THE EQUITABLE REMEDY OF SUBROGATION TO EXTINGUISHED RIGHTS: DO WE NEED THE FICTION?

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INTRODUCTION

Both American and Anglo-Canadian law have developed a complex body of doctrine relating to the equitable remedy of subrogation.[1] The very term "subrogation" is an initial source of complexity. As a preliminary point, we should note that there are two different types of subrogation.

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[1] A substantial body of literature devoted exclusively to this subject has appeared in recent years. *See, e.g.*, CHARLES MITCHELL, THE LAW OF SUBROGATION (1994); CHARLES MITCHELL & STEPHEN WATTERSON, SUBROGATION: LAW AND PRACTICE (2007); DENIS SK ONG, ONG ON SUBROGATION (2014); RORY GREGSON, SUBROGATION AND MARSHALLING (2024).

The first might be referred to as "subrogation to subsisting rights"[2] or "conventional subrogation."[3] The classic illustration would be the claim available to an insurer who has indemnified the insured with respect to a loss caused by a third party (typically a tortfeasor) against the third party in subrogation to the rights of the insured against the tortfeasor. In such a case, typically, the claim is brought by the insurer in the name of the insured. It is important to note that in such cases, the insurer is enforcing existing rights that the insured has against the third party. The claim is real and existing.

In the second type of subrogation, this is not the case. The equitable remedy of restitution is also available in cases where assets of a complainant or plaintiff have been used by the defendant to discharge an obligation of the defendant owed to a third party. The plaintiff wishes to bring a claim against the defendant on the theory that it is subrogated to the claim of the third party which, though discharged and in that sense non-existent, has been, in some sense, revived for this purpose. The classic illustration would be the claim of a surety against the principal debtor after the surety has performed its obligation to discharge the debt owed to the third-party creditor. The surety is entitled to be subrogated to and enforce the "extinguished rights"[4] owed by the debtor to the creditor. Someone new to the subject might well ask why the surety would wish to be subrogated to the extinguished rights of the creditor rather than to simply enforce the contractual rights typically owed by the debtor to the surety. The short answer is that the creditor may have been entitled to a security interest or a preference that the surety would like to enjoy in enforcing its claim against the debtor. The equitable remedy of subrogation achieves this objective by reviving the discharged creditor's rights to this end.[5] The surety is not required

[2] This is the terminology employed by Mitchell & Watterson, *supra* note 1, at 5.

[3] Comment, *Subrogation – An Equitable Device for Achieving Preferences and Priorities*, 31 MICH. L. REV. 826, 829 (1933).

[4] Mitchell & Waterson, *supra* note 1.

[5] English courts initially resisted this feature or implication of reviving subrogation. In the mid-nineteenth century, legislation clarified the point and provided that the secured interest was also enforceable. *See* Mercantile Law Amendment Act 1856, 19 & 20 Vict. c. 97, § 5 (Eng.). The surety is not obliged to assert such claims and will typically pursue its contracted remedies against the debtor.

to assert the claim in the name of the creditor. The creditor's rights are revived and now vest in the surety.[6] We may observe, then, that the subrogation of the surety to the rights of the creditor is a pure fiction created by the law to achieve the instrumental purpose of creating or enhancing the remedies available to the surety as against the principal debtor. It is, we might say, a legal fantasy.

This latter form of subrogation finds its origins centuries ago in English private law doctrine and was adopted at an early stage in American law. As we shall see, the use of this form of subrogation has greatly expanded over time. This remedy has become available in a great variety of factual settings. Inasmuch as the target of relief in these cases may be considered to be a form of benefit conferred by the plaintiff upon the defendant, that is, a discharge of the defendant's liability to a third party, it is not surprising that this form of subrogation has been included in the American restatements on restitution.[7] A brief account of this recognition of subrogation as a remedy for unjust enrichment will be provided here as well as a brief summary of the principal applications of the doctrine in American law and their implications for the law of restitution. We will then turn to a consideration of the principal question addressed by this Article, that is, whether it is necessary or desirable to maintain the fictitious use of the subrogation concept in cases of extinguished rights. In a modern or contemporary system of jurisprudence, does the continued use of completely fictional devices clarify or confuse the nature of and reasons for the relief provided by this body of doctrine? It will be suggested that it may be time to lay this particular fiction to rest.

I. EXPANSION OF THE EQUITABLE SUBROGATION REMEDY

The employment of the concept of subrogation to, in effect, revive extinguished rights and enable a claimant to enforce them has a lengthy history. Recognition of the ability of a surety to

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[6] *See* Mitchell, *supra* note 1, at 7.

[7] *See* RESTATEMENT OF THE L. OF RESTITUTION: QUASI-CONTS. & CONSTRUCTIVE TRS. (A.L.I. 1937); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (A.L.I. 2011).

revive and enforce the rights of the creditor whose debt has been discharged by the surety's payment can be traced back to the seventeenth century.[8] In the early eighteenth century, English courts began to apply the doctrine in what might be considered to be less obvious cases. Thus, in 1706,[9] relief by subrogation was granted to a lender who advanced funds to a minor who, in turn, used the moneys to purchase necessaries. The lending contract was unenforceable on policy grounds by reason of minority. What we would now call a restitution claim would be unavailable to the lender for similar policy reasons. But to the extent that the moneys were employed by the minor to acquire necessaries, the lender could be subrogated to the supplier's extinguished restitutionary claim for necessaries supplied.

This pattern—creation of an exception by subrogation in circumstances where restitution would otherwise be unavailable—was repeated in other contexts. Thus, under traditional law, a lender of moneys to a corporation under a contract which was *ultra vires* the corporation, and therefore unenforceable, would be denied a right to restitution of the loaned moneys. If, however, the moneys were actually spent by the corporation in making payments on *intra vires* loans, the lender could be subrogated to the position of the *intra vires* creditors in order to revive and enforce their rights to recover the moneys in question.[10] Similarly, when an agent borrowed funds on behalf of the principal without authority to do so, the lender would have no remedy against the principal. If the funds were used to discharge legitimate debts of the principal, however, the lender would be subrogated to the revived claims of the legitimate creditors against the principal.[11]

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[8] *See* Morgan v. Seymour (1637) 21 Eng. Rep. 525; 1 Chan. Rep. 120; William H. Loyd, *The Surety*, 66 U. PA. L. REV. 40 (1917). *See generally* M.L. Marasinghe, *An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine*, 10 VALPARAISO U. L. REV. 275 (1976).

[9] *See* James v. Warren (1706) 90 Eng. Rep. 956; Holt K.B. 104; Marlow v. Pitfield (1719) 23 Eng. Rep. 516; 1 P. Wms. 558. Prior to modern legislative reform, a similar subrogation right could be exercised by a supplier of necessaries to a married woman exercising the supplier's rights against the husband. *See, e.g.*, Harris v. Lee (1718) 24 Eng. Rep. 482; 1 P. Wms. 482.

[10] *Re* German Mining Co. (1854) 45 Eng. Rep. 415; 4 De G.F. & J 19.; Baroness Wenlock v. River Dee Co. (1888) 38 Ch. D 534.

[11] *See, e.g.*, Cotton v. Dacey, 61 F. 481 (D. Kan. 1894); Reid v. Rigby & Co. [1894] 2 Q.B. 40; Bannotyne v. MacIver (1906) 1 KB 103.

American authority follows a similar pattern. Thus, many American and English cases deal with situations where moneys have been advanced by mistake, often under an unenforceable lending contract, and the moneys are then used by the borrower to discharge an existing encumbrance on the borrower's property. The lender is subrogated by the rights of the security holder which, although discharged, are revived for this purpose.[12] Numerous American authorities grant relief in the form of subrogation where the transfer of funds is fraudulently induced and then used by the recipient to discharge a secured interest in property owned by the recipient.[13] A victim of theft is entitled to similar relief.[14] Assets misappropriated by a trustee and then applied by the trustee to discharge a debt owed by the trustee to a third party gives rise to a reviving subrogation claim by the trust to enforce the third-party debt against the trustee.[15] A common theme in cases of mistake, fraud, misappropriation, and theft is that the claimant has transferred property to the defendant on an involuntary basis. We shall return to this point.

Although these appear to be the most common instances of reviving subrogation, there are other possibilities. Thus, a voluntary payment by the government to a victim of a public servant may give rise to a subrogated claim by the government against the public servant.[16]

In cases of mistake, fraud, breach of trust, and theft, of course, the claimant will have a direct right of restitution against the initial recipient of the funds, the mistaken payee, the fraudster, the trustee, and the thief. The attraction of the subrogation claim in such circumstances will typically be one of gaining access to a security interest discharged with the transfer of funds. There are also numerous American and English cases where the advantage of the subrogation claim is to secure priority over the interests of other holders of security interests in the same property. In *Dunsmuir v. Port Angeles Gas, Water, Electric Light*

[12] *See, e.g.*, Vogel v. Glickman, 117 F. Supp. 2d 572 (W.D. Tex. 2000).

[13] *See, e.g.*, Banton v. Hackney, 557 So. 2d 807 (Ala. 1989).

[14] *See, e.g.*, Newell v. Hadley, 92 N.E. 507 (Mass. 1910).

[15] RESTATEMENT OF THE L. OF RESTITUTION: QUASI-CONTS. & CONSTRUCTIVE TRS. § 207, illus. 4 (A.L.I. 1937).

[16] Ford v. United States, 88 F. Supp. 263 (Ct. Cl. 1950).

& Power Co.,[17] for example, a lender advanced moneys on a purported first mortgage. A second mortgage was entered by the owner with a third party. In order to prevent a tax sale, the lender paid the amount of taxes due. When the invalidity of the lender's first mortgage was discovered in foreclosure proceedings, the lender was granted subrogation to the discharged tax lien in priority to the second mortgagee. Similarly, a third mortgagee who has made payments on the first mortgage to prevent foreclosure would be ranked as first mortgagee with respect to those payments.[18] The payments, in such cases, arguably, have the effect of preserving the value of the asset for the benefit of the second mortgagee.

In summary, then, the use of the concept of reviving subrogation has become quite expansive over the years. Indeed, its growth inspired the conclusion in the recent *Third Restatement of Restitution*[19] that it is available in virtually any case of unjust enrichment.

II. ABSORPTION OF REVIVING SUBROGATION INTO THE MODERN LAW OF RESTITUTION

The reorganization of the legal profession's knowledge of basic doctrines of private law into two new branches of the law—contracts and torts—was a signal achievement of nineteenth century legal scholarship. Previously, legal knowledge of these subjects was organized around the rules relating to various writs or procedural devices that permitted the enforcement of promises and compensation for wrongfully caused injuries. The writing of the initial English treatises on contract and tort made these bodies of doctrine more accessible, more easily committed to memory, and more expeditiously applied to the performance of professional tasks. The organizing structures or principles were easily grasped. "Contracts" was the law relating to the enforcement of promises. "Torts" was the law relating to compensation for wrongfully caused injuries. As well, such works

[17] 71 P. 9 (Wash. 1902).

[18] *See, e.g.*, Equity Sav. & Loan Ass'n v. Chi. Title Ins. Co., 463 A.2d 398 (N.J. Super. Ct. App. Div. 1983).

[19] 2 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 356 (A.L.I. 2011).

had the effect of exposing anomalies in the existing law and facilitating the process of gradual evolution and improvement of doctrine that lies at the heart of common law jurisprudence.

A similar breakthrough occurred in America with the publication of the 1937 *Restatement of Restitution*.[20] Sub-titled "Quasi-Contracts and Constructive Trusts," the basic idea of the 1937 *Restatement* was to bring together and restate large bodies of common law—formerly known as the law of quasi-contract—and of equity—centering on, but not limited to, the doctrine relating to the equitable remedy of constructive trust. Quasi-contract had previously been considered to consist of liability rules based, in a not entirely clear sense, on the implication of contractual obligations. Constructive trusts, on the other hand, were considered to be an aspect of trust law based on, again, in a not entirely clear sense, implied trust obligations. Inspired by Harvard scholars' earlier writings[21] on these two subjects, the basic idea was to build upon the similarities in the types of problems addressed by these two discrete bodies of doctrine, pry them loose from their false homes in contract and trust, and unify them on the basis of an organizing principle of unjust enrichment. That underlying principle was stated in the opening section of the 1937 *Restatement* on the following terms:

> A person who has been unjustly enriched at the expense of another is required to make restitution to the other.[22]

Part I of the 1937 *Restatement* then proceeded to restate the law of quasi-contracts (with some equitable counterparts) relating the recovery of benefits conferred by mistake, under coercion, and under ineffective transactions together with common law doctrines pertaining to discharge of another's liability, protection of proprietary interests, emergency intervention, and benefits tortiously acquired. Part II offered a restatement of equity doctrine, including acquisition of interests in land under oral

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[20] RESTATEMENT OF THE L. OF RESTITUTION: QUASI-CONTS. & CONSTRUCTIVE TRS. (A.L.I. 1937).

[21] *See* J.B. Ames, *History of Assumpsit*, 2 HARV. L. REV. 53 (1888); Roscoe Pound, *The Progress of the Law, 1918-1919: Equity*, 33 HARV. L. REV. 420 (1920).

[22] RESTATEMENT OF THE L. OF RESTITUTION: QUASI-CONTS. & CONSTRUCTIVE TRS. 12 (A.L.I. 1937).

agreements, acquisition of property on death, acquisition of property in breach of fiduciary duty, and the rules on tracing.

As with contract and tort, the basic structure of this new branch of the law was accessible, though perhaps less so. The restated doctrines concerned benefit-based liability. The defendant had acquired benefits at the plaintiff's expense that could not be justly retained. The inclusion of benefits tortiously acquired or acquired in breach of fiduciary duty did complicate matters, as such relief could extend to benefits acquired wrongfully from third parties in breach of duties owed to the plaintiff.[23] Nevertheless, the central idea of unjustly retained benefits was relatively clear and accessible.

For present purposes, it is important to emphasize that the invention of restitution as a third branch of private law was an exercise in eradicating fictional explanations for liability imposed by the relevant doctrines. The law of quasi-contract could not be properly explained by the concept of implied contractual obligation, nor could constructive trusts be properly explained as implied trusts. Both types of obligations did not rest on implied consent. On the new view of the proper explanation for liability, they were obligations *imposed* by the courts in order to prevent the unjust enrichment of the defendant.

Against the background of the brief survey of subrogation doctrine set out above, it is not surprising that subrogation was considered by the authors of the 1937 *Restatement*[24] to fall within the four corners of this new branch of the law. Subrogation enables a claimant to recover the value of benefits conferred upon

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[23] Thus, it could be questioned whether such benefits could be said to have been acquired by the defendant in the words of the general principle "at the expense of" the plaintiff. The reporters of the 1937 *Restatement* were not troubled by this point of difficulty. *See* Warren A. Seavey & Austin W. Scott, *Restitution*, 54 L.Q. REV. 29 (1938). In such cases, in their view, the emphasis shifts from "restitution" to "unjust enrichment." The issue may be resolved by simply conceding that there is a second principle underlying this body of doctrine to the effect that a person "is not permitted to profit from his wrong" and that in such cases it is not necessary to establish a corresponding loss or expense of the plaintiff. For this approach, see 1 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 22 (A.L.I. 2011). This issue need not trouble us for preset purposes as reviving subrogation cases all involve benefits acquired by the defendant "at the expense of" the plaintiff.

[24] RESTATEMENT OF THE L. OF RESTITUTION: QUASI-CONTS. & CONSTRUCTIVE TRS. (A.L.I. 1937).

a defendant through discharge of a liability owed to another. Thus, the opening sections of Part II, which provides a brief restatement of equitable restitutionary *remedies*, include the following restatement of the doctrine of subrogation:

> §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.[25]

The reference in this section to the fact that the obligation is used in "discharging" the obligation makes it abundantly clear that the subject-matter of the section is subrogation to extinguished rights, that is, to the fictional version of subrogation. No reference is made here—or elsewhere in this restatement—to the conventional form of subrogation to existing rights. The commentary to this section confirms that the obligation, though discharged, is revived and confers upon the plaintiff "an equitable obligation or lien similar to that which was discharged."[26] Listed examples of situations in which this remedy is available included mistake, fraud, and duress.[27] The commentary emphasizes that the discharge must not be officious in nature.[28]

The 1937 *Restatement* returns to the subject of reviving subrogation in the context of its treatment of the subject of "Following Property into its Product."[29] Section 207 states that "[w]here a person wrongfully uses property of another in discharging an obligation of the wrongdoer to a third party or a lien held by a third person upon his property,"[30] the other party is

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[25] *Id.* at 653. On a comparative note, a similar approach has been adopted in England. *See* Banque Financiere de la Cité v. Parc (Battersea) Ltd. [1998] UKHL 7, [1999] 1 AC (HL) 221 (appeal taken from Eng.).

[26] RESTATEMENT OF THE L. OF RESTITUTION: QUASI-CONTS. & CONSTRUCTIVE TRS. 653-54 (A.L.I. 1937).

[27] *Id.* at 655 (making cross-references to the liability rules that hold enrichments to be unjust in these and other circumstances).

[28] *Id.* at 654-55.

[29] *Id.* ch. 13.

[30] *Id.* at 838.

subrogated to the position of the third person. The location of this section suggests that subrogation is considered to be a form of following or tracing. Indeed, the commentary carefully distinguishes between constructive trust relief where the wrongdoer uses the complainant's money to acquire an asset from a third party (which the wrongdoer then holds on a constructive trust) and, on the other hand, a subrogation case where the wrongdoer uses the claimant's money to discharge an obligation of the wrongdoer owed to a third party.[31] In the latter case, it is said, the wrongdoer does not hold any property in which the constructive trust can attach. Although the commentary suggests that, in some sense, the plaintiff is following the wrongfully obtained moneys into the discharged obligation, it does not directly address the oddity of tracing into a non-existent asset. The commentary does emphasize that the discharged obligation could be either secured or unsecured in nature.[32]

The subject of subrogation reappears in somewhat modified form in the *Restatement (Third) of Restitution*,[33] the successor to the 1937 *Restatement*.[34] In *Restatement Third*, a distinction is drawn between subrogation as a liability rule and subrogation as a remedy. The liability rule is set out in Section 24 in the following terms:

> §24. Performance of an Independent Obligation (Equitable Subrogation)
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> (1) If the claimant renders to a third person a performance for which the defendant would have been independently liable to the third person, the claimant is entitled to restitution from the defendant as necessary to prevent unjust enrichment.
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> (2) There is unjust enrichment in such a case to the extent that

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[31] *Id.* at 838-39. The same distinction is drawn in the commentary to section 162. *See id.* at 654.

[32] *Id.* at 840.

[33] 1 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 22 (A.L.I. 2011).

[34] RESTATEMENT OF THE L. OF RESTITUTION: QUASI-CONTS. & CONSTRUCTIVE TRS. (A.L.I. 1937). For an explanation of the fact that the "third" restatement becomes the immediate successor to the first, see Andrew Kull, *Three Restatements of Restitution*, 68 WASH. & LEE L. REV. 867 (2011).

> a. the claimant acts in the performance of the claimant's independent obligation to the third person, or otherwise in the reasonable protection of the claimant's own interests; *and*
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> b. as between the claimant and the defendant, the performance in question (or the part thereof for which the claimant seeks restitution) is primarily the obligation of the defendant.[35]

One of the great strengths of *Restatement Third* is to provide in Part II a much more extensive account of the basic liability rules for restitution, integrating both common law and equitable doctrine, than is found in the 1937 *Restatement*. It is of interest in the present context, then, to consider how it is that, unlike the 1937 *Restatement*, the *Restatement Third* includes "equitable subrogation" as a liability rule.

Section 24(1) indicates that these are cases where the claimant has conferred value on the defendant by discharging a liability of the defendant to a third person. Section 24(2)(a) then identifies two different situations in which such an enrichment is unjust: either the party itself must have an independent obligation to transfer that value to the third person or, alternatively, must be acting reasonably in the plaintiff's own interests. Section 24(2)(b) requires that the defendant is "primarily" liable to transfer the value to the third party. The first branch of (a) coupled with (b) is neatly illustrated by a leading English authority.[36] Under import duty legislation, both the importer and the warehouse in which the imported goods are stored are required by statute to pay such duties. The collecting authority can collect the duty owed from either one but not both. When the warehouse is held liable by the authorities, it has a good claim against the importer on the basis that the latter's statutory liability is obviously primary.

The type of liability imposed by the second branch of (a) coupled with (b) may be illustrated by a case referred to in the commentary following Section 24 of *Ford v. United States*.[37] An

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[35] 1 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 344 (A.L.I. 2011).

[36] Brook's Wharf & Bulls Wharf Ltd. v. Goodman Bros. [1937] 1 KB 534.

[37] Ford v. United States, 88 F. Supp. 263 (Ct. Cl. 1950).

American soldier steals money from a foreign national. Legislation permits the U.S. government to compensate the foreign national. The government does so. The government is able to claim restitution from the soldier. It has acted reasonably in its own interests in discharging the primary obligation of the soldier. The *Restatement Third* explains both lines of cases as fictional subrogation liability claims that are not covered by the other liability rules contained in the *Restatement*.

Although these two types of liability exist and should be captured by a restatement of the liability rules for restitution, one might question the need or desirability of characterizing them as liability rules based on subrogation. If one begins with the proposition that discharge of another's liability is simply one type of "benefit" that might be unjustly retained, the question of liability in these cases turns on reasons why retention of that benefit is unjust. Thus, in the standard categories of liability such as mistake and duress, no new liability rule is needed to capture cases of mistaken discharge of another's liability or the conferral of such a benefit under duress. *Restatement Third* plainly accepts this proposition and indicates that references to "subrogation" is "probably" unnecessary to explain the liability imposed in such cases.[38] Thus, in a case of mistaken discharge of another's liability, the liability rule is mistake and no reference to subrogation to the rights of the party to whom the obligation was owed is necessary.[39] Accepting this proposition, we may ask whether it is necessary to employ the concept of subrogation to explain the injustice of retaining the benefits conferred in the two types of liability captured by Section 24.

The first appears to involve unjust enrichment because of the fact that the plaintiff was compelled by law to confer the benefit in question in circumstances where the primary liability for doing so falls, albeit implicitly in some cases, upon the defendant. In the example given above, the liability of the importer to pay the tax is

[38] 2 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 354 (A.L.I. 2011).

[39] Thus, one of the leading decisions of the Supreme Court of Canada in unjust enrichment concerns mistaken discharge of another's liability. *See* Cnty. of Carleton v. City of Ottawa, [1965] S.C.R. 663 (Can.) (plaintiff municipality mistakenly provides necessary services to indigent for whom defendant municipality has a statutory duty to provide such services). No mention of subrogation was made by the court.

obviously primary to the obligation of the warehouse. The statute, in effect, imposes surety-like liability on the warehouse. Is this not best characterized, then, as a type of compulsion? To be sure, this type of compulsion appears to be peculiar to this particular type of benefit, but it is surely unnecessary to explain this form of relief as resting on a fictional "standing in the shoes of" the recipient of the tax payment in order to bring a claim against the person primarily liable to discharge the liability. Thus, the pioneering English treatise on restitution,[40] first published in 1966, characterized this particular claim as "Compulsory Discharge of Another's Liability." No reference is made to the concept of subrogation in explaining the liability imposed. In retrospect, the extensive treatment of legal compulsion doctrine in *Restatement Third*[41] could have provided an appropriate home for this rule.

Characterization of the second type of liability imposed by Section 24 is a more subtle matter. These are cases where the plaintiff, acting "in the reasonable protection of its own interests," discharges a liability of the defendant. The illustration provided by *Ford*[42] is particularly compelling. The government should have a good restitution claim against the soldier on such facts. The government was not acting under a mistake or because of compulsion. Rather, it was acting in its own interests for the policy reasons underlying the statutory scheme. The point is nicely captured by Section 24.[43] Again, however, we may ask whether it is necessary to explain this as a case of subrogation, permitting the U.S. government to stand in the shoes of the foreign national and assert his or her extinguished rights against the soldier.

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[40] ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION ch. 12 (1966). This chapter was one of six chapters under a broader heading of "Compulsion" which contained, inter alia, other chapters on duress, undue influence and unconscionable transactions. This was the first major treatise on the subject in the common law world. The leading American treatise appeared in 1978. *See generally* GEORGE E. PALMER, THE LAW OF RESTITUTION (1978).

[41] 1 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 244-85 (A.L.I. 2011) (restating a number of rules under the topic "Transfers Under Legal Compulsion").

[42] Ford v. United States, 88 F. Supp. 263 (Ct. Cl. 1950).

[43] 1 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 344 (A.L.I. 2011).

The idea that a plaintiff could obtain restitution for benefits conferred in the plaintiff's own self-interest was not explored in the 1937 *Restatement*. Indeed, the idea was first examined thoroughly in a masterly article by the great American restitution scholar, John P. Dawson, published in 1974.[44] Characterizing these cases as instances of liability imposed on behalf of "self-serving intermeddlers," Dawson identified a number of types of existing American authorities granting restitution to plaintiffs who had reasonably acted in their own self-interest in conferring benefits on defendants. Interestingly, *Restatement Third* contains an elegant restatement of these rules in Sections 26 to 30.[45] Another possible device for inclusion of the liability rule represented by *Ford*, then, would have been to include it in the more general section on "Self-Interested Intervention." Again, no reference to "standing in the shoes" of the party to whom the discharged obligation was owed would be necessary.

In sum, it is at least arguable that reference to reviving subrogation as a type of liability rule in Section 24 is quite unnecessary. Be that as it may, the more important point for present purposes is that Section 24 sheds no light whatsoever—and is not intended to do so—on the use of reviving subrogation as a remedy. *Restatement Third* addresses this set of issues in Section 57.[46]

Section 57 expresses the remedial role of reviving subrogation in very similar terms to those employed in Section 207 of the 1937 *Restatement*.[47] The new version adds subsections limiting relief to reimbursement, providing a defense where granting relief would lead to an inequitable result and permitting the claimant to succeed to collateral rights of the defendant. These

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[44] John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409 (1974); *see also* John P. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975); John W. Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. PA. L. REV. 261 (1947). For an attempt to apply Dawson's analytical model to Canadian and English authorities, see John D. McCamus, *The Self-Serving Intermeddler and the Law of Restitution*, 16 OSGOODE HALL L.J. 517 (1978).

[45] 1 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 384-477 (A.L.I. 2011).

[46] 2 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 353 (A.L.I. 2011).

[47] RESTATEMENT OF THE L. OF RESTITUTION: QUASI-CONTS. & CONSTRUCTIVE TRS. 838 (A.L.I. 1937).

refinements need not distract us from the general proposition that the *Restatement Third* accepts that reviving subrogation is a generally available remedy in restitution cases.

The general availability of the remedy is made explicit in the commentary to Section 57. "Unjust enrichment for which subrogation is a remedy may be established by any of the substantive rules in this Restatement that describe the transaction in question."[48] The commentary specifically notes that this would include cases of "equitable subrogation described in Section 24,"[49] reproduced above.[50] The commentary includes, as well, a shopping list of illustrative liability rules, including mistake, fraud, and breach of trust—among others.[51] As the commentary further notes, however, the first analytical step in determining whether the remedy is available is to determine that the claimant has an unjust enrichment claim against the defendant. Further, if the plaintiff seeks only a personal, rather than a proprietary remedy, "it is probably superfluous to speak of a remedy via subrogation."[52] And further, by way of explanation, "the claimant's right to a money judgment in the amount of the defendant's unjust enrichment . . . is as advantageous as the third-party claim to which the claimant might be subrogated."[53] In other words, the reviving subrogation claim generally becomes material only if the claimant is seeking what is, in effect, proprietary relief. As the commentary explains:

> Subrogation becomes a meaningful remedy principally when the restitution claimant is in competition with general creditors of the defendant, and when the obligation that was satisfied with the claimant's money enjoyed some form of priority over the claims of general creditors.[54]

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[48] 2 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 356 (A.L.I. 2011).

[49] *Id.* at 356.

[50] *See supra* note 34 and accompanying text.

[51] 2 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 356 (A.L.I. 2011).

[52] *Id.* at 354.

[53] *Id.*

[54] *Id.*

The commentary further notes that there may be other advantages flowing from proprietary relief such as a favorable limitations rule.[55]

In the scheme of *Restatement Third,* then, subrogation remains relevant as a source of personal restitutionary *liability* only under Section 24, which identifies types of unjust enrichment liability not covered by the vast array of other liability rules set out in *Restatement Third*. When one turns to the role of subrogation as a remedy, however, the remedy is of little, if any, relevance to personal liability and has as its principal (and possibly only) function, the granting of proprietary relief. Viewed from this perspective, the commentary makes the following concession:

> In both purpose and operation, the remedy of subrogation is often closely analogous to—and may sometimes be difficult to distinguish from—the associated equitable remedies of constructive trust and equitable lien. Outcomes explained by the courts in terms of one of these remedies might sometimes be explained equally well in terms of another.[56]

Whether it is either necessary or desirable to preserve the distinction between, on the one hand, subrogation and, on the other, constructive trust and equitable lien is a subject to which we will shortly turn.

III. THE CONTRIBUTIONS OF REVIVING SUBROGATION TO OUR UNDERSTANDING OF RESTITUTIONARY LIABILITY

The considerable expansion in the use of reviving subrogation over the centuries demonstrates that the remedy responded to evolving professional attitudes to achieving just results in cases which we now consider to be restitutionary in nature. What lessons can be learned from the use of doctrine? Or we may ask, what contributions has subrogation made to our evolving understanding of the nature of restitutionary doctrine? Focusing on the materials referred to above, at least three significant contributions can be identified.

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[55] *Id.* at 361.
[56] *Id.* at 356.

First, from the early cases allowing restitution for lenders to minors in cases where the money was spent on acquiring necessaries,[57] we learn that there may be exceptions to general rules denying restitutionary relief of benefits transferred under ineffective transactions. We need not review the policy reasons for the traditional refusal of the law to enforce agreements entered into by minors.[58] For obvious reasons, a rule granting restitutionary relief for benefits transferred under ineffective agreements with minors would go a considerable distance in undermining the policies underlying the general rule making such agreements unenforceable. Hence, a general rule denying restitution. The common law also recognized, however, that the need for minors to be able to acquire necessaries on credit supported an exceptional rule permitting restitution to the supplier of necessaries. The idea of employing reviving subrogation to permit lenders to recover from minors' loaned moneys advanced that were actually spent on necessaries was a, albeit disguised, decision to grant restitution to lenders where such relief was warranted by the same policy considerations.

A similar lesson flows from decisions from the same era granting reviving subrogation relief to *ultra vires* borrowers who spent the moneys advanced on discharging *intra vires* loans.[59] In the interest of protecting shareholders and creditors from essentially unauthorized activities of corporations, *ultra vires* agreements, including borrowing, were unenforceable. But the same policy considerations were not violated if the moneys advanced under *ultra vires* loans were employed to discharge *intra vires* debts. The exposure of shareholders and creditors to *ultra vires* activities of the corporation was not increased where the *ultra vires* loan was, in effect, simply consolidated *intra vires* debt. Again, the doctrine of subrogation enabled one to see, however dimly through the mask of subrogation, that an exception on sound policy grounds could be made to the general rule denying restitutionary relief.

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[57] *See, e.g.*, James v. Warren (1706) 90 Eng. Rep. 956; Holt K.B. 104.

[58] *See generally* David R. Percy, *The Present Law of Infants' Contracts*, 53 CANADIAN BAR REV. 1 (1975); John D. McCamus, *Restitution of Benefits Conferred Under Minors' Contracts*, 28 U.N.B. L.J. 89 (1979).

[59] *See, e.g.*, *Re* German Mining Co. (1854) 45 Eng. Rep. 415; 4 De G.F. & J 19.

Second, the cases granting reviving subrogation in the principal and agent context provided a valuable lesson on the nature of the benefits transferred that could be subject to restitutionary relief. As a general proposition, unrequested benefits have not traditionally been the subject to restitutionary relief. In the context of principal and agent relationships, an agreement entered into by an agent beyond the scope of their contracting authority would be unenforceable. They may bind the principal if they are either ratified by the principal or are subject to the doctrine of agency by estoppel or ostensible authority (which holds that an agreement entered into within the usual authority of an agent of this particular kind would bind the principal).[60] If the agreement is not binding, neither is the other party to the agreement able to seek restitutionary relief against the principal for what are considered to be unrequested benefits conferred under an unenforceable agreement. The authorities do permit, however, reviving subrogation claims to be brought against the principal in cases where moneys received under such agreements were used by the agent to discharge existing legitimate debts of the principal. In such a case, the principal is not harmed by the granting of restitutionary relief. The principal was already indebted to the extent of the preexisting debt discharged by the agent. The lesson, although again disguised by the language of subrogation, is that restitutionary relief may be granted for unrequested benefits where the benefit conferred might be said to be an inevitable expense of the principal. The lesson is one that can be extended beyond the receipt of moneys received by an agent and then utilized to pay off a preexisting debt of the principal. There is no reason why the lesson cannot be extended to any form of benefit—including goods and services—which would have to be acquired by the principal in any event. Indeed, Anglo-Canadian authority has plainly adopted such a rule.[61] This concept of inevitable expense can be employed in other cases of unrequested benefits. From the subrogation cases, then, a valuable lesson was learned. Even if unrequested benefits are generally not subject to restitution claims, there may exist

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[60] *See generally* RAPHAEL POWELL, THE LAW OF AGENCY 120 (1961).

[61] *See, e.g.*, Crown-Ellis v. Canons Ltd. [1936] 2 KB 403. *See generally* PETER D. MADDAUGH & JOHN D. MCCAMUS, THE LAW OF RESTITUTION ch. 16, § 3 (2025) .

circumstances where the acquisition of the benefit constitutes an inevitable expense of the defendant and, accordingly, restitutionary relief should be allowed.

A third lesson relates to the availability of proprietary relief in certain types of restitution claims. As we have seen, when the reviving subrogation remedy is available, it has the effect of reviving any security interest that secured payment of the debt discharged by the defendant's payment. Although we may question whether proprietary relief should be, in effect, an automatic remedy in any case where the defendant has discharged a secured debt—a point to which we will return—it is, nonetheless, the case that reviving subrogation is a well-established basis for granting proprietary relief in the context of restitutionary claims. Although, again, the reasons for granting such relief are obscured by the language of subrogation, sound policy reasons for granting such relief can be articulated. In the simple case where moneys are advanced on the basis of a payer's mistake or recipient's fraud or theft and then used to discharge a debt subject to a lien or charge on assets owned by the recipient, the law of subrogation revives the discharged lien for the benefit of the payer of the moneys. The payer thus gains priority over other unsecured creditors in the event of the recipient's insolvency. Again, sound policy reasons can be articulated for the results achieved by applying the reviving subrogation doctrine in this fashion. The question raised is whether parties who have transferred value as a result of fraud and mistake should have priority over the claims of other unsecured creditors or the recipient. A policy favoring priority for involuntary creditors is quite defensible.[62] The other creditors have typically assumed that status voluntarily. Should they be allowed to, in effect, profit at the expense of the victim of a mistake, fraud, or theft? The proprietary relief achieved by reviving subrogation seems quite defensible as a matter of policy in such cases.

Similar support can be drawn for the impact of reviving subrogation on other secured creditors of the recipient of moneys acquired in this fashion. In the simple case of a lender who mistakenly believes that an advance will be used by the borrower

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[62] *See generally* Maddaugh & McCamus, *supra* note 61, ch. 5, § 10.

to discharge an existing first mortgage and will be secured by a new replacement first mortgage on the borrower's property, only to subsequently learn that the promised first mortgage is ineffective for some reason and that an existing second mortgage now ranks ahead of the lender, the application of the doctrine of reviving subrogation has the effect of reviving the now discharged original first mortgage for the benefit of the lender. Is such a result just? Again, the involuntary nature of the lender's assumption of unsecured status weighs heavily in favor of such relief. Further, the existing second mortgagee has not been prejudiced by being required to retain the status of second mortgagee. The second mortgagee is in exactly the same position held before this unfortunate chain of events occurred. Indeed, one might reasonably argue that if the existing second mortgage were to be increased in value from the advances made on an involuntary basis by the new lender, the second mortgagee would be unjustly enriched at the lender's expense.[63] In these contexts, then, the doctrine of reviving subrogation has demonstrated that proprietary relief can be an appropriate device for preventing unjust enrichment.

In these various ways, then, the doctrine of reviving subrogation has provided a basis for extension of restitutionary relief where it plainly appears warranted.

IV. RETHINKING REVIVING SUBROGATION: CAN WE MOVE BEYOND THE FICTION?

Unquestionably, legal fictions play an important role in the growth and development of the law. Indeed, we have seen above that the fiction of reviving subrogation has played such a role in providing relief in the form of what we would now describe as cases of "restitution" or "unjust enrichment" in circumstances where the judges of the day felt that there was no other means of doing so. At the same time, resort to legal fictions has negative consequences. Legal fictions obscure from view the real reason for imposing liability in the particular circumstances. The above discussion also reveals this negative aspect of the resort to legal fictions. Thus, for example, in the agency context, the legal fiction

[63] *See generally* Mitchell & Watterson, *supra* note 1, at 34-41.

of reviving subrogation enabled courts to grant restitutionary relief to lenders of money to agents acting beyond the scope of their authority who then used the moneys to discharge debts of the principal. Lenders are granted relief against the principal on the basis of the fiction that the debts, though now discharged, are revived for the purpose of allowing the lenders to "stand in the shoes" of the paid off creditor and fictionally assert its claim against the principal. Relying on the fantasy of reviving subrogation to achieve such results is harmful in two respects. First, by hiding the real reasons for granting such relief, it renders the doctrine obscure and not easily remembered or applied by members of the profession. Second, it may prevent us from learning what may be a more general truth about the liability in question. The real reason for granting relief in such a case is that the discharge of the debt is, even though not requested by the principal, a genuine or unquestionable benefit to the principal. It constitutes an enrichment and may thus be an appropriate target for restitutionary relief. This is an important lesson that will have implications in other situations where unrequested benefits have been conferred. By obscuring such more general lessons or principles, legal fictions can thus inhibit growth and development of the law. Accordingly, the abandonment of legal fictions is also an important engine of growth and development of the law. The abandonment of the legal fictions of implied contract and implied trust achieved in the 1937 *Restatement*[64] enabled us to see more clearly the nature and potential extent of restitutionary liability. We may ask, then, whether the time has come to consider the abandonment of the fiction of reviving subrogation.

In considering this question, two further issues should be addressed. First, is the fiction of reviving subrogation, in some sense, *necessary* to our understanding of the nature of restitutionary liability in the contexts in which it is commonly applied? In other words, are there existing conceptual frameworks, principles, or rules that can satisfactorily or, indeed, better explain the results of these cases? If so, there is a means at hand for abandonment. Second, is it *desirable* for some reason to

[64] RESTATEMENT OF THE L. OF RESTITUTION: QUASI-CONTS. & CONSTRUCTIVE TRS. 838 (A.L.I. 1937).

retain the fiction? If not, abandonment seems the appropriate course. We consider each question in turn.

In contemplating whether the fiction of reviving subrogation is necessary to explain the results in cases where the doctrine currently provides relief, it is useful to distinguish personal and proprietary relief, the latter being the more difficult subject. With respect to personal relief, the *Restatement (Third) of Restitution*[65] itself provides the answer. As noted above,[66] *Restatement Third* indicates that the remedy of reviving subrogation is available broadly in cases of unjust enrichment. Thus, as we have seen, the remedy is typically available in cases of mistake, fraud, and breach of fiduciary duty. *Restatement Third* tells us that the first step in the analysis of claims for the remedy of reviving subrogation is to establish that an unjust enrichment of the defendant on these or other grounds has occurred.[67] Once one takes that step, a personal restitutionary claim against the recipient of the benefit is clearly established. Resorting to the fiction of reviving subrogation is simply unnecessary for that claim to succeed. As noted above,[68] the *Restitution Third* itself states that if all the claimant is seeking is personal restitutionary relief, resort to the remedy of subrogation is "probably superfluous"[69] as the money judgment in unjust enrichment is as advantageous as the personal remedy that could be explained on the basis of the fiction of reviving subrogation. Indeed, it may be that the word "probably" here is a bit too tentative. It seems quite evident that in cases of personal relief, resort to the fiction is simply unnecessary.

One possible source of hesitation on this point, however, is created by Section 24 of *Restatement Third*.[70] As noted above,[71] Section 24 restates a liability rule based on reviving subrogation.

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[65] RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (A.L.I. 2011).

[66] *See supra* note 48 and accompanying text.

[67] 1 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 355 (A.L.I. 2011).

[68] *See supra* note 38 and accompanying text.

[69] 2 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 354 (A.L.I. 2011).

[70] 1 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 344 (A.L.I. 2011).

[71] *See supra* notes 34-45 and accompanying text.

The independent statement of the substantive liability imposed by Section 24 implicitly indicates that it is considered to be different from that imposed by the other liability rules restated elsewhere in *Restatement Third*. Further, the liabilities imposed in Section 24 are said to be based on discharge of the defendant's liability to another. Accordingly, the liability appears to be based on reviving subrogation. We may ask, then, whether the concept of surviving subrogation is necessary to provide a basis for the rules of liability restated in Section 24. Would abandoning the reviving subrogation fiction have the effect of eliminating the liability rules restated in Section 26? As we have noted above, however, it is not self-evident that reviving subrogation is the true or only possible explanation for the liability imposed by Section 24. The restated rule envisages two types of cases.

The first involves a compulsory discharge of another's liability. Such relief can be explained more simply and directly on the basis that the discharge of liability constitutes a "benefit" and the involuntary nature of the transfer makes its retention unjust.[72] Invocation of the fiction of reviving subrogation has no additional explanatory power. The second type envisaged is a case where the claimant reasonably acts in his own interest—without being compelled to do so—in conferring the benefit of a discharge of the defendant's liability. Again, the better explanation is the discharge constitutes a benefit and that there are indeed cases where a claimant confers such value acting reasonably in pursuit of self-interest. As noted above,[73] these cases have been described by others as cases of "self-serving intermeddling." In the particular instance of self-serving intermeddler captured by Section 24,—that is *Ford v. United States*[74]—the better explanation for the reasonableness of the plaintiff's intervention is simply that it was authorized by statute. Again, the fiction of reviving subrogation appears to add no explanatory power. In sum, then, Section 24 does not offer a compelling reason for resisting the conclusion that the notion of reviving subrogation is simply superfluous or redundant.

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72 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (A.L.I. 2011).

73 *See* sources cited *supra* note 44.

74 Ford v. United States, 88 F. Supp. 263 (Ct. Cl. 1950).

Turning then to the question of proprietary relief, we may note that *Restatement Third* itself states that the proprietary effect of reviving subrogation constitutes its principal significance and that subrogation "becomes a meaningful remedy principally when the restitution claimant is in competition with general creditors of the claimant."[75] If one accepts the views expressed above, we might add that the proprietary implications of reviving subrogation are its exclusive source of significance. We may ask, then, whether there are other doctrinal tools available which could provide proprietary relief without relying on the fantasy of reviving subrogation. The obvious candidates are the equitable remedies of constructive trust and equitable lien. Although the equitable lien is the more obvious candidate as relief in the discharged debt cases typically involves securing a fixed sum on a particular asset, we will continue to refer to equitable proprietary relief as the "constructive trust."

An important step in the direction of making constructive trust relief available in the subrogation context is the recognition in American law and in the two American restatements of restitution that the constructive trust (and equitable lien) are simply possible *remedies* in cases of unjust enrichment. Section 160 of the 1937 *Restatement* simply states that where one is under an equitable duty to convey property to another on the ground that otherwise, "he would be unjustly enriched …, a constructive trust arises."[76] A similar proposition—not limited to equitable duties—is restated in the *Restatement Third.*[77] The recognition of the remedial nature of the constructive trust constituted an important departure from English thinking on this subject, then and now.[78] In English law, the constructive trust has traditionally been considered to be an institutional trust in the sense that it principally arises in cases of breach of fiduciary duty. This is,

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[75] 2 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 354 (A.L.I. 2011).

[76] RESTATEMENT OF THE L. OF RESTITUTION: QUASI-CONTS. & CONSTRUCTIVE TRS. 640-41 (A.L.I. 1937).

[77] 2 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 294 (A.L.I. 2011).

[78] *See* FHR Eur. Ventures LLP v. Cedar Cap. Partners LLP [2014] UKSC 45, [2015] AC 250; GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 595-96 (3d ed. 2015).

indeed, the implied trust mode of analysis which the American invention of restitution was intended to subvert. The constructive trust was now to be considered to be a remedy for unjust enrichment, not an implied trust rooted exclusively (or almost so) in the fiduciary duty context. It could be available, for example, in the context of a traditional common law claim for moneys paid by mistake.[79] To be sure, full abandonment of the fiction might involve discontinuance of the "trust" language altogether and replacement with plain English such as "restitutionary proprietary relief." But the recognition that the constructive trust is merely remedial has rendered the "trust" language essentially harmless. In principle, then, constructive trust relief could be extended to unjust enrichment claims giving rise to the remedy of reviving subrogation.

An obstacle to doing so, however, is provided in the 1937 *Restatement*. As noted above,[80] the 1937 *Restatement* purports to distinguish between constructive trust and reviving subrogation on the basis that where the claimant's property has been used by the defendant to acquire a claim or lien against a third party, the defendant holds that claim or lien on a constructive trust, but where the defendant uses the plaintiff's property to discharge a claim or lien, "a court of equity gives analogous relief by allowing the plaintiff to be subrogated to the position which the obligee or lien-holder occupied prior to the discharge."[81] In other words, a purchased claim or lien can be held on a constructive trust, but not a discharged claim or lien. A discharged claim or lien, presumably, is a non-existent thing. Hence the need for the fiction. A similar line of thinking appears to underly the treatment of the distinction between constructive trust and subrogation in

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[79] The contrast between English and American views on this point is illustrated in *Chase Manhattan Bank N.A.* v. *Israel-British Bank (London) Ltd*., [1981] Ch. 105. On a conflicts point, the contrasting laws of the two systems were compared. The English judge was able to impose constructive relief only on the questionable basis that the recipient of the mistaken payment holds it as a fiduciary of the payer. *See* ANDREW BURROWS, A RESTATEMENT OF THE ENGLISH LAW OF UNJUST ENRICHMENT 164 (2012) (recommending the American solution).

[80] *See supra* notes 30-32 and accompanying text.

[81] RESTATEMENT OF THE L. OF RESTITUTION: QUASI-CONTS. & CONSTRUCTIVE TRS. 654 (A.L.I. 1937).

the *Restatement Third*.[82] Thus, the commentary on Section 57 notes, by way of making such a distinction, that "[e]nrichment in such a [reviving subrogation] case results from reduced liabilities rather than increased assets."[83] How can one impose a constructive trust, we may ask, on a reduced liability? At first impression, this may appear to create an insurmountable obstacle to employing constructive trust relief in reviving subrogation cases.

The answer or solution to this conundrum, however, is simply that these passages identify the wrong target for the constructive trust in reviving subrogation fact situations. The target should be the now unencumbered asset rather than the now non-existent liability. Assume, for example, that money is mistakenly paid to defendant, the owner of Blackacre. Defendant then uses the money to discharge a first mortgage on Blackacre. It is that asset—Blackacre—that can and should be the subject of the constructive trust (or equitable lien) claim. Indeed, is not the reviving subrogation description of the situation—the defendant now owns the extinguished debt—a rather misleading characterization of the situation? What the defendant now owns is Blackacre, free and clear of the mortgage. Once one identifies the now unencumbered portion of Blackacre as the target asset, it becomes obvious that proprietary relief on that asset is appropriate. The constructive trust (or equitable lien) is plainly applicable. Indeed, is it not a more clear and direct way of describing the connection of the proprietary interest to the liability rule? The defendant increased the value of Blackacre to himself with the mistakenly paid moneys.

We need not agonize, for present purposes, as to whether constructive trust relief should be made available in all cases now covered by reviving subrogation doctrine. In cases of mistake, fraud, theft, and breach of fiduciary breach, for example, such relief is typically available.[84] Once the target of relief is correctly identified, proprietary relief would normally follow. We may note, in passing, however, that one advantage of moving to the

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82 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (A.L.I. 2011).

83 2 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 354 (A.L.I. 2011).

84 *Id.* at 296-99.

constructive trust analysis is that it requires the plaintiff to provide a convincing reason why proprietary relief and the resulting priority over other creditors is appropriate. Reviving subrogation appears to assume that such relief is appropriate whenever the plaintiff's assets have been used to discharge a secured obligation.[85] In the above scenario, the fact that the moneys were paid by mistake is a better explanation for granting proprietary relief than the fact that the moneys happened to be used by the recipient to discharge a secured debt. Moreover, if constructive trust is appropriate, it would apply to all traceable assets transferred by the plaintiff to the defendant, not just those that happen to be used by the defendant to pay off a secured debt.

The same analysis could apply in cases where the claimant seeks priority over less secured debtors. Take the simple case of Blackacre subject to three mortgages, A, B, and C. Mortgagee C, the third mortgagee, makes payments on the first mortgage to mortgagee A in order to prevent forfeiture of the property. As we have seen,[86] it is well-established that in the event of the ultimate forfeiture of the property, C is entitled to be subrogated to mortgagee A to the extent of such payments in priority to second mortgagee B. What is the asset of B that could be subject to the constructive trust? Again, it is unhelpful to consider the target to be the extinguished debt. Rather, the target of the constructive trust should be considered to be the increased value of Blackacre resulting from the payments by C that reduced the encumbrance represented by the A mortgage. B is now positioned, in the absence of such relief, to acquire that value. Making such relief available simply requires identifying the now unencumbered asset as the target of proprietary relief, rather than the extinguished

[85] This cannot be correct and, in this respect, the generalized doctrine of reviving subrogation is misleading. Consider, for example, restitution claims for benefits conferred under agreements discharged by breach. Moneys paid, either by the victim of the breach or by the perpetrator are recoverable in restitution, though, in the latter case, are subject to a counterclaim for damages for breach. It is not established law that a constructive trust remedy would be available for the moneys paid, thus granting priority over other creditors. Like the others, the parties to the contract are voluntary unsecured creditors. Nor would it make sense to hold that if either party happens to use the money to discharge a lien, proprietary relief in the form of subrogation would be available.

[86] *See supra* notes 16-17 and accompanying text.

and therefore non-existent debt. Again, this appears to be a more clear-headed description of the nature of the liability imposed rather than the fiction of reviving subrogation. In sum, then, there appears to be no principled reason why proprietary relief could not be awarded in such cases now subject to reviving subrogation if that doctrine were to be abandoned. Rather than engage in the fiction of C's revival of the now non-existent debt, we may analyze the liability imposed on B as a constructive trust or lien on the increased value of Blackacre imposed to prevent the unjust enrichment of B (who could otherwise unfairly receive that increased value).

In conclusion, there appears to be no principled reason why proprietary relief could not be awarded in cases now subject to the doctrine of reviving subrogation in the extinguished debt. Once the appropriate target is identified, the application of the remedy is more clearly explained. Moreover, the burden will be more clearly cast upon the plaintiff to explain why priority over other credits is warranted. In short, it does not appear necessary to retain reviving subrogation as a device to facilitate proprietary relief in unjust enrichment cases.

If it is not necessary to retain the fiction of reviving subrogation, would it nonetheless be desirable to do so? The negative aspects of the fictional analysis were briefly alluded to in the opening paragraph of this section.[87] These are neatly illustrated by reviving subrogation. Fictions obscure the reasons for imposing liability. Here the important form of liability imposed is proprietary in nature. It is not at all obvious how proprietary relief can be generated by an extinguished obligation. Properly identifying the target asset and the reasons why the plaintiff should be entitled to its value more clearly explains and justifies the nature and extent of the liability imposed. As always, where it is possible to do so, dispensing with fictions and grounding the explanation for liability and the remedies therefor on the actual facts and the policy reasons for imposing such liability and granting such relief is an instrument of progress in doctrinal development.

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[87] *See supra* notes 1-73 and accompanying text.

Finally, one may ask whether there might be further lessons to be learned from reviving subrogation and whether the doctrine should be preserved with that objective in mind. With the emergence of a modern law of restitution, however, it seems unlikely that the fantasy of reviving extinguished debt is likely to offer many lessons in the future. If the fiction is not necessary to achieve fair results, there does not appear to be a reason to continue to analyze restitutionary problems on this basis.

CONCLUSION

As Lon Fuller indicated in his classic study of the phenomenon of legal fictions,[88] many notable commentators and critics—perhaps Jeremy Bentham[89] is the most ardent—have criticized the legal system for its reliance on fictional concepts. To be sure, legal fictions create unsatisfactory explanations for the imposition of liability and may lead to both confused thinking and unsatisfactory results. The growth of a coherent body of restitutionary doctrine was stymied to some extent by adherence to the fictions of implied contract and implied trust. The abandonment of these fictions by the American Law Institute in the 1937 *Restatement*[90] has stimulated the development of a more coherent and just body of doctrine. At the same time, legal fictions do enable the courts to expand and impose liability in circumstances where it would not be clear that such results can be achieved under existing doctrine. However cramped and unsustainable the explanations for relief offered in quasi-contract and implied trusts jurisprudence, the evolution of the doctrine enabled by such doctrines facilitated constructive growth of the doctrine. It has been argued that the fiction of surviving subrogation has performed a similarly positive role in providing a basis, however muddled the reasoning, for granting relief in cases where relief does seem justified.

It has also been argued here, however, that the time to put aside the fiction of surviving subrogation is at hand. With the

88 LON L. FULLER, LEGAL FICTIONS 1-6 (1967).

89 Bentham, as quoted by Fuller, described legal fictions as analogous to a venereal disease infecting law "in every vein." *Id.* at 2.

90 RESTATEMENT OF THE L. OF RESTITUTION: QUASI-CONTS. & CONSTRUCTIVE TRS. (A.L.I. 1937).

growth of a more modern law of restitution and, more particularly, with the American-led recognition of the remedial nature of the constructive trust, it is now possible to explain more directly and clearly the reasons for and the nature of the proprietary relief currently made available by the fiction of reviving subrogation. It should now be possible to put the fiction of surviving subrogation behind us. Jeremy Bentham would be pleased.