to be indemnified by the principal, his *loss* is looked at and made good. The remedy is *plaintiff-sided*. The "not-requested" surety is only entitled to have the *enrichment* of the principal reversed. His remedy is *defendant-sided*.

What the Restitution Restatement omits, is contained in the volume on Security Law. In § 132 there is a rule on the surety's discharge upon surrender or impairment of a security by the creditor. Section 129 deals with extension of time to the principal, which likewise leads to the surety's discharge.

bb. Restatement of the Law Third, Restatement of the Law of Suretyship and Guaranty (1996)

The same observation holds true for §§ 27 seqq of the Restatement of the Law Third, Restatement of the Law of Suretyship and Guaranty published in 1996. Although the wording of the subrogation paragraph is altered, it still does not contain a reference to unjust enrichment. Such is left to the comment.¹⁹⁷ The purpose of subrogation is said to *reallocate the cost of performance* from the surety to the principal obligor.¹⁹⁸ This tribute paid to the parlance of the economic analysis of law is surely not incorrect. *Every* recourse is about reallocating burdens, and therefore costs. A *substantial argument why* the surety should be entitled to *privileged* recourse is, however, missing. Still, the law of subrogation is fully exposed, including rules on impairment of collateral, and other securities in §§ 42, 44.

iii. Summary

The treatment of subrogation as an equitable remedy alongside constructive trust, and others, by the Restatement of Restitution was a milestone for the understanding of derivative recourse as an example of unjust enrichment. Therefore, the Restatement is noteworthy. The ambiguity of the treatment of the topic of subrogation in the Restatements of Restitution and Security respectively begs the question why different restatements of the same body of rules come to diverse definitions, and arguments.

e. Modern English law

i. The Restitution School of Thought

When in England earlier inhibitions against the notion of unjust enrichment weakened, the guarantor's right to subrogation was claimed for the new territory on the map of the legal landscape. In England, the

197. Restatement of the Law Third, Restatement of the Law of Suretyship, 1996, § 27, comment a.

198. Restatement of the Law Third, Restatement of the Law of Suretyship, 1996, § 27, comment b.

great contributions by scholars to the detection of an unjust enrichment principle in the Common Law followed the American example.¹⁹⁹ Only a few quotations will suffice. In their standard treatise on the law of restitution, *Goff and Jones* write: “[T]he surety, A, is subrogated to the rights of the creditor, C, to prevent the principal debtor’s, B’s, unjust enrichment.”²⁰⁰ In Professor *Burrows’* introduction we find the formulation:

The authorities establish that a surety (C) who has paid off another’s (D’s) debt is subrogated to the creditor’s (X’s) (former) remedies against the debtor to recover the sum paid. This right of subrogation is statutorily enshrined in the Mercantile Law Amendment Act 1856, s 5.

This is straightforwardly explicable on unjust enrichment reasoning. The unjust factor is the policy-motivated factor of legal compulsion, which . . . is designed to avoid an undeserved escape from liability. The enrichment is the discharge of the debtor’s liability to his creditor; and the enrichment is directly at the surety’s expense in the subtractive ‘transfer of value’ sense.²⁰¹

Charles Mitchell, in particular, has put forward the proposition that unjust enrichment is the rationale of most cases of subrogation,²⁰² including guarantees.²⁰³ Many authors share this view.²⁰⁴ Professor *Mitchell’s* writings foremost have influenced the understanding of subrogation in general as an unjust enrichment remedy in England.

199. Birks, [1971] 34 MLR 207; Mitchell, English Private Law, *supra* note 5, 2d ed. 2007, para. 18.216; Birks, *supra* note 29, pp. 191, 93 ff; Birks, Unjust Enrichment, *supra* note 166, pp. 296 ff; Burrows, *supra* note 166, pp. 7, 116; Burrows, (2001) 117 LQR 412, 423 f; Burrows/McKendrick, Cases and Materials on the Law of Restitution, 1997, pp. 725, 747; Maddaugh/McCamus, *supra* note 152, pp. 159 ff; Kull, (1995) 83 Calif. L. Rev. 1191, 1192 f; J.P. Dawson, Unjust Enrichment, A Comparative Analysis, 1951, p. 37; Friedman, *supra* note 33, p. 553; Tettenborn, Law of Restitution in England and Ireland, 3d ed. 2007, para. 2-22 ff; Edelman/Bant, Unjust Enrichment in Australia, 2006, 25 f, 288 f; for further references see Dieckmann, *Der Derivatvregreß des Bürgen*, *supra* note 11, pp. 261 ff.

200. Goff/Jones, *supra* note 31, para. 3-009, also 3-025 seqq. The quotation is taken from the last edition by the hand of the original co-author Professor Gareth Jones. Likewise the new edition of Goff & Jones, The Law of Unjust Enrichment, *supra* note 5, para. 39-01 ff.

201. Burrows, The Law of Restitution, 3d ed. 2011, p. 148.

202. Mitchell, The Law of Subrogation, *supra* note 5; Mitchell/Watterson, *supra* note 5, para. 1.02, 3.01 seqq.

203. Mitchell, The Law of Subrogation, *supra* note 5, pp. 10 seq, 51 seqq, 54 seqq; Mitchell, *supra* note 4, pp. 489, 498 seq; Mitchell/Watterson, *supra* note 5, para. 1.06, 6.03 ff; Mitchell, English Private Law, *supra* note 5, II, 2d ed. 2007, para. 18.216 ff.

204. Birks, *supra* note 29, pp. 93, 191; Birks, Unjust Enrichment, *supra* note 166, pp. 170 seq, 296 seqq; see the references Dieckmann, *Der Derivatvregreß des Bürgen*, *supra* note 11, pp. 261 seqq; Goff & Jones, The Law of Unjust Enrichment, *supra* note 5, para. 39-01 ff.

ii. Sceptics

However, not all of the modern authors dealing with subrogation subscribe to the unjust enrichment theory. Clearly against this view is, e.g., *Gummow J*, who—writing extra-judicially—explains: “a doctrine of unjust enrichment is not readily accommodated to the adjustment of tripartite as distinct from merely bipartite relationships. Hence the difficulty in adjusting the doctrine of subrogation into the framework of a general scheme of unjust enrichment.”²⁰⁵ Other authors share these doubts,²⁰⁶ the present one included.²⁰⁷

Traditionally, in the books on the law of guarantees²⁰⁸ one would not find the unjust enrichment explanation, though this seems to change in accordance²⁰⁹ with later judicial opinions on subrogation.

The sceptical view is certainly supported by the fact that the Principles, Definitions and Model Rules of European Private law do not include subrogation—or any other form of derivative recourse—in its part on unjustified enrichment.²¹⁰

iii. The cases in England (and elsewhere)

aa. England

In English law the cases on the guarantor’s right to subrogation traditionally do not indicate any relationship to unjust enrichment. This is, of course, particularly true for the cases defining the classical position,²¹¹ as well as for those cases that follow this line.²¹²

205. Gummow, *supra* note 10, pp. 47, 69 seq.

206. Stoljar, [1987] 50 MLR 603, 608 seq; Hedley, *Restitution: Its Division and Ordering*, 2001, pp. 119 seqq, 134 seqq; Meagher/Heddon/Leeming, *supra* note 152, para. 9-075; Visser, *Unjustified Enrichment in Comparative Perspective*, in: Reimann, Mathias/Zimmermann, Reinhard (eds.), *The Oxford Handbook of Comparative Law*, 2006, ch. 30, pp. 969, 973 seqq, 984 seqq; Leeming, in: Glister/Ridge (eds.), *Fault Lines in Equity*, 2012, 27.

207. Dieckmann, *Der Derivativreß des Bürgen*, *supra* note 11, pp. 245-314, 515-24, 548 seqq; JA Dieckmann (2004) 8 *Edinburgh L. Rev.* 329, 347 seq; JA Dieckmann, *European Review of Private Law* (forthcoming)

208. Salter, in: *Halsbury’s Laws of England*, vol. 20, 4th ed. 1993, para. 228 seqq, especially at 228 seq; Rowlatt, *supra* note 152, p. 145; Putnam, *supra* note 29, p. 82 seqq; Andrews/Millett, *Law of Guarantees*, 2d ed. 1995, para. 11.17 (but see next footnote).

209. Now tentatively Andrews/Millett, *Law of Guarantees*, 5th ed. 2008, *supra* note 29, para. 11.017, 11.019.

210. von Bar/Clive (eds.), *Principles, Definitions and Model Rules of European Private, Draft Common Frame of Reference (DCFR) Full Edition, Volume 4*, 2009, pp. 3083 seqq.

211. *Aldrich v Cooper* (1802) 8 Ves Jun 382; 32 ER 402; *Craythorne v Swinburne* (1807) 14 Ves Jun 160; 33 ER 482; *Hodgson v Shaw* (1834) 3 My & K 183, 191; 40 ER 70, 73.

212. *Newton v Chorlton* (1853) 10 Hare 646, 648 seq; 68 ER 1087, 1088; *Watts v Shuttleworth* (1860) 5 H & N 235, 247; 157 ER 1171, 1176; *Pearl v Deacon* (1857) 24 Beav 186, 190; 53 ER 328, 330; *Duncan, Fox & Co & Robinson & Co v N. & S. Wales Bank* (1880-81) 6 App. Cas. 1 (HL) 12, 19; *Ward v Nat’l Bank of N.Z.* (1883) 8 App. Cas. 755, 765 (PC); *Morris v*

The cases stress that subrogation originates from the creditor-surety relationship.²¹³ In contradistinction to that approach the restitutionary thesis centers on the position between surety and principal. In some cases on *other* instances of subrogation,²¹⁴ lately, it is considered to be a remedy directed against unjust enrichment, e.g., by *Millet* LJ (as he then was) in *Boscawen v Bajwa*: “Subrogation, therefore, is a remedy, not a cause of action . . . it is available in a wide variety of different factual situations in which it is required in order to reverse the defendant’s unjust enrichment.”²¹⁵ And Lord *Hoffmann* in *Banque Financière de la Cité v Parc (Battersea) Ltd*: “It is important to remember that . . . subrogation is not a right or a cause of action but an equitable remedy against a party who would otherwise be unjustly enriched.”²¹⁶ There surely is a certain tendency in the later cases towards unjust enrichment reasoning, and, in the context of guarantees it is also mentioned obiter in *Liberty Mutual Insurance Company (UK) Ltd & Another v HSBC Bank plc*.²¹⁷ But, so far, there is no case in the law of the guarantor’s right to derivative recourse that the *ratio decidendi* depended on its qualification as unjust enrichment. It is questionable if reasoning from one instance of subrogation can be readily transferred to another instance of that doctrine. Because of the variety of cases this should be denied. Obviously, the views expressed here are restricted to guarantees.

bb. Elsewhere

However interesting a comparative survey on the case law in different common law jurisdictions would be, only a slight glance at non-English cases shall be made, here. There are, of course, cases in the US

Ford Motor Co Ltd [1973] 2 All ER 1084, 1089 (CA); *Scholefield Goodman and Sons Ltd v Zyngier* [1984] VR 445, 452 (Supreme Court of Victoria); *Scholefield Goodman and Sons Ltd v Zyngier* [1986] AC 562, 571 f (PC); *McCull’s Wholesale Pty Ltd v State Bank of New South Wales* [1984] 3 NSWLR 365, 378 (Supreme Court of New South Wales); *Mathews v Aikin* (1848) 1 NY 595, 600 (New York Court of Appeals).

213. Cf. *Newton v Chorlton* (1853) 10 Hare 646, 647 seqq; 68 ER 1087, 1088 seqq; *Pearl v Deacon* (1857) 24 Beav 186, 189 seqq; 53 ER 328, 329 seqq; *Duncan, Fox & Co & Robinson & Co v N. & S. Wales Bank* (1880-81) 6 App. Cas. 1 (HL) 12 seq, 18 seq; *China & South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536, 544 f (PC); *Butcher v Churchill* (1808) 14 Ves 567, 575 seq; 33 ER 638, 641; *Capel v Butler* (1825) 2 Sim & St 457, 462; 57 ER 421, 423; *Watts v Shuttleworth* (1860) 5 H & N 235, 248; 157 ER 1171, 1176; *Taylor v Bank of New South Wales* (1886) 11 App. Cas. 596, 599 seqq (PC).

214. *In re T.H. Knitwear (Wholesale) Ltd* [1988] Ch. 275 (CA) 283, per Slade LJ; see also at 292, per Caulfield J; *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ. 291.

215. *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) 335.

216. *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] 1 All ER 737 (HL) 749.

217. *Liberty Mutual Inc. Co (UK) Ltd & Another v HSBC Bank plc* [2002] EWCA Civ. 691.

where subrogation is seen as an enrichment remedy. The Arkansas case of *Southern Cotton Oil Company v. Napoleon Hill Cotton Company*²¹⁸ may be mentioned.²¹⁹ However, there are other cases,²²⁰ and reasonings not compatible with an unjust enrichment approach.²²¹ There are several subrogation cases decided by the US Supreme Court that do not mention any unjust enrichment context at all (pre²²² and post²²³ Restatement alike).

In Australia the courts seem not convinced of the unjust enrichment explanation. They stay clear off it. E.g., in the case of *Bofinger v Kingsway Group Ltd.*²²⁴ the High Court of Australia has explicitly rejected the view, that subrogation is considered to be based on unjust enrichment. Australian law has been more cautious than English law, and does not include subrogation in an enrichment context.²²⁵

IV. CONCLUSION

This comparative survey has shown the great variety of different rationales that historically have been, and still are ascribed to the guarantor's right to derivative recourse in the common law world, in some civil law jurisdictions, and in the mixed legal systems of Louisiana, and Scotland. The same legal phenomenon is explained in different ways.

The fiction, or rather comparison, of the purchase of the actions by the paying guarantor offered by the Roman sources, should not count as a real attempt at an explanation. However, the equitable considerations

218. *S. Cotton Oil Co. v Napoleon Hill Cotton Co.*, 108 Ark. 555, 158 S.W. 1082 (1913); see also *Newberry v Scruggs* 986 S.W.2d 853 (1999) 336 Ark. 570.

219. Likewise *Newberry v Scruggs* 986 S.W.2d 853 (1999) 336 Ark. 570; *Evans' Administrator v Evans* 199 S.W.2d 734, 737 (1947; Court of Appeals of Kentucky). Some of the cases speak of "unearned enrichment," *First Taxing Dist. v Gregory*, 118 Atlantic Reporter 96, 97 (1922, Supreme Court of Errors of Connecticut).

220. *Nat'l Am. Ins. Co. v United States*, 498 F.3d 1301, 1304 seqq (2007); *Pa. Nat'l Mut. Cas. Ins. Co. v City of Pine Bluff*, 354 F.3d 945, 951 seqq (2004).

221. For example, the "five part test" of subrogation which one line of cases applies: *In re Kaiser Steel Corp* 89 BR 150, 152 (1988); *Simon v United States*, 756 F.2d 696, 699 (9th Cir.1985); *In re Flick*, 75 B.R. 204, 206 (1987).

222. *Aetna Life Ins. Co. v Middleport* 124 U.S. 534 (1887); *Prairie State Nat'l Bank of Chi. v United States* 164 U.S. 227, 230 seqq (1896); *Henningsen v US Fid. & Guar. Co.*, 208 US 404, 409 seqq (1908); *United States v Nat'l Sur. Co.*, 254 U.S. 73, 74 seqq (1920); *Jenkins v Nat'l Sur. Co.*, 277 U.S. 258, 264 seqq (1928); *Lidderdale Executioners v Executioners of Robinson* (1827) Wheat 594.

223. *Am. Sur. Co. v Bethlehem Nat'l Bank* (1941) 314 U.S. 314, 317, 318, 323 seqq (Justice Douglas dissenting); *Am. Sur. Co. v Sampsell*, 327 U.S. 269, 270 seqq (1946); *United States v Munsey Trust Co. Receiver* 332 U.S. 234 (1947); *Pearlman v Reliance Ins. Co.* (1962) 371 U.S. 132, 136 seq; *United States v California*, 507 U.S. 746, 756 seqq (1993); *Dep't of the Army v Blue Fox, Inc.*, 525 U.S. 255, 259, 264, per Rehnquist, CJ (1999).

224. *Bofinger v Kingsway Group Ltd.* [2009] HCA 44 at 85 seqq.

225. O'Donovan/Phillips, *supra* note 31, para. 12-255 seqq n.44 at p. 757; Tilley, (2005) 79 ALJ 518; Leeming, in: Glister/Ridge (eds.), *Fault Lines in Equity*, 2012, 27.

carved out in the writings of the scholars of the *ius commune*, and decisions of the courts in 19th century Germany, furnish an impressive line of argument. The modern German view, that sees the securing of the original right to recourse as the main purpose of the *cessio legis* of § 774 BGB, on the contrary, is somewhat dry. It mainly states the obvious fact, that derivative recourse is *privileged* recourse. It altogether fails to give an answer to the question, *why privileged* recourse is proper. The same appears true for the case law of Louisiana. Apparently the existence of exact statutory provisions makes search for a justification of the law less needed.

Maybe the most sophisticated explanation is the sound, detailed, and elaborate reasoning of Lord *Kames*. His balanced evaluation of the interests of the parties involved in the suretyship situation, and affected by the creditor's choice, is particularly convincing. The classical approach of English law laid out in the case law of the early 19th century Chancery Court, and maintained by eminent lawyers like *Joseph Story* bears a striking resemblance to the Scottish Judge's argument. Of the many divergent views why derivative recourse is justified, only the classical English position and *Kames'* argument are familiar. The similarity can be explained only by an adoption of *Kames'* reasoning by the equity lawyers.

The look at the sources, and material of the civil law has revealed a certain amount of divergence within the civil law world. The equitable considerations of the *ius commune* are not referred to any more in modern German law. It is forgotten knowledge.

The modern view in the common law is the restitutionary thesis. Even if it is not subscribed to by everyone, it is an important contribution. The restitutionary thesis is a child of US-American jurisprudence, adopted (late) by the English unjust enrichment school of thought. The absence of an equivalent in the civilian, and mixed-legal systems casts severe doubts on its validity. If the thesis is correct, civilian legal thinking must have overlooked over the last couple of hundreds of years, that the essence of derivative recourse is in fact the reversal of an unjustified enrichment. These doubts are supported, when one considers the following facts. All the civil codes have provisions on unjustified enrichment, the different jurisdictions have produced a vast amount of case law on enrichment issues, and there is a great deal of literature on the topic. None of these sources include derivative recourse. The latest contribution to the restitutionary thesis—the Restatement Third of Restitution by the ALI—it is submitted, would have been well advised to look into the provisions and rules in Louisiana.

Lord *Diplock's* tentative suggestion in the case of *Orakpo* quoted in the introductory paragraph²²⁶ has not found support. The civil law does not back the restitutionary thesis. The civilian reasoning dealt with here makes it clear, that they do not consider derivative recourse to be a remedy to reverse an unjustified enrichment of the principal at the guarantor's expense.

This diversity of explanations of the normative basis of derivative recourse is somewhat surprising. For all these explanations refer to a legal figure that is in structure, and scope equivalent to the right to subrogation (if not in every detail). However, the diversity shown proves that any form of subrogation is a complex, and most difficult legal figure. And the diversity shows that subrogation is not easily explained in a monocausal way. Any theory giving an explanation for the guarantor's right to derivative recourse will have to take that into consideration.

226. *Orakpo v Manson Invs. Ltd*[1978] AC 95, 104 (HL), *supra* Part I.A.2.