The Role of Subrogation by Operation of Law and Related Problems in the Insurance Field

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greatly increase litigation, then the remedy would not be worth the treatment.

Conclusions

In the reported cases, the courts have protected the insurer's freedom to distribute the policy proceeds among multiple claimants and have refused to permit claimants to protect a pro rata share. Such freedom, however, could be easily abused. The insurer could offer a claimant the choice of accepting what the company has to offer, or risk exhaustion of the proceeds in settlements with other claimants who will accept the company's terms. If such a practice were widespread, or if disproportionate distribution were common, perhaps courts or legislatures should provide claimants with enforceable rights in the proceeds. However, it is submitted that there is insufficient evidence to indicate that these practices are commonplace. There are very few reported cases in which a claimant contests a disproportionate settlement. Further, there are indications that carriers go to some lengths to distribute the proceeds pro rata, lest claimants be permitted to preserve their shares in court. Moreover, there is a lack of agitation from text writers or plaintiffs' attorneys to change the present system of free distribution by the insurer. If the freedom which the companies now enjoy is not being abused, then allowing claimants enforceable interests in the proceeds would entitle them to nothing more than they now receive. Allowing enforceable proration under any plan thus far suggested would serve needlessly to increase litigation in courts whose dockets are already overcrowded.

Gerald LeVan

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Introduction

Subrogation accompanies payment. Payment discharges the obligation, but the fiction of subrogation operates to continue the existence of the rights, privileges, and powers of the former

43. Professor Keeton does not suggest commonplace abuse by the insurance companies. He only suggests that the company's duty to the insured and its obligations to the claimant be consistent. Id. at 28.
creditor, the subrogor, in favor of the subrogee. Subrogation confers upon the subrogee not only the cause of action of the subrogor, but also any security devices accessory thereto. These security devices of the reimbursed creditor are not released, but rather secure the cause of action acquired by the subrogee, now himself a creditor of the former debtor of the subrogor. Hence, subrogation is a higher right than the simple, or unsecured, cause of action which appears to be provided for in France and in Louisiana for one who pays another's debt pursuant to considerations other than donative intent.

The question of the applicability vel non of subrogation principles arises only in connection with the discharge by one person of the obligation of another. Casualty insurers are daily engaged in indemnifying their policyholders for losses covered by the policies. In many instances, these policyholders may have had lawful claims sounding in tort or contract against others. Hence it is apparent that the subrogation doctrine claims considerable attention in the field of insurance law. The primary thrust of this Comment is focused upon the role of legal subrogation and related problems in insurance law, with emphasis on Louisiana law. However, a brief general analysis of subrogation law, in its civilian setting, is undertaken at the outset. The desirability of attempting to distinguish subrogation from somewhat similar concepts in a civilian system is indicated.

Subrogation is distinguishable from assignment in several respects. Assignment is always conventional, whereas subro-

1. 4 Aubry et Rau, Cours de Droit Civil Français no 321 (6th ed. 1946): "Subrogation is a juridical fiction, admitted or established by the law . . . by virtue of which an obligation, extinguished with regard to the original creditor . . . is regarded as continuing to subsist to the benefit of this third party, who is authorized to avail himself, to the extent he has paid, of the rights and actions of the old creditor." (Transl. by author.)


3. This becomes clear from a reading of Article 2642 and following of the Louisiana Civil Code. However, Article 2011 of the Code provides: "Not only the obligation, but the right resulting from a contract relative to immovable property, passes with the property. Thus the right of servitude in favor of immovable property, passes with it, and thus also the heir or other acquirer will have the right to enforce a contract made for the improvement of the property by the person from whom he acquired it." On the strength of this provision, it has been held that some obligations owed owners of immovable property pass to the vendee of that property. Breaux v. Laird, 223 La. 446, 65 So.2d 907 (1953); McGuffy v. Weil, 120 So.2d 358 (La. App. 2d Cir. 1960). It is arguable that this is, in effect, an assignment by operation of law. It seems more proper, however, to reason that such obligations form part of the quid pro quo of the sale and are tacitly transferred along with the property purchased as consideration for the purchase price. Such a transfer, although tacit, would nonetheless be conventional.
gation may take place by operation of law. With every assignment warranty of the existence of the credit assigned is implied, but this is not the case with subrogation. Subrogation carries with it only the limited claim to reimbursement, arising as it does upon payment to discharge a third person's indebtedness. Assignment, on the contrary, is actually the sale or exchange of a credit, and therefore involves the power to collect in full the credit transmitted.

Subrogation differs from that form of novation which involves substitution of creditors in that novation must be contracted expressly, whereas it has been noted that subrogation may take place by effect of law. Furthermore, one of the essential juridical effects of subrogation is the acquisition by the subrogee of whatever security the subrogor possessed. To the contrary, novation ordinarily operates to extinguish the security protecting the creditor of the original debt.

The Louisiana Civil Code provides that subrogation is either conventional or legal. Conventional subrogation, as it relates to insurance law, is contracted at the time of payment by the insurer to the insured who has suffered a loss. Subrogation of right, or legal subrogation, takes place under the Code in several given instances. Specifically in point is Article 2161(3)

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4. LA. CIVIL CODE arts. 2159, 2161 (1870).
5. Id. art. 2646; FRENCH CIVIL CODE art. 1693 (Cachard transl. rev. ed. 1930).
7. 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 520(4) (1959).
8. LA. CIVIL CODE art. 2190 (1870).
9. Id. art. 2185 et seq. See also 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1637(3) (1959).
10. LA. CIVIL CODE art. 2159 (1870).
11. Id. art. 2160(1) provides: "The subrogation is conventional: 1. When the creditor, receiving his payment from a third person, subrogates him in his rights, actions, privileges, and mortgages against the debtor; this subrogation must be expressed and made at the same time as the payment." (Emphasis added.) (In connection with the italicized phrase, it is incidentally noted that Union Indemnity Co. v. Crow, 127 So. 35 (La. App. 2d Cir. 1930) seems to stand for the proposition that subrogation made prior to payment is valid provided that payment is later actually made.)
12. LA. CIVIL CODE art. 2161 (1870) provides: "Subrogation takes place of right:
   "1. For the benefit of him who, being himself a creditor, pays another creditor, whose claim is preferable to his by reason of his privileges or mortgages.
   "2. For the benefit of the purchaser of any immovable property, who employs the price of his purchase in paying the creditors, to whom this property was mortgaged.
   "3. For the benefit of him who, being bound with others, or for others,
which allows subrogation of right to one who "being bound with 
others, or for others, for the payment of the debt, had an interest 
in discharging it."13

Article 2134 of the Civil Code14 is likewise important to 
the ensuing analysis. It is this article which seems to provide 
an unsecured simple cause of action in favor of one who, in his 
own name, pays the debt incurred by another. It is suggested 
that this provision was intended by the lawmaker to furnish 
a cause of action for one discharging another's obligation volun-
tarily, as a negotiorum gestor. Since the insurer does not make 
payment as a volunteer "no way concerned" in the obligation, 
but rather as one who is bound to make payment, it should be 
granted a higher right by law than that accorded a mere 
volunteer, or gestor. It is submitted herein that this higher 
right is embodied in the provision of Article 2161(3) of the 
Code for subrogation by operation of law in favor of one who is 
bound with or for another for the payment of a debt and thus 
has an interest in paying it.

Tort Claims

In common law jurisdictions the casualty insurer who has 
paid is subrogated to its insured's tort claims whether conven-
tional subrogation is present or not.15 This allowance of subro-
gation has its roots in the equitable doctrine of preventing 
unjust enrichment.16 Accordingly, in the absence of conventional

13. Id. art. 2134.
14. Id. art. 2161(3).
15. 6 Appleman, Insurance Law and Practice § 4051 (1942) and nume-
rous cases cited therein.
16. 6 id. § 4054; Vance, Insurance § 134 (2d ed. 1951); Patterson, Esse-
tials of Insurance Law § 33 (1935). See also King, Subrogation Under Con-
tracts Insuring Property, 30 Texas L. Rev. 62 (1951). The doctrine has been 
referred to by one author as "nonconsensual suretyship." Campbell, Non-Consen-
sual Suretyship, 45 Yale L.J. 69, 76 (1935): "An insurer and a tortfeasor whose 
willful, reckless or negligent conduct causes loss to a third person, for which loss 
the insurer is bound to indemnify the latter, are in the relation of surety and 
principal, although it is obviously not consensual. The reasons are (1) that the 
insurer and the tortfeasor are bound, the one by contract and the other because 
of his tort, to indemnify the insured for the loss; (2) that, in equity and good 
conscience, the insured should but once receive full compensation in his own be-
half; and (3) as between the insured and a tortfeasor who is in fault, the latter 
should bear the ultimate burden of making compensation for the loss resulting

subrogation, Anglo-American courts have predicated their findings of subrogation in favor of insurers who have paid upon the conclusion that subrogation takes place by operation of law.\textsuperscript{17} The Louisiana courts have not arrived at such well-defined results. The cases involving conventional subrogation appear to be fairly satisfactory and may be said to stand for the proposition that conventional subrogation is permissible for insurers and will be supported if adequate proof is adduced that subrogation was made conformably to the pattern prescribed by the Code.\textsuperscript{18} There is, however, no way to reconcile the cases in which conventional subrogation was lacking or at issue. Conflicting bases upon which earlier decisions were founded and discordant interpretations of the limits of legal subrogation have combined to create a state of confusion in our law on the matter. Some cases have founedered on the tort theory reef, while others are embattled by diverse pronouncements of subrogation law.

In general, it may be said that the Louisiana jurisprudence has moved in three directions. Some decisions have held that Article 2161 provides legal subrogation for a casualty insurer who has paid.\textsuperscript{19} Others hold that there is no legal subrogation in therefrom. The consequences of this relation of surety and principal are, first, that the insurer is subrogated in equity to the rights of the insured against the tortfeasor, even in the absence of the usual provision in the policy to that effect.\textsuperscript{17} 6 \textit{APPLEMAN, INSURANCE LAW AND PRACTICE} § 4051 (1942), note 1, and accompanying text.


19. Monteleone v. Royal Ins. Co., 47 La. Ann. 1563, 18 So. 472 (1895) and Monteleone v. Harding, 50 La. Ann. 1147, 23 So. 990 (1898) (where building was destroyed by fire and intervenor insurance company which had paid off claim sought recovery of one-half value of party wall from adjoining co-owner by virtue of subrogation, the court approved the action which seemed to be based upon legal subrogation, although the question did not seem greatly at issue); Moncrieff v. Lacobie, 89 So.2d 471, 475 (La. App. 1st Cir. 1956) ("[T]he collision insurer also may if it chooses bring an independent action for recovery of damages paid to its insured against the third party tortfeasor by virtue of its \textit{legal or conventional} subrogation" (Emphasis added.)); Aetna Life Ins. Co. v. Dejean, 167 So. 864 (La. App. 1st Cir. 1938) (definitely seems to recognize legal subrogation in favor of insurer, but found no cause of action in favor of insured and consequently none in favor of the insurer; point not passed upon on appeal, Aetna Life Ins. Co. v. Dejean, 185 La. 1074, 171 So. 450 (1938)). See also Hanton v. New Orleans & C. B. Light & Power Co., 124 La. 502, 50 So. 544 (1909); Duchamp v. Dantilly, 9 La. Ann. 247 (1854) ("the legal subrogation extends to every case when a person pays a debt which he has an interest in discharging" (emphasis added.)); Travelers Fire Ins. Co. v. Ackel, 29 So.2d 617 (La. App. 2d Cir. 1947) (dictum to effect that subrogation takes place by operation of law in favor of an insurer who paid); Miller v. Newark Fire Ins. Co., 12 La. App. 315, 125 So. 150 (Orl. Cir. 1929) (seems to accept legal subrogation in favor of insurers, but it is difficult to ascertain exact conclusion of the court). \textit{Cf.} Howe v. Frazer, 2 Rob. 424, 428 (La. 1842). This case seems to be a landmark on legal subroga-
such a case. Finally there are the decisions which, seemingly oblivious of the subrogation schism, have been pitched on principles of tort law. Of those decisions denying legal subrogation, the D. R. Carroll & Co. case\textsuperscript{20} is the citadel to be razed if the argument for legal subrogation for insurers is to carry the day. In the Carroll case, a majority of the Louisiana Supreme Court denied legal subrogation to a fire insurer which had indemnified its insureds, shippers of cotton, for loss of the cotton by fire in transit on the defendant carrier’s railway. The court disallowed the insurer’s claim of subrogation to its insureds’ possible cause of action against the defendant with the summary statement that the insurer did only that which it was paid a premium to do and that the defendant owed no obligation to the insurer. The dissenting Justice was of the opinion that a clear case of legal subrogation had been presented.

Although the Carroll case has not been overruled, it is submitted that the force of its precedent has been considerably lessened. Without alluding to the Carroll case, several subsequent

\textsuperscript{20} D. R. Carroll & Co. v. New Orleans, J. & G. N. R. R., 26 La. Ann. 447 (1874) (holding no legal subrogation for fire insurer who paid off its insureds’ claims to the insureds’ possible cause of action against the defendant railroad company). The only case of recent date which seems in line with the Carroll decision is Forcum-James Co. v. Duke Transportation Co., 231 La. 953, 93 So.2d 228 (1957), in which the court denied subrogation by operation of law to a contractor who, in fulfillment of its contractual obligation, repaired a bridge damaged by a tortfeasor. The contractor in this case was in virtually the same position as is an insurer. It seems that the plaintiff did nothing to substantiate its claim to legal subrogation, which accounts for the court’s summary disposition of the claim. Cf. United States Fidelity & Guaranty Co. v. Thomas, 14 La. App. 117, 129 So. 556 (Orl. Cir. 1930) (denying subrogation to fidelity insurer on authority of the Carroll case) and Bouchon v. Southern Surety Co., 151 La. 503, 91 So. 854 (1922) (no longer the law since 1926 amendment to Workmen’s Compensation Act, but disallowing compensation insurer subrogation).
cases took an opposite course. Moreover, its authority has been diminished by the adoption in 1898 by Louisiana of the standard fire policy which contains provision for subrogation to tort claims, by the inclusion since 1926 of statutory provision for subrogation of compensation insurers, and by the repeated criticism to which the decision has been subjected.

The reasoning underlying the Carroll denial of legal subrogation would seem to be simply that one who is contractually bound to indemnify another in case of loss is not, as relates to the similar duty arising in tort of the one causing the loss, bound with or for the wrongdoer within the meaning of Code Article 2161(3). However, it is suggested that a persuasive argument can be made that the insurer is in fact bound with the tortfeasor, at least in the sense of Howe v. Frazer that the insurer is bound "for the same debt as another." A discussion of this suggestion must await consideration of another case of major importance, one which did not rest upon subrogation principles, but rather was charted in tort.

The landmark case of London Guarantee & Accident Ins. Co. has been relied upon by all of the Louisiana courts of

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21. See note 19 supra.
25. 2 Rob. 424 (La. 1842). The Howe case is important for its decision that Article 2161(3) includes provision for subrogation in favor of one who is bound for the same debt as another. The case involved a surety's demand that it be subrogated to the claims of its principal, whose adverse judgment it had satisfied. The crucial language of the opinion is quoted. "It is not very clear that the parties are bound with each other, for they did not bind themselves together. They were, however, certainly bound for the same debt, which forms a third category, the first being a binding for another, the second with another, the third for the same debt as another." Id. at 426.
26. London Guarantee & Accident Ins. Co. v. Vicksburg, S. & P. R.R., 153 La. 287, 95 So. 771 (1923) (citing as authority Foster and Glassell Co. v. Knight Brothers, 152 La. 596, 93 So. 539 (1922); Appalachian Corp. v. Brooklyn Coop. Co., 151 La. 41, 91 So. 539 (1922). Although it does not appear that the Supreme Court of Louisiana has had occasion to review or follow the London case, the courts of appeal, all circuits, in most instances eschewing other possible considerations, have adopted and expanded the London ruling in a bevy of decisions. McCoy v. State Farm Mutual Ins. Co., 129 So.2d 66 (La. App. 3d Cir. 1961); Emmco Ins. Co. v. Sharp, 126 So.2d 57 (La. App. 1st Cir. 1960); Emmco Ins. Co. v. Nola Cabs, Inc., 125 So.2d 207 (La. App. 4th Cir. 1960); Pellegrin v. Canal Insurance Co., 111 So.2d 583 (La. App. 1st Cir. 1959); American Bankers Ins. Co. v. Costa, 107 So.2d 75 (La. App. Orl. Cir. 1958) (court held that a restricted release could not destroy insurer's own cause of action under Civil Code Article 2315), noted in 19 Louisi-
appeal for the position that an insurer who is obliged by contract to indemnify an injured party for loss caused by another's tort is likewise injured by the wrongful conduct and therefore has an action in tort. This tort action is defined as being independent of the possible cause of action of the injured insured against the wrongdoer. The difficulty with the London result is that it runs counter to the general rule that a tortfeasor is not liable for such loss as it is not "proximately" caused by his wrong. "Proximate" is an admittedly elusive concept, being in the main no more than a semantic cloak for judicial policy conclusions as to the limits of liability for sub-standard conduct. Be that as it may, however, it seems well settled that loss incurred as a result of contractual commitment is not "proximately" caused by the tort which was responsible for the damage which made the contractual obligation exigible. Regardless of what factors may have militated in favor of the adoption of a rule


The possibility bears mentioning that the decision in London might have been precipitated by the Carroll denial of legal subrogation. Faced with the Carroll decision, yet feeling in sympathy with the insurer's position, it is conceivable that the London course of action appeared to the then Louisiana Supreme Court preferable to overruling Carroll. However, a solution of lesser inequities hardly seems a desirable alternative to erasing a poor precedent. Of course, whether this was the fact of the matter or not is purely conjectural. Nevertheless, it is certain that the court in London carefully skirted its clearly presented opportunity to rule on the question of subrogation by operation of law under Article 2161. "It is argued on behalf of appellant that the right of action for reimbursement of the compensation paid to Williams arises also from article 2161 of the Civil Code, declaring when subrogation shall take place. Inasmuch as plaintiff has a right of action, directly, under article 2315 of the Civil Code, there is no occasion for deciding whether plaintiff might also have a right of action by subrogation under article 2161 of the Code." London Guarantee & Accident Ins. Co. v. Vicksburg, S. & F. R.R., 153 La. 287, 291, 95 So. 771, 772 (1923).

27. LA. CIVIL CODE art. 2315 (1870), as amended, La. Acts 1960, No. 30, § 1, provides in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

28. Mr. Justice Holmes in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 309, 309 (1927): "[N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other. . . . The law does not spread its protection so far." Quoted with approval in Forcum-James Co. v. Duke Transportation Co., 231 La. 953, 962, 93 So.2d 228, 231 (1957).
contrary to that of London by the courts of other jurisdictions, the following inequities of the London independent cause of action doctrine are evident. The most obvious hardship of the doctrine is that the tortfeasor might be twice mulcted for his single wrong, whereas the ordinary rule excludes double damages. In addition, a release given by the injured insured sufficient to bar the action of a subrogee insurer would not be effective to defeat an insurer's tort suit if the cause were truly supported by an independent claim. Furthermore, the insurer bringing its own action would not be barred by defenses which could be urged against the injured insured, nor would the insurer be limited to the amount which the injured insured could have recovered. And these or similar pandorian potentialities have apparently at last come to the attention of the Louisiana Supreme Court. Although that court has not lately been presented a clear opportunity to overrule the London case, it is suggested that this might be the action of the court when an opportunity arises. This suggestion is made on the basis of rather strong language impugning London in several Supreme Court cases of recent date.

30. The assumption that situations might be presented wherein the tortfeasor would in fact be required to pay twice is posited on the independent character of the action accorded the insurer. That is, recovery by the injured insured from the tortfeasor could not be posed as a bar to recovery by the insurer, who had likewise paid the insured, if the insurer's cause of action were independent of that of its insured.
32. This limitation is the rule in subrogee suits. See, e.g., Great American Ins. Co. v. Hill, 125 So.2d 669 (La. App. 1st Cir. 1960) (holding that contributory negligence of subrogor bars recovery by subrogee insurer).
34. In Marquette Casualty Co. v. Brown, 235 La. 245, 250, 103 So.2d 269, 271 (1958), our Supreme Court said, in a footnote: "[W]e take note again of the decision in London, Guarantee & Accident Ins. Co. v. Vicksburg, S. & P. R. Co., 153 La. 287, 95 So. 171 ... In the recent case of Forcum-James Co. v. Duke Transportation Co., 231 La. 953, 93 So.2d 228, we found the views expressed in the London, Guarantee & Accident Ins. Co. case to be in discord with the basic principle of law that a tortfeasor is responsible only for the direct and proximate results of his acts. We reiterate this resolution." And, in Forcum-James Co. v. Duke Transportation Co., 231 La. 953, 961-62, 93 So.2d 228, 230-31 (1957), the court stated: "It is a basic principle of the law that a tortfeasor is responsible only for the direct and proximate result of his acts and that, where a third person suffers damage by reason of a contractual obligation to the injured party, such damage is too remote and indirect to become the subject of a direct action ex delicto, in the absence of subrogation. ... This appears to be the general rule, to which the Supreme Court of the United States has given its stamp of approval. ... Even the broad language used in Article 2313 of our Code does not
It has been submitted that the Carroll refusal of legal subrogation and the London tort theory are both unsound. The Carroll case seems at odds with the apparent intention of the redactors of the Civil Code, and to do violence to firmly entrenched unjust enrichment principles. The decision in London unjustifiably overreaches a well-defined pale of tort law and leaves in its wake a welter of potential inequities. It is suggested that the just and apparently intended solution to the problem lies in a consideration of Articles 2134 and 2161(3) of the Louisiana Civil Code.

Assuming first that London's days may be numbered and that highly questionable decision soon laid at rest, there will be two possible approaches to cases in which no conventional subrogation is present. One involves following the Carroll case and denying legal subrogation to the insurer who has indemnified its insured. This resolution would bear the equally unhappy possible turns of events of either unjustly enriching tortfeasors, or doubly indemnifying the insured, thereby also flying in the face of the law's low regard for unjust enrichment. The latter prospect is disturbing for the further reason that, from the point of view of the tortfeasor who is sued after the injured party has been indemnified by his insurer, the ordinary rule is that the measure of compensatory damages is limited to the loss sustained. The alternative approach would be to allow legal subrogation, a choice which would comply with the spirit of Article 2161 of the Code, as well as provide what would seem to be the most logical and expedient way to untie this Gordian knot in our law.

Even if legal subrogation be denied insurers who have paid,

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Footnote: "And this, notwithstanding the ruling apparently to the contrary in London, Guarantee & Acc. Ins. Co. v. Vicksburg, S. & P. R. Co., 153 La. 287, 95 So. 771, which was used to buttress the opinions of the Court of Appeal for the Parish of Orleans in Universal Automobile Ins. Co. v. Manisalco, 148 So. 731, and Hansen v. Hickenbotham, 61 So.2d 620 and that of the First Circuit in John M. Walton, Inc. v. McManus, 67 So.2d 130. To the same effect is Board of Com'rs v. New Orleans, 223 La. 199, 209-10, 65 So.2d 313, 316-17 (1953), the following language of the opinion which seems particularly noteworthy: "(D)efense counsel are quite critical of expressions contained in several decisions (relied on by plaintiff to support the contention that it has an independent right of action) . . . the cases being Foster and Glassell Company, Limited v. Knight Brothers, 152 La. 596, 93 So. 313; London Guarantee and Accident Insurance Company v. Vicksburg, S. & P. R. Co., 153 La. 287, 95 So. 771, and Smith v. McDonough, La. App. Orleans Circuit, 20 So.2d 818. . . . The criticism is justified. From a single tortious injury . . . there arises but one cause of action, . . . and all damages flowing therefrom, which may include several different and distinct elements, are recoverable in one and the same suit."
there is yet a logical remedy for them. Article 2134 would be drained of its content were it regarded as providing anything other than that one who discharges another's obligation, acting in his own name and as a volunteer "no way concerned" in the matter, has a cause of action for reimbursement against the debtor.35 The reason this article provides that such a person,

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35. Cf. note 14 supra. See also Standard Motor Car Co. v. State Farm Mutual Auto. Ins. Co., 87 So.2d 435 (La. App. 1st Cir. 1957), in which the court relied on numerous cited authorities for its holding that Article 2134 does provide such a cause of action.

The French commentators seem to agree that there is a simple cause of action for the volunteer who, having no interest in the obligation, acts in his own name in discharging it. This cause of action is found under French Civil Code Article 1236, the counterpart of our Article 2134. In 2 Planiol, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 474, 475 (1959), it is written: "He who pays the debt of another has, in principle, recourse against the debtor whom he frees. There is no exception to that rule except in the very rare case where the payment is made 'animo domandi,' that is, when the third party intends to make a gift to the debtor in freeing him from his obligation. In this case, and in conformity with his intention, the law does not give him any recourse. The fact of payment alone for the account of another gives rise in favor of the person who does so, to a special action, viz. the 'action de mandat' (action of mandate) or the 'action de gestion d'affaires' (action of administration of affairs), according to whether the third party has paid on the invitation of debtor, or whether he acted spontaneously to relieve him from a menacing creditor (Cass. Civ., 12 Feb. 1929, Gaz. Palais, 16 April)."

"Enfin un tiers quelconque, même non intéressé et agissant de son propre gré, a qualité pour payer. Le créancier n'a aucun motif en effet de refuser la prestation qui lui est offerte et il est même tenu de l'accepter, à moins qu'il ne s'agisse de certaines obligations de faire pour lesquelles la considération de la personne du débiteur est essentielle (confection d'une œuvre d'art, d'un travail industriel exigeant une habileté professionnelle) (art. 1237) (2). Mais le tiers qui paie ne peut exiger à son profit le bénéfice de la subrogation de la part du créancier (art. 1238); il ne pourra exercer contre le débiteur que le recours fondé sur le gestion d'affaires ou l'enrichissement sans cause (3)."

"Finally any third person whatsoever, although he be not interested and acting of his own inclination, has the capacity to pay [another's debt]. The creditor indeed has no cause to refuse the payment which is offered him and he is bound to accept it, at least where the matter does not involve certain obligations to do in which the consideration of the physical identity of the debtor is essential (the making of a work of art, or a skilled undertaking requiring professional qualification) (art. 1237) (2). But the third person who pays the debt cannot require the benefit of subrogation to the interest of the creditor (art. 1238); he is only able to exercise against the debtor the remedy founded on administration of affairs [negotiorum gestio] or unjust enrichment (3)."

(Transl. by author.) 7 Planiol et Ripert, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS, OBLIGATIONS, no. 1150 (2d ed. 1954). To the same general effect are the following commentators: 4 Aubry et Rau, COURS DE DROIT CIVIL FRANÇAIS § 316 (5th ed. 1902); 2 Baudry-Lacanterie, PRÉCIS DE DROIT CIVIL no 321 (33th ed. 1925); 5 Demante, COURS ANALYTIQUE DE CODE CIVIL no 175 (2d ed. 1885); 4 Demolombe, TRAITÉ DES CONTRATS no 80 et seq. (1874); 4 Marcardé, EXPLICATION DU CODE CIVIL art. 1236 (7th ed. 1873).

This allowance of a simple cause of action is in keeping with the rule that a volunteer is never allowed subrogation. "The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own." Harford Bank v. Hopper's Estate, 169 Md. 314, 324, 181 Atl. 751, 755 (1935). The essentials of a claim to subrogation are that the party claiming it shall have paid the debt; that he was
presumably acting as a *negotiorum gestor* in managing another's affairs, is not to be allowed subrogation, carrying with it the additional benefit of any security devices which the creditor might have possessed, should be clear. Security devices are ordinarily employed only in connection with contractual undertakings. When one has seen fit to bind himself and his property or his surety to another, there is little reason why a third party, stranger to the transaction, should not be allowed to perform for the one so bound, so long as the obligation is one, such as the payment of a sum of money, which could be discharged equally well by one person as by another. However, it is quite another matter to place the volunteer in a position where he could, for example, foreclose on a mortgage granted by the debtor. One who burdens his property to secure a debt may have counted heavily on the probable leniency or forbearance of the creditor he has chosen. It would be manifestly unjust to expose him to the possible ruthlessness of a stranger to whom he had in no manner bound himself. Thus, the prohibition, in Article 2134, against subrogating a volunteer is the codification of the lawmaker's purpose to prevent such an eventuality. Yet, even a volunteer is given a cause of action for reimbursement, because to do otherwise would be to permit unjust enrichment.

It should be obvious that an insurer does not act as a volunteer when it indemnifies its insured. Therefore, the insurer is "concerned" in the obligation, or, stated in the terms of Article 2161, the insurer has "an interest in discharging it." Although it is true that an insurer who makes payment pursuant to a claim under a casualty insurance policy is discharging its own

not acting as a volunteer, but had a direct interest in discharge of the debt; that he was secondarily liable for the debt; and that no injustice would be done to the other party by the allowance of the remedy of subrogation. Hampton Loan & Exchange Bank v. Lightsey, 155 S.C. 222, 227, 152 S.E. 425, 427 (1930); Enterprise Bank v. Federal Land Bank, 133 S.C. 397, 404, 138 S.E. 146, 148 (1927). In Louisiana, this prohibition against subrogating a volunteer is codified in the proviso of Article 2134 of the Code that if the obligation of a third party is discharged by one no way concerned in it the one discharging it may not be subrogated, and in the requirement of Article 2161(3) that for legal subrogation to obtain under its provisions the one claiming it must have had an interest in discharging the obligation.

36. See La. Civ. Code art. 2295 et seq. (1870). "Although the institution of *negotiorum gestio* is often associated with an act *motivated* by the desire to render a *service to the principal* whose affair is managed, this motivation is said not to be an essential of its application. All that is required is that the gestor be aware of the fact that he is attending to another's business, in this case the defendant tortfeasor's obligation to repair the damage . . . and his motive may be to benefit (a) another or even (b) himself." Standard Motor Car Co. v. State Farm Mut. Auto. Ins. Co., 97 So.2d 435, 439, n. 9 (La. App. 1st Cir. 1957). See also Roman and Kernion v. Forstall, 11 La. Ann. 717, 720 (1868).
contractual obligation, as the injured insured should not then be able to proceed against the tortfeasor to the extent he has been indemnified by the insurer, it would seem that the insurer is also discharging pro tanto the tortfeasor's obligation. The crucial question then is whether the insurer is, in the language of Article 2161(3), bound with or for the tortfeasor for the reparation of the damage. The answer to this question seems clearly affirmative, if the Louisiana courts adhere to the holding of the Howe case 37 that Article 2161(3) provides legal subrogation for one who was bound for the same debt as another and paid that debt. Such an answer seems desirable, for otherwise the insurer would be equated to the level of the mere volunteer. Moreover, this solution would accord with that arrived at in all other American jurisdictions. But, should the courts here decide against legal subrogation for the insurer, then presumably there would have been a finding that the insurer was not bound with or for the tortfeasor within the meaning of Article 2161(3). As this would necessarily be the determination, and as the tortfeasor’s obligation to the injured insured would be discharged to the extent of payment by the insurer, then there seems no reason to deny that the insurer’s payment, in its own name, constituted the discharge of the obligation of another by one no way concerned in it within the intendment of Article 2134. 38 Hence, the insurer should have, at least, a cause of action under that provision. Actually, the cause of action under Article 2134 might prove just as attractive as subrogation under Article 2161(3). The only element which elevates the subrogated cause of action, in order of preferability, over the simple cause of action is that of succession to the security devices accessory to a cause of action. And it is difficult to imagine a tort injury claim protected by a security device.

Contract Claims

In addition to a claim against his insurer, a policyholder may have a contractual right against a third party to compensation for his loss. In such a situation, the problem arises of whether the insurer, or the obligor under the collateral contract, or both, should bear the risk of loss. No comprehensive survey

37. Howe v. Frazer, 2 Rob. 424 (La. 1842).
38. Cf. Standard Motor Car Co. v. State Farm Mut. Auto. Ins. Co., 97 So.2d 435 (La. App. 1st Cir. 1957), in which the court found such a cause of action in favor of a garageman who repaired a car which, while in his possession, was damaged by a negligent tortfeasor.
of subrogation claims by insurers can be made without allusion to the collateral contract claim problem. Nonetheless, discussion of this subject must be prefaced by the caveat that results in this area are, for the most part, unpredictable. Moreover, owing to a paucity of Louisiana cases dealing with the multifarious problems of collateral contract claims, the answers which will be given here can only be suggested, not reported.

Given a situation in which one person is contractually bound to discharge an obligation to another who likewise has a claim against his insurer for indemnity on the same account, three choices of the placement of detriment and benefit present themselves. Either the insured obligee will be allowed a double recovery, or the obligor of the contract debt may be given the benefit of the obligee's insurance, or the insurer, upon paying its insured's claim, may be subrogated to the insured's cause of action to enforce the collateral contract indebtedness. The more frequently arising contract claims cases, in which a choice from the above alternatives must be made, seem to involve contracts of carriage, mortgages, and contracts of sale.

As the common carrier is ordinarily absolutely liable for any loss to the property of its shippers occurring in transit, a shipper who has insured the shipped goods may have two causes of action upon loss of or damage to the goods in the course of shipment. The question then is whether the insurer should be subrogated upon payment to the shipper's cause of action against the carrier. The answer seems generally to be in the affirmative, even in the absence of a stipulation to that effect in the insurance contract. However, the previously discussed Carroll de-

40. "An insurer of goods lost while in course of transportation by a common carrier is entitled, after payment of the loss, to recover what he has paid by suit against the carrier. No right, in the absence of special contract to the contrary, is better established. The legal principles upon which this right rests are most clearly stated in Hall v. Railroad Cos., 13 Wall. 370, 80 U.S. 370, by Mr. Justice Strong, who says: 'It is too well settled by the authorities to admit of question, that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for non-performance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar
cision in Louisiana involved shipper, carrier, and insurer and flatly denied legal subrogation in a situation where negligence on the part of the carrier was alleged. Although it has been suggested that the holding of Carroll is of dubious validity, it seems doubtful that a Louisiana court would allow the insurer legal subrogation to its insured shipper's cause of action against the carrier not at fault. The only reason for doubt that conventional subrogation to such a cause of action would be acceptable in Louisiana is that the carrier and the insurer are in virtually the same position with reference to loss of goods in transit. In fact, the carrier is, loosely speaking, a near insurer itself. In the absence of fault and in a situation where it may be difficult to say that either of the risk-bearers is primarily responsible, a court might regard the shipper and the insurer as concurrently liable and therefore allow each of them only the right to enforce ratable contribution.42

In mortgage cases, Louisiana43 and all other jurisdictions save Massachusetts44 hold that a policy provision subrogating the insurer to the mortgagee's cause of action against the mortgagor, where the mortgagor insures solely for his own benefit, is enforceable.45 However, where a policy is found to be for the


42. In connection with this possibly equitable solution, it is noted that a carrier-insurer contract clause tiff, in which the carrier has attempted to provide for its receiving the benefit of the shipper's insurance and the insurer has provided for conventional subrogation and, more recently, a “loan receipt device,” has provoked more than one writer to suggest that the insurer and the carrier should be regarded as concurrently liable, each with the right to claim contribution. See, e.g., King, Subrogation Under Contracts Insuring Property, 30 Texas L. Rev. 63, 65, 81 (1851); Langmaid, Some Recent Subrogation Problems in the Law of Suretyship and Insurance, 47 Harv. L. Rev. 976, 992 (1934).


44. King v. State Mutual Fire Insurance Co., 61 Mass. (7 Cush.) 1 (1851). Cf. Patterson, Cases and Materials on the Law of Insurance 302 (2d ed. 1947) to the effect that the King case is of little efficacy in Massachusetts today as a result of a statutory requirement that a subrogation clause covering the mortgage situation be inserted in the standard fire policy.

On the problem of legal subrogation to an insured mortgagee's cause of action against the mortgagor, there are no Louisiana cases in point, and the decisions of the common law courts having occasion to pass upon the question are at variance. Payment by an insurer does relieve the mortgagor of the mortgage indebtedness *pro tanto*. Assuming then that risk of loss is on the mortgagor, legal subrogation could fairly be allowed the insurer, as it stands as a substitute for the security, the mortgaged property. As such, the insurer is not unlike a compensated surety and is bound *for* the same debt as the mortgagor, and thus its situation should fall within Article 2161(3) of the Code. If, however, legal subrogation is not allowed, then the simple cause of action of Article 2134 of the Civil Code should yet provide a mode of obtaining relief for the insurer.

Probably the most troublesome cluster of cases concerning subrogation to collateral contract claims is that relating to the contract of sale cases. Such cases ordinarily arise when an insurer claims subrogation to its insured vendor's cause of action against his vendee, after the insurer has indemnified its policyholder for damage or destruction to the property. Anglo-American jurisdictions are divided. Although some of these jurisdictions have allowed subrogation, the tendency appears to be to accord to the vendee the benefits of the vendor's insurance. While Louisiana courts have apparently had no occasion to de-

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cide whether subrogation is permissible in the contract of sale cases, the decisions have gone both ways on the question of whether the vendee is to have the benefit of his vendor's insurance.\textsuperscript{50} Whereas permitting the proceeds of a vendor's insurance policy to inure to the benefit of the vendee may seem to be a rational expedient in that it acts as a device to shift the risk indirectly to a greater number of people so that it may be borne more tolerably, second thought suggests that the fact that a particular solution provides a windfall for someone does not necessarily recommend the soundness of the solution. And allowing one person to benefit from another's insurance contract is contrary to the unjust enrichment doctrine and the principle that a casualty or fire insurance contract is a personal contract of indemnity. As the risk of loss is ordinarily on the vendee after the sale is completely perfected, it seems that it should be the vendee's responsibility to protect himself from loss. There seems to be little compelling reason for encouraging improvidence by allowing a vendee who fails to procure a policy of insurance to avail himself of his more prudent vendor's insurance contract, absent a stipulation in his favor in the contract or assignment of the policy prior to loss with the consent of the insurer. The argument ordinarily asserted for allowing a vendee to benefit from his vendor's insurance coverage is simply that, as a policy matter, the insurance should run with the property.\textsuperscript{51}

\textsuperscript{50} See Automatic Sprinkler Corp. v. Robinson-Slagle Lumber Co., 147 So. 542 (La. App. 2d Cir. 1933), allowing the vendee to benefit by the vendor's insurance by requiring that the fire insurance proceeds be applied to reduce the balance due on the purchase price. The case of King v. Preston & Hall, 11 La. Ann. 95 (1856), was distinguished in the Automatic Sprinkler Corp. case on the basis that in King the vendor who recovered from the insurance company had no insurable interest in the property at the time of the loss and the "fact that he collected money to which he was not legally entitled did not give the vendee any right to it." In the first place, the vendor's privilege or lien is thought to be sufficient to give rise to an insurable interest in the vendor in some jurisdictions. White v. Gilman, 138 Cal. 375, 71 Pac. 436 (1903); Skinner & Sons' Co. v. Houghton, 92 Md. 68, 48 Atl. 85 (1900). And, too, leaving aside the issue of the validity of such devices under the rule prohibiting conditional sales contracts in Louisiana, it surely seems that the bond for deed agreements frequently employed in Louisiana leave an insurable interest in the vendor. However, pretermittng further inquiry into the accuracy of the court's distinction between the King case and the one before it in Automatic Sprinkler Corp., it is observed that, Automatic Sprinkler Corp. to the contrary notwithstanding, the King case is a Louisiana Supreme Court case which denied the vendee the benefit of his vendor's insurance policy.

\textsuperscript{51} This same type of notion crops up in the field of automobile insurance law, some writers maintaining that the insurance should follow the automobile, rather than covering some drivers of some automobiles, as detailed in the policy in question, for the reason that automobile insurance is primarily designed to protect the public at large. This is obviously subject to question, because certainly the insured, under a policy of automobile liability insurance, took out the policy under the compulsion to protect himself from financial vulnerability, should he
However, a forceful objection to the argument that the insurance should follow the property lies in the very nature of the personal contract rule. It is established that the cupidity, carelessness, or mania of some persons may lead them to destroy their own property. It is immaterial to insurers whether such persons are brought to this destruction by reasons of lucre, negligence, or madness. In all such cases, these persons are thought to be undesirable risks. The practice of selecting risks by face to face transactions between the prospective insureds and the insurers or their agents is employed as an aid to excluding undesirable risks from insurance programs. Thus, insurance contracts covering property are personal contracts in the making of which the physical identity of the person to be insured plays an important part. If the insurance policy runs with the property, this will mean that there are going to be many insureds about whom the insurers have no knowledge. This runs counter to the idea that insurance policies protecting against the risk of property damage are personal contracts and is the sort of thing which causes premiums to rise. If the policy factors underlying this insurance-follows-the-property idea are sufficiently persuasive to lead legislatures to adopt it, that is another matter. Meanwhile, the courts should abide by the law of contract. The property destroyed belonged legally to the vendee, who still owed a portion of its price. It seems a non sequitur to say that if the property suffered destruction, then its owner is no longer indebted for that which he owed on its purchase price. A sounder approach, it would seem, would be to allow the insurer who has paid the insured vendor to be subrogated to its insured's right to the balance due on the purchase price.

Conclusion

In fine, it is suggested that insurers against casualty losses should be accorded legal subrogation to the tort or contract claims of their insureds. The insurer is not unlike a surety, standing, in a manner of speaking, as security to protect against the risk of loss, and is therefore bound for the debt which it secures. The equities of the situation favor the insurer's succeeding by subrogation to these claims, for other approaches lead inevitably into either the brambles of double recovery or the briers of unjust enrichment. As for the possible objection ever be legally responsible for damaging another's person or property with his automobile.
that if insurers are allowed subrogation by operation of law to its insureds' collateral causes of action they will be receiving premiums without furnishing a *quid pro quo*, its obvious fallacy is that in many instances the remedy will be hollow and in others the prosecution of the cause will be costly even if successful. Finally, should the courts of Louisiana deny subrogation by operation of law to insurers, the simple cause of action for reimbursement, based on Article 2134 of the Civil Code, is logically undeniable to insurers, who, in distributing proceeds under casualty policies, effectively discharge to the extent of payment obligations for which others were liable.

There is unfortunately no better indication of the future course of Louisiana jurisprudence than a review of the decisions already rendered. Such a review has revealed that the problem of recourse for insurers who have paid has proved sufficiently troublesome to produce a confusing collection of cases. It has been submitted that many of these cases are unsound in theory as well as in result, and that the doctrine of subrogation by operation of law offers a solution which is not only workable but is also on solid ground theoretically. There appears to be a growing disapproval of the tort remedy. As this route was the only fairly sure way to recovery open to the insurer, possibly this awareness of its several shortcomings augurs favorably for the adoption of the suggested approach.

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The Louisiana Direct Action Statute

This Comment presents a review and discussion of the Louisiana Direct Action Statute as it relates to modern automobile liability insurance. The statute will be considered as a measure designed to afford financial protection both to individuals and to the public at large in the assertion of claims arising out of automobile accident cases. Primary emphasis will be placed upon the manner in which the statute implements this purpose by providing ready procedural access to the insurer.

Utility to Injured Party

(1) *The purpose of the Direct Action Statute.* Automobile liability insurance contracts commonly contain "no action"