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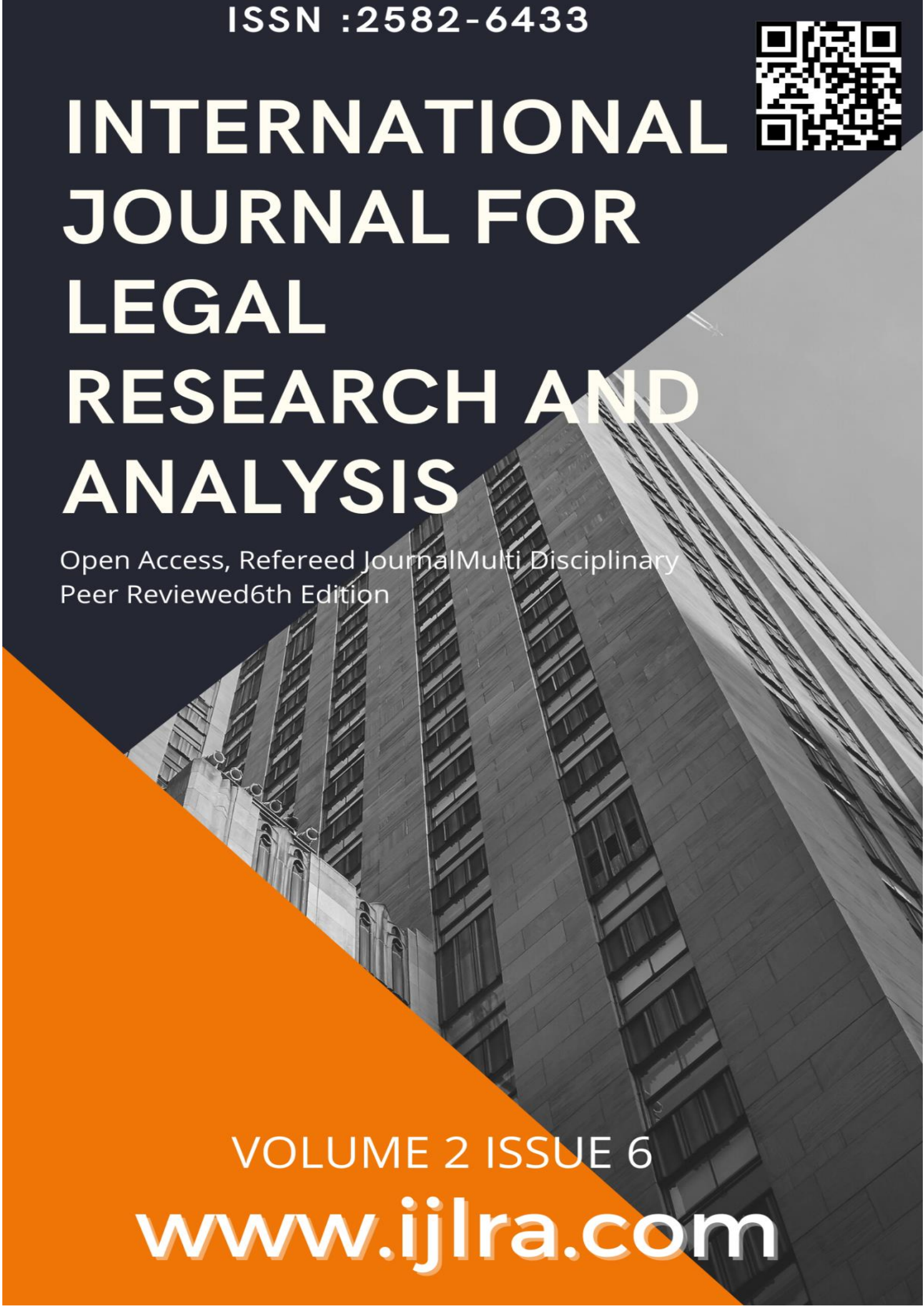

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DOCTRINE OF SUBROGATION: EVOLUTION AND APLICATION IN THE CONTRACT OF INSURANCE IN INDIA

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Abstract

The term subrogation literally means 'to substitute one person in the place of another'. This is an equitable doctrine as it is recognised by the equity courts based on the principle of justice, equity and good conscience. This Article mainly deals with two parts. The first part deals with the historical evolution of the equitable doctrine of subrogation under the chancellorship of Lord Hardwicke and its acceptance in common law courts. The second part is regarding the statutory recognition of this doctrine in India and its application in the contract of indemnity insurance. The right of subrogation is mainly recognised in debtor-creditor relationship and the contract of insurance whereby the rights are transferred from the principal obligor to the subrogee, on payment of the loss suffered or discharge of the debts, as the case may be. The rights of subrogation is applicable to all indemnity insurance but, it does not allow the insured to gain from the loss caused.

Key words: Subrogation, Hardwicke, Equity, Randal, Indemnity insurance

Introduction

This topic is a study on the historical evolution of the equitable doctrine of subrogation in the court of equity, its application in the common law courts, the French influence on the doctrine and the contemporary changes in the equitable doctrine through statutory recognitions namely, in the area of insurance.

Equity is the system of justice which was administered by the High Court of Chancery set up with the chancellors. Equity Courts has been adopted as a result of the inadequacies in common law courts. The equity courts decide cases based on the principle of equity, justice and good conscience and thereby developed new remedies to compensate the plaintiff.

The equitable doctrine of subrogation is one such remedy that was evolved in the High Court of Chancery in England.

Doctrine Of Subrogation

Subrogation is a Roman word which means to put one person in the place of another or to substitute someone for another with regard to a legal right or claim. The theoretical justification for the equitable doctrine of subrogation was evolved under the chancellorship of Lord Hardwicke in the case *Randal v. Cockran*[1] decided in the High Court of Chancery. Thus, Hardwicke is recognized as the founder of this doctrine. The word subrogation was taken from the French law and its origin is traced back to the Roman civil doctrine '*cessio actionum*'. Rights of subrogation can arise in two different ways[2]- either ipso jure i.e., by operation of law, or by express agreement as a part of the contract. Contract of insurance is the common domain wherein the rights of subrogation are applied. Subrogation as a matter of law is an equitable doctrine and brings in a broader term 'unjust enrichment'. The doctrine of subrogation is most relevant in the contract of insurance and sureties. In each case, the basic theory is that where one person makes a payment on an obligation which, in law, is the primary responsibility of another party, the person making the payment is subrogated to the claims of the person to whom they made the payment which are now actionable against the primary obligor.

[1] 1 Ves. Sen. 98, 27 Eng. Rep. 916 (1748)

[2] M. L. Marasinghe, *An Historical Introduction To The Doctrine Of Subrogation: The Early History Of The Doctrine II*, 10 ValpoScholar 275, 298 (1976), https://scholar.valpo.edu/vulr/vol10/iss2/4

History Of The Doctrine

The historical evolution of subrogation was examined under the chancellorship of Lord Hardwicke in the decision of *Randal v. Cockran* in the first half of the eighteenth century. This landmark case has marked the recognition of the doctrine with equity. Hardwicke in this case has suggested a theoretical basis to the doctrine and justified the role of equity in the area of contribution. Randal V. Cockran was preferred for appeal in the High Court of Chancery from the Court of Boston and decided on 17 June 1748. The case arose out of a decree by King George II allowing compensation to be paid to those affected during war with Spain. The facts of the case is that A ship which was insured from London to Carolina was taken by a Spaniard, and later on it was retaken by an English Privateer to Boston during the wartime. The ship was condemned and sold as no person was ready to give security for the ship. The recaptors took their moiety from the sale proceeds and the residue remained in the Court of Admiralty at Boston. The respondent insurer brought an action at law on insurance policy for its recovery. Subsequently plaintiff filed an injunction that the defendant ought to have recovered not more than the share of their loss. The court refused the injunction on the ground that defendant had offered to rescue the disabled ship from loss and hence entitled to recover the whole money insured. An insurer who has fully indemnified an insured against a loss covered by a contract of insurance, may enforce in the insurer's own name, any right of recourse available to the insured.[3]

Acceptance Of Randal In Common Law Courts

The basis advanced by Lord Hardwicke in Randal was readily accepted by common law courts. Several cases illustrate the application of the equitable doctrine of subrogation in the common law courts. In *Mason v. Sainsbury*[4], the insured claimed for compensation against the insurance company and local district administrative authority as his house was wrecked by the civil rioters. The insurers paid their claim and were held entitled to recover from the district authority in the name of the insured. Here, Lord Mansfield stated that "Every day the insurer is put in the place of the assured[5]... The insurer uses the name of the insured". The two facets discussed by the court includes - Firstly, the insured cannot make a profit from the loss caused i.e., the principle of indemnity does not allow the insured to be placed in a better position than the loss occurred. Secondly, the insurer, having contributed to his claim will step into the shoes of the insured,

[3] SWARB, https://swarb.co.uk/randal-v-cockran-17-jun-1948 (01/06/2022)
[4] 3 Doug. 61, 64, 99 Eng. Rep. 538, 540 (1782)
[5] M. L. Marasinghe, *An Historical Introduction To The Doctrine Of Subrogation: The Early History Of The Doctrine I*, 10 ValpoScholar 275, 298 (1975), https://scholar.valpo.edu/vulr/vol10/iss2/4

thereby securing all the rights and remedies that were available to the assured.

In *London Assurance Co. V. Sainsbury*,[6] the insurer having paid the assured as a result of the loss sustained by civil rioters gave the insurer the right to recover the same from the third party, the municipality. In addition to the prior recovery, he assured also claimed from the municipality. Lord Mansfield, in the instant case stressed on the i*pso jure* transference of rights from the payee to the payor. Buller, J. Stated the three aspects[7], (1) the trust concept entitles the insurer to sue against the tortfeasor of the insured after having paid the claim in accordance with the policy, (2) the insurer step into the shoes of the assured, (3) the process of subrogation occurs by *ipso jure* transference of rights.

In *Lawson v. Wright*,[8] the plaintiff who was the executor of a surety paid the entire debt and claimed for contribution from the co-surety. The court permitted he claim by justifying the role of equity in the area of contribution and stated that he has "a right to call on another for contribution in cases of this nature...[since] the origin of the court of equity.

By the end of the eighteenth century, both the common law courts and equity courts recognized the application of this equitable doctrine. The developed doctrine hence provides that a person who had paid a third party in discharge of the debts of the principal obligor, secured from that third party a right to sue the principal obligor, for a contribution or for an indemnity. When the claim is made among the joint sureties, and the claim is limited to a proportionate payment, it is in the nature of 'contribution'. However, when the claim is for the recovery of the entire amount of loss, it would be in the nature of 'indemnity' as in the case of contract of insurance.

Subsequently, by the beginning of the nineteenth century, the constituents of subrogation were comprehensible as:

(1) The person having paid the third party on behalf of the principal obligor secures the right to claim a contribution or an indemnity, as the case may be.

(2) The acquisition of the so-called right is obtained ipso jure and not under any express agreement.

(3) It was accepted by both common law courts and equity courts that the right so acquired against the principal obligor is an operation of equity and not of common law.

[6] 3 Doug. 245, 99 Eng. Rep. 636 (1783)

[7] M. L. Marasinghe, *An Historical Introduction To The Doctrine Of Subrogation: The Early History Of The Doctrine I*, 10 ValpoScholar 275, 298 (1975), https://scholar.valpo.edu/vulr/vol10/iss2/4

[8] 1 Cox. 275, 29 Eng. Rep. 1164 (1786)

French Influence On Hardwicke's Doctrine

By the middle of the nineteenth century the concept laid down in Randal received wide acceptance both in common law courts and in equity courts. The English courts looked into other domains where a similar equitable doctrine was followed to name the English concept of Hardwicke. After 1850, the English courts recognised a similar equitable remedy in the French law which was labelled 'subrogation. The French remedy was traced back from the Roman civil doctrine of '*cessio actionum*'[9]. However, the English doctrine of subrogation and the Roman doctrine of cessio actionum displays several similarities and differences. The most obvious similarity between the two doctrines are that both of them deal with the transference of rights from one person to another whereas the main difference between the two is in the mode of its transference. Subrogation relates to the ipso jure transference of rights by the parties without any express agreement whereas, cessio actionum is an enforcement of a simple contract wherein rights are transferred through express agreements.

Quebec Fire Insurance Company v. Augustin St. Louis and John Molson[10] appears to be the first case where the French concept of Subrogation was used. This case was preferred on appeal from the Court of Appeals of the Province of Lower Canada to the Privy Council. In the instant case, the respondent's servants were held negligent for causing fire which partially destroyed a parish church. In consideration of the claim satisfied by the insurance company, the priest and the Marguilliers-in-charge of the church transferred their right to sue the respondants by means of a notarial instrument to the appellants for recovering their amount. On account of this notarial instrument, the insurers sued against the original tortfeasors. The Court of Appeal of Lower Canada reversed the judgement of the Court of Queen's Bench on the ground that the rights of the insured has not been subrogated to insurer and held that the suit is not maintainable as the insurers has tried to enforce the rights derived from the assured. On appeal to the Privy Council, it was held that the notorial instrument entitles the insurer the right which the assured had against the respondents.

In succeeding years, the word 'subrogation' and the theory evolved in Randal combined into the doctrine of subrogation and Lord Hardwicke became accepted as its founder.

The term 'subrogation' was first used in the English case, *Stringer v. The English and Scotch Marine Insurance Company*[11]. In this case, the plaintiffs insured a ship cargo with the defendants which was subsequently captured by a US cruiser and taken to New Orleans where a suit for its condemnation was filed. The plaintiffs succeeded the action and the captors appealed. On appeal,

[9] Fred Wells Hargreaves, *Subrogation Of Insurers* (Cornell Law Library) 1, 22 (1891), scholarship.law.cornell.edu.
[10] 7 Moo. P.C. 286, 13 Eng. Rep. 891 (1851)
[11] L.R. 4 Q.B. 676 (1868-69)

the court ordered the plaintiff to furnish security against costs which they could not afford, for which the ship was condemned. As a result, the plaintiff subsequently gave a formal notice of abandonment of the cargo and requested the insurers to pay for the entire loss. Having paid the entire loss, the insurers were entitled to be subrogated in the position of the plaintiffs i.e., the insured and to recover the ship cargo.

The meaning of subrogation became more clarified in *Darrell v. Tibbitts*[12]. Forbes owned a house and leased the same wherein he placed the duty upon the lessee to make repairs in the event of any explosion. An explosion occurred, due to the negligence of an employee of the Brighton Corporation. The lessee made the repairs and subsequently recovered the loss from the corporation. The house was then sold by Forbes to Tibbitts with the benefit of the insurance policy. The insurer, without knowledge of the payment made to the first lessee by the Brighton Corporation, paid the new owner in conformity with the policy. Subsequently, the insurers became aware of the first payment and sought to recover their amount. Lord Justice Brett clearly stated the doctrine of subrogation as it applied to insurance:[13]

> *"Where something is insured against loss either in a marine or a fire policy, after the reimbursement by the insurer to the assured for the loss, the insurers are put into the place of the assured and secure every rights and claims which the insured previously had."*

The application of subrogation in the principle of indeminity was recognised by Lord Justice Brett in *Castellain v. Preston*[14]. The vendor was in the process of selling his house which was insured against fire. After the execution of sale and payment of purchase consideration, the house got destroyed by fire before it was actually transferred to the vendee. Without the knowledge of the sale, the insurer reimbursed the loss amount in conformity with the policy. After the fact of sale was known, the insurer sued the vendor for recovery of their amount. The Court, in Castellain, refused the action filed by the insurer on the ground that the insurance company was claiming a right to be subrogated to a contract between the assured and third party that was not in existence at the time of maturity of the insurance policy. This decision of the Lower Court was reversed by the Court of Appeals, stated that fundamental principle of the contract of insurance in marine and fire policy is the principle of indemnity whereby the insured shall be fully indemnified for the loss against policy but not more than the loss.

[12] 5 Q.B.D. 560 (1880)
[13] IMITHAL. BABIKER AHMED, SOME ASPECTS OF THE DOCTRINE OF SUBROGATION IN INSURANCE LAW 72, (core.ac.uk 2006)
[14] 8 Q.B.D. 613 (1881-82)

Application Of Subrogation In Insurance Law In India

New openings in the field of commerce and the increasing demand of markets has greatly influenced the development of the doctrine of subrogation. The right of subrogation arises under tort, contract, and other statutes which create a liability to make compensation arising out of a breach thereof. The types of subrogation are mainly divided into - Indemnity insurance's subrogation rights, Surety's subrogation rights, Subrogation rights of the business creditors, Lender's subrogation rights, Banker's subrogation rights, and Trustee's subrogation rights.[15]

Application Of Subrogation In Contract Of Insurance

Insurance is a contract of indemnity whereby, the insurer in return for the premium paid by the insured for any unforeseen risk, indemnifies the insured for any financial loss to the subject matter so insured. The fundamental principle in the contract of indemnity states that in case of loss, the insured shall be indemnified to the extent of the loss sustained and cannot make profit from the loss. There are two categories of insurance which may be termed as 'indemnity insurance' and 'contingency insurance'. The indemnity insurance is an indemnity against loss as in the case of fire policy and marine policy. Contingency insurance is concerned with the payment upon a contingent event and not a matter of indemnity as in the case of life policy or personal injury policy. The doctrine of subrogation is applicable to all indemnity insurance.

The contract of indemnity provided under section 124 of Indian Contract Act, 1872 is a fundamental element to the equitable doctrine of subrogation whereby, the insurer having satisfied the claim of the insured pursuant to the insurance policy is subrogated in the position of the insured and thereby derive the rights of the insured to sue the third party or the original tortfeasor.[16]

Insurance law is law relating to insurance policies and claims. The principal legislation regulating insurance in India is the Insurance Act, 1938.[17] The right of subrogation is statutorily recognised under Section 79 of the Marine Insurance Act, 1963. The section provides that:[18]

> *"If the insurer pays for a total loss of the subject- matter insured, he secures all the rights of the assured in the subject matter and is subrogated to the position of the assured. Whereas, if the insurer satisfies only a partial loss, he acquires no title to the subject matter insured but he is subrogated to all rights and remedies of the assured and in respect of the subject matter so far as the assured has been indemnified."*

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[15] Nishi Bhandari, *Doctrine of Subrogation and its uses in Contract of Guarantee*, 3 (IJARND) 29, 30 (2018) www.ijarnd.com.

[16] Praveen Nagree-Mahtani, *Insurance Law & Regulations In India* p.1, 25 (2002) www.nishithdesai.com

[17] C. A Rajkumar S. Adukia, *Insurance Laws of India* p.1, 13 (www.caaa.in)

[18] Marine Insurance Act, 1963, No. 11, Acts of Parliament, 1963 (India).

A few Indian cases to illustrate the decisions on insurance law are mentioned. *Economic Transport Organization v. Charan Spinning Mills*[19], The `Assured' is a manufacturer of the cotton yarn insured from the National Insurance Co. Ltd, covering transit risks in cotton yarn sent by it to various consignees through rail or road against theft, pilferage, non-delivery and/or damage. The appellant, a `carrier' for transportation and delivery to a consignee at Calcutta was entrusted a consignment of hosiery cotton yarn of the value of Rs.7, 70,948/- to. The vehicle carrying the said consignment met with an accident and the goods were completely damaged. On the assessment of the damage, the insurer settled the claim of the first respondent for Rs.447, 436/-. On satisfying the claim, the assured issued a Letter of Subrogation-cum-Special Power of Attorney in favour of the insurance company. Thereafter, the insurer and the insured filed a complaint under the Consumer Protection Act, 1986 against the appellant before the District Consumer Disputes Redressal Commission, Dindigul, claiming compensation of Rs.447,436/- with interest at 12% per annum, for deficiency in service, as the damage to the consignment was due to the negligence on the part of the appellant and its servants. The District Forum directed the appellant to pay Rs.447, 436/- with interest at the rate of 12% per annum from the date of accident till date of payment to the Insurer, on the basis of the subrogation.

The principles relating to subrogation subsequently encapsuled in this case are:[20]

(i) Equitable right of subrogation confers rights of the assured against the original tortfeasor in favour of the insurer on payment of entire loss.

(ii) Subrogation entitles the insurer to sue the wrongdoer for the amount paid to the assured for the loss.

(iii) Where a letter of subrogation is issued by the insured, the rights of assured in favour of the insurer will be governed by the letter of subrogation.

(iv) On satisfaction of claim by the insurer, subrogation enables the insurer to sue the wrongdoer in the name of the assured.

In *United India Insurance Co. Ltd. V. Levis Strauss (India) Pvt. Ltd*[21]., the Supreme Court held that where there is an overlapping in insurance policies, the insured is fully indemnified by one insurer, and the second insurer is not liable for the claim. The court referred to Castellain v. Preston and held that the insured can be indemnified only to the extent of loss and no double indemnity is

[19] JT 2010 (2) SC 271, 2010 (2) SCALE 427, (2010) 4 SCC 114, 2010 (2) UJ 1004 (SC)
[20] INDIANKANOON, https://indiankanoon.org (01/06/2022)

[21] 33 (1833) 11 QBD 380. 26.

allowed.

New India Assurance Co. Ltd. & M/s Ahuja Radios v. M/s Harsh Transport Pvt. Ltd[22]., the defendant, a common carrier was entrusted by Ahuja Radios to dispatch their duly packed goods from Delhi to Bhopal. The vehicle transporting these goods were hijacked by thieves and the materials were stolen. The insurer on settling the claim of loss suffered by the plaintiff sued the defendant's company to reimburse their amount. It was held by the Delhi District Court that the insurance co. is entitled to recover the damages indemnified in favour of the plaintiff.

In all these cases the Indian Courts commonly points out the rights of insurer to sue the wrongdoer in the place of assured on settling their claim of loss. The binding nature of subrogation in all indemnity insurance policies and its effect on the insurer to sue the original tortfeasor in the name of the assured is clearly recognised. Though there are two main categories of insurance termed as life insurance and general insurance, the doctrine of subrogation is applicable to those contracts of insurance which has an element of indemnity inherent in it[23]. Hence, the primary feature of subrogation in the contract of insurance is to subrogate insurer in the position of the assured.

[22] AIR 1997 P H 257, (1997) 116 PLR 339.
[23] INDIANKANOON, https://indiankanoon.org (01/06/2022)

Conclusion

The historical evolution of the doctrine of subrogation traced back from the Roman Civil law and its French influence from the French doctrine cessio actionum has revealed a major similarity and difference between the both. The similarity between these two doctrines are that, both of them deal with the transference of rights from one person to another. And, the major difference to be noted is that subrogation is the transference of rights ipso jure whereas, in cessio actionum an express agreement must always precede the payment for transferring rights. In other words, subrogation is the application of equity and cessio actionum is the enforcement of contract where, both of them deals with tranferance of rights. Also, the theoretical justification to the equitable doctrine of subrogation is clearly laid down by Lord Hardwicke in Randal v. Cockran which was then commonly accepted by common law courts and equity courts.

While discussing the contemporary change in the equitable doctrine of subrogation, it can be well established that this doctrine which evolved from the principle of Justice, equity and good conscience in the equity courts was subsequently added to Indian statutes. The right of subrogation is now statutorily recognised under Section 79 of Marine Insurance Act and Section 92 of Property law. The application of subrogation is recognised in various domains of law. Contract of indemnity insurance is one such domains where the doctrine of subrogation is applied.

The final part of the Article which examines the right of subrogation in the contract of insurance through Indian case laws points out the significance and application of the doctrine in the contract of insurance. For the application of subrogation in insurance, the principle of indemnity should be an inherent element in the contract. The contract of indemnity is a contract whereby one party promises to indemnify loss caused to the other. Thus, all contracts of indemnity insurance such as fire policy and marine policy are a promise by the insurance company to indemnify the policyholder to the extent of loss caused. On payment of the claim made by the assured, the insurer step into the shoes of the assured i.e., the insurer secures the right to sue the third party in the name of the assured for the loss thereby subrogating the insurer in the position of the assured.