PAYMENT WITH SUBROGATION UNDER THE ETHIOPIAN CIVIL CODE

*by Jonathan A. Eddy**

I. Introduction

A. General

Subrogation allows the substitution of a new creditor in the place of the original creditor, with the possibility of the new creditor now exercising the right, and its accessories, of the original creditor. In this article, discussion will be restricted to the role of payment with subrogation, dealt with by the Ethiopian Civil Code primarily in Arts. 1968-75.[1]

1. Sources. — Payment with subrogation may occur when performance of an obligation is made to the creditor by someone other than the debtor. In certain such cases, the law provides directly that the person making performance shall receive in return the paid creditor's right against the debtor. This is legal subrogation, which has particular importance in the law of suretyship, co-debtors, and mortgage. Yet in many cases, there will be no Code provision or special law entitling the third party payor to legal subrogation. In these cases, the payor may still be able to obtain the benefits of subrogation through a contract. For instance, a third party may pay the original creditor under an agreement by which the creditor transfers his rights against the debtor to the paying third party. Alternatively, a third party may lend a debtor the funds necessary to satisfy the creditor, under an agreement by which the debtor permits the lender to exercise against the debtor the rights which the now-satisfied creditor previously held. Under certain conditions, the law will give effect to such agreements; indeed, contractual subrogation also holds an important place in the law, because it allows the introduction of needed flexibility into the payment of obligations.

2. Effects.—Whatever the *source* of subrogation, the *effects* are the same: the third party payor is substituted for the original creditor, and is allowed to exercise

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1 Payment with subrogation is one particular instance of "personal subrogation", that is, the substitution of one *person* for another in a legal relationship. Mazeaud et Mazeaud, *Lecons de droit civil* (1956), Vol. II, §841. Personal subrogation, thus defined, might be taken to include assignment and the oblique action. *See* De Page, *Traité élémentaire de droit civil belge* (3rd ed., 1964), Vol. II, §513B. The element these institutions share (substitution) is so general, and of such little import compared with the different functions they fulfill and the technical rules surrounding each, that the value of the generalized concept may be questioned. De Page is typical: after noting the general concept in his discussion of payment with subrogation, he makes little use of it in his elucidation of the oblique action or of assignment. *Id.*, Vol. III, §180 *et. seq.*; Vol. III, §378 *et seq.*
In addition to personal subrogation, French doctrine recognizes "real subrogation," that is, the substitution of one "*thing*" for another in a legal relationship. Mazeaud et Mazeaud, *op. cit.*, Vol. II, §841. The theory of real subrogation is properly part of the concept of patrimony. For further discussion, *see* Mazeaud et Mazeaud, *op. cit.*, Vol. I, § 282 *et. seq.*, *esp.* §293.

the latter's rights against the debtor. Subrogation thus avoids the normal effect of a valid payment: the extinction of the obligation. But it is important to understand that even without subrogation, a third party making a valid payment will have an action to recover from the debtor the amount paid on his behalf. For at the same time the original debt is extinguished, a new obligation will be created. If, for instance, C pays B's debt to A, this payment will extinguish the AB debt, but it will create a new BC debt.[2]

The importance of subrogation is not simply that the subrogee receives an action by which he may reimburse himself: this he will already have. Rather, its importance lies in the fact that the subrogated right will retain in the subrogee's hands all the characteristics and accessories which it had in the hands of the subrogor. And thus it will often be advantageous for the subrogee to base his action on this right. The subrogee also retains his personal action for reimbursement; in some circumstances this might be the more useful action, and the subrogee will continue to have the option of proceeding on that basis.

B. Payment

In Parts II and III, respectively, of this article, the different sources of subrogation and the effects of subrogation are discussed in detail. Prior to that, however, the law of payment must be considered briefly. This is so for two reasons: first, subrogation usually presupposes a valid payment by a third party;[3] second, while the Ethiopian Code follows French law very closely in the area of subrogation proper, certain complications arise due to variations between the French and Ethiopian law relating to the underlying payment.[4]

French and Ethiopian law are agreed that *some* obligations must be performed by the debtor personally. These are obligations *intuitu personae*, where the parties have contracted with a view to the personality of the debtor: for instance, contacts for the performance of an operation by a surgeon, or for a painting by a particular artist. Under Art. 1740 (1) of the Ethiopian Code, which reflects the French position,[5] an obligation may have such a character where "given the nature of the contract, this is essential to the creditor or has been expressly agreed."[6]

2. For present purposes the exceptional case, where it is C's intention to confer a gift on B, may be disregarded.

3. The exceptional case occurs in subrogation by the debtor when the subrogee lends money to the debtor who makes payment with this money personally; *see* discussion *infra*, text at n. 42.

4. The following discussion restricts itself to the pertinent variations, dealing with the issue who may make payment. Ethiopian law follows French law respecting capacity of the payor (Fr. Civ. Code Art. 1238 al. 1; the same rule obtains in Ethiopia by application of the Code's general rules respecting capacity, *see esp.* Arts. 313, 358, 381, and J. Vanderlinden, *The Law of Physical Persons* (HSIU, 1969); capacity of the payee (Eth. Civ. Code Art. 1742, Fr. Civ. Code Art. 1241); and to whom payment may be made (Eth. Civ. Code Art. 1741, Fr. Civ. Code Art. 1239, al. 1; Eth. Civ. Code Art. 1743, Fr. Civ. Code Arts. 1239 al. 2, 1240). For discussion of the French law, *see generally* Mazeaud et Mazeaud, *op. cit.*, vol. II, §830 *et seq.*; Planiol et Ripert, *Traité practique de droit civil francais* (2nd ed., 1954, by Esmein) vol. VII, §1149 *et seq.*

5. Fr. Civ. Code Art. 1237.

6. The phrase "given the nature of the contract" has been dropped from the English translation of the Code; it appears, however, in the official Amharic text, as well as in the French draft.

In addition to the extreme examples given, many other contracts for services are *intuitu personae.*[7]

But many obligations, and in particular obligations to pay a sum of money, do not have this character.[8] Art. 1740 (2) provides the general rule:

"In all other cases, the obligations under the contract may be carried out *by a third party so authorized by the debtor, by the court or by law.*" (Emphasis added).

This appears to introduce into Ethiopian law a substantially narrower rule than that of French law. For under French Civil Code Art. 1236:[9]

> "An obligation may be performed by any person who has an interest, such as a co-debtor or a guarantor.
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> An obligation may even be performed by a third party who has no interest provided that the third party acts in the name and on behalf of the debtor, or that, if he acts in his own name, he is not to be subrogated to the rights of the creditor."

Under either provision, the creditor may be constrained to accept performance by someone other than the originally envisaged debtor. The rationale for this is simply that the creditor, who is receiving performance, has no sufficient ground for complaining as to the person who is performing. Naturally the object of the obligation, that is, what is to be performed, remains unaffected,[10] as does the primary legal responsibility of the debtor for any misperformance or non-performance.[11] But the French provision lacks the general requirement of authorization contained in Ethiopian Art. 1740 (2). Accordingly, payment may take place without the debtor's consent, or even over his objection. The sole limitation of French law is that payment may not validly be made by a third party over the objection of both parties.[12]

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7. For further examples, *see* David, *Commentary on the Ethiopian Civil Code*, Title XII (preliminary draft), (trans. Kindred) (HSIU, 1968), p. 43; De Page, *op. cit.*, vol. III, §400, 401, 408. Contracts other than those for personal services may also be *intuitu personae:* a contract of bail, on the bailee's side; so also, a contract of residential lease, on the lessee's side.

8. It must be emphasized that the only question involved here is the delegation of the *factual* performance, sometimes referred to as vicarious performance. Delegation of the *legal responponsibility* for performance (properly known as "delegation") is a different matter, dealt with by the Ethiopian Code in Art. 1976 *et. seq.*

9. Author's translation. Some explanation is required of the language of the last phrase: that if the payor acts in his own name, he is not to be subrogated to the rights of the creditor. A payor who has an "interest," for instance by being a codebtor or guarantor, is accorded subrogation as a matter of law, both in French and Ethiopian law (see text *infra* at n. 15). When Art. 1236 states that a person paying in his own name who has no "interest" is not to be subrogated, the meaning is simply that he is not, through his act of payment alone, entitled to subrogation as a matter of law. It remains possible, in both French and Ethiopian law, for such a person to obtain subrogation as a matter of *contract*, at the hands of either the creditor or debtor. (See text *infra* at nn. 32, 42).

10. It is exactly for this reason that, conversely, *intuitu personae* obligations must be personally performed: the identity of the person in those cases affects the character of the performance, and a change of persons thus means a change of object.

11. See note 8, *supra.*

12. This is the usual statement of the rule in French law. *See, e.g.*, Colin et Capitant, *Cours élémentaire de droit civil francais* (9th ed., 1942, by de la Morandiere), vol. II, § 476 (citing Req. 7 juin 1937, S. 1937. 1.25). There is, and has been for some time, some controversy over the exact "rule;" *see, e.g.*, Aubry et Rau, *Droit civil francais* (6th ed., 1948, by Bartin;

Art. 1236 fits well with the French provisions regarding subrogation: in cases of legal subrogation, the payor will have an "interest"; his payment is therefore specifically authorized by Art. 1236 al. 1. And in those cases where a payor does not have an interest, and is therefore relegated to contractual subrogation at the hands of either the creditor or debtor, the grant of subrogation makes clear that the subrogating party does not object to the third party payment.

Art. 1740 (2) cannot be said to fit nearly so well with the subrogation provisions of the Ethiopian code. True, there will be no problem respecting subrogation by the debtor. There, by the same reasoning just applied to the French provisions, the debtor's consent to the subrogation will imply an authorization of the third party to make payment. But in the case of legal subrogation or subrogation by the creditor an anomolous situation may arise: the Code clearly authorizes subrogation, but does not always clearly authorize the underlying payment without which subrogation cannot occur.

Of course, in many of those cases also, while the subrogation may not be made by the debtor, he may authorize the payment. But this is not a complete answer. To begin with, it is also possible that the debtor will not do so. For if the payment is coupled with subrogation, it will not extinguish the debtor's obligation, but at best postpone it; whether this will be sufficient incentive to induce the debtor's cooperation will depend upon the circumstances of the particular case, including the presence or absence of countervailing considerations such as inconvenience.

Moreover, even if the debtor would be willing, it may be inconvenient or impossible to contact him, or it may entail unacceptable delays. And as the uncertainty thus created is the antithesis of the security which the subrogee usually hopes to obtain from subrogation, it may dissuade him from acting at all. Thus there are significant practical differences in the results to be expected under the French and the Ethiopian rules, the latter being much less satisfactory from the viewpoint of the creditor or would-be payor.

Where authorization is not obtained from the debtor, payment may still be valid if the third party is authorized by the court or by law. Only the latter will be discussed here, for it alone has the potential of offering a general solution circumventing the inadequacies of a rule requiring the debtor's consent. The question of legal authorization of third party payment will be discussed first in relation to cases of legal subrogation, and then in relation to subrogation by the creditor, as the relevant considerations are quite different in the two areas.

1. Legal subrogation. — In the areas covered by legal subrogation, express authorization often does occur in the Code: Art. 1939 expressly authorizes a guarantor to make payment to a creditor after the debt has fallen due; Art. 3083 (1) authorizes a mortgagee to pay a superior creditor with the latter's consent or where the immovable is attached on the latter's request. And for co-debtors, no problem arises, since each co-debtor owes the whole debt as against the creditor.

The presence of such provisions in the Code indicates that it is correct to distinguish authorization to pay and authorization to receive subrogation. Rather than solving the problem, therefore, they contribute to it. For sometimes the Code

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trans., 1965 Yiannopoulos), vol. I, §316 at nn. 1, 2; Pothier, *Oeuvres* (1861 ed., by Bugnet), vol. II, §495 *et. seq.* The authorities are in accord, however, that in French law a valid payment may be made without the debtor's knowledge, and, *a fortiori*, without his authorization. It is this that contrasts with Ethiopian law, and provides the practical difficulties existing in the area of subrogation.

authorizes subrogation, but is entirely quiet as to the right to make payment. In fact, this is the case with Art. 1971, the Code's general provision relating to legal subrogation. And Art. 1971 is not coterminous with the various specific provisions appearing elsewhere.[13] Thus while there is no specific provision relating to pledges analogous to Art. 3083 governing mortgages, Art. 1971 will allow subrogation of a pledgee who pays a superior (or a junior) creditor who has a security interest in the pledged property. Since the law is silent as to authorization to make payment, should it be assumed that a "legal authorization" is lacking, and the debtor's authorization is necessary?

While that is a possible implication, it is not a necessary one. Rather, by the process of interpretation frequently applied in France, Art. 3083 may be treated as "illustrative" of a general principle underlying the Code. To do otherwise would create anomalies, for instance in the treatment of pledge and mortgage, which have no basis in differing policy considerations.

Yet even if it is accepted that Art. 3083 is "illustrative" of a general principle, what is that principle? The analogy between pledge and mortgage is immediate, but is the "principle" limited to the law of real security interests? On the contrary, Art. 1939 would seem to be another "illustration:" for the principle with which we appear to be dealing is that of French law: that a person with "an interest" may pay a debt, and will be accorded legal subrogation. In terms of the Ethiopian Code, payment in such situations is "authorized by law;" the express provisions simply note particular instances of this principle's application. By this circuitous route, we are led back to the French law of payment.

2. Subrogation by the creditor. — Reconciling the draftsman's alterations of the law of payment with his apparent intent to introduce unchanged the French law of subrogation proper is yet more difficult when subrogation by the creditor is considered. Reliance on the debtor's authorization is equally inadequate in this instance; authorization by the court would again be a special case. So once more the question is to determine whether the payor is "authorized by law" to make payment in cases of subrogation by the creditor.

Express authorization does not exist: Art. 1968 mentions only subrogation, not payment. And an argument of implied authorization faces substantial objections. The principle developed above with reference to legal subrogation does not extend to these situations, for the payor now is a person who has "no interest." One might argue that, since subrogation requires a valid payment, Art. 1968, in authorizing subrogation, must implicitly authorize payment. But Art. 1968 has a meaningful area of application without this implication: that is, to authorize subrogation in those cases where the third party's payment is otherwise authorized. Finally, this interpretation would lead to the somewhat bizarre result that the creditor could "authorize" payments by a third party without the debtor's consent, but only when he also subrogated the third party.

At this point, there remains open only a choice of anomalies. For if Art. 1968 does not authorize payment, a valid payment will normally require the debtor's authorization. Thus while his consent is not required for subrogation, subrogation could only occur if he authorized the payment. The actual obstacle that this creates may

13. This matter is treated fully in the discussion of legal subrogation in Part II.

not be large, for the debtor would not often have an interest in refusing authorization, and the courts ought to treat an arbitrary refusal as a violation of the debtor's obligation of good faith under Arts. 1713 and 1732.[14] But the more important practical consideration remains that it may be difficult to obtain "authorization" simply because it is difficult to reach the debtor. This result is thus not wholly satisfactory; nevertheless it appears to by the best which can be reached in light of the unreconciled discrepancies of Arts. 1740 (2) and 1968.

3. Summary.— Subrogation usually presupposes a valid payment by a third party. Ethiopian law requires, as French law does not, that a third party making a payment be authorized to do so, by the debtor himself, by a court, or by law. In cases of subrogation by the debtor, the debtor's consent to the subrogation will subsume his authorization of payment. And in the area of legal subrogation, the Code embodies indirectly a principle also found in French law, payment by a third party who has "an interest." But with respect to subrogation by the creditor, it is not permissible to imply authorization by law. Validity of payments will therefore normally depend upon the debtor's authorization of payment, which may certainly not be presumed from the creditor's consent to subrogate. Some amelioration of this rule may be obtained if the courts will hold an arbitrary refusal of authorization by the debtor to be a violation of his obligation of good faith.

II. Sources of subrogation

Against this background, it is possible to consider in detail the sources of subrogation. Three such sources exist in Ethiopian law: legal subrogation, that is, subrogation of the payor to the creditor's rights by operation of law; and two forms of contractual subrogation: by the creditor and by the debtor.

A. Legal Subrogation

In certain cases, a person who pays another person's debt is accorded the benefit of subrogation by simple operation of law, without the necessity of any agreement at all. In each case, we may see that the law recognizes a special interest of the payor in the extinguishment of the other person's debt. Usually this is because although the debt ultimately rests with another, the payor entitled to legal subrogation is directly affected by the extinction or non-extinction of the debt: such, for instance, is the situation of co-debtors, guarantors, or persons enjoying interests in the same property.

Art. 1971 is the Code's general provision providing for legal subrogation. It outlines two broad principles upon which legal subrogation shall be granted, each of which is elaborated elsewhere by specific Code provisions. Both principles again reflect French law.[15]

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14. Compare the discussion of the "interests" of the various parties contained in the discussions of the French rule by the authorities cited, n. 12, *supra*.

15. Eth. Civil Code Art. 1971:
Subrogation to the rights of the creditor shall take place by virtue of the law, to the extent of the amount paid:
(a) for the benefit of any person who, being bound with others or on behalf of others for the payment of a debt, discharged the debt and is thereby entitled to indemnity or contribution from his co-debtors; and
(b) for the benefit of any person who, bring owner of a property or enjoying over it a right of lien, mortgage or pledge, paid a creditor who enjoyed over the same property a right of lien, mortgage or pledge; and

1. Payment by a person "bound with another or on behalf of others."[16] If a payor discharges the debt of a person "with" whom or "on behalf of" whom the payor is himself bound, the payor is entitled by Art. 1971 (a) to subrogation as a matter of law, to the extent of the amount paid. This article applies to a codebtor, who is bound "with" another, as well as to a guarantor, who is bound "on behalf of" another. Both these results are made explicit by more specific provisions, Art. 1909[17] and Art. 1944, respectively.

a. Codebtors. — Suppose B and B_2 as codebtors owe A $1000 on a note due December 31, bearing 12% interest. On December 31, B_2 pays A in full himself As against A, B_2 was bound to pay the full amount; his payment is clearly valid. Two effects would normally follow: the extinguishment of the AB debt,[18] and the creation of a new B_2 debt. The latter effect does occur, for under Art. 1908 B_2 is given a claim against B for the amount paid in excess of his share. This action is in the nature of an agent's claim against his principal for reimbursement for outlays made on the proncipal's behalf.[19] And as such, the claim will bear interest at the rate of 9% from the date of B_2 's payment, without the necessity of a default notice to B.[20]

However, since the Code accords the paying codebtor subrogation to the creditor's rights under Arts. 1971 (a) and Art. 1909, the first effect, extinguishment of the AB debt, does not take place. Rather, the debt continues to exist, not in favour of A, but rather in favour of B_2. Thus B_2 acquires a second action against B, and one that in this case will be more advantageous for him, since it bears interest at 12%.

b. Guarantors. — The suretyship provisions of the Code provide an exceptionally clear view of the relationship of subrogation to the guarantor's personal action for indemnification. Suppose B borrows $ 1000 from A, without interest, and guarantees this loan. On the due date, B fails to make payment; A approaches C, who pays in B's stead.

Again, C has a personal action against B for indemnification under Art. 1940. This action includes a right to principal and interest paid, and to costs incurred. Sometimes it may also include damages suffered as a consequence. Art. 1941. Like

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(c) whenever the law so provides.
Particular differences which may exist between French and Ethiopian law are treated in the course of the following discussion.

16. Ethiopian law follows French law most closely in this area. *See* Mazeaud et Mazeaud, *op. cit.*, §855; Planiol et Ripert, *op. cit.*, §228.

17. In the English version of the Code, "subrogation" has been inconsistently translated as "substitution". A more graceful rendition of Art. 1909(1) would be:
(1) A debtor who may claim under Art. 1908 shall be subrogated to the rights of the creditor to the extent of the amount paid by him to the creditor.

18. Eth. Civ. Code Art. 1806.

19. Eth. Civ. Code Art. 2221(3). In French law, the action is viewed either as an agency action or as *gestion d'affaires* (unauthorized agency in the Ethiopian Code), depending on whether the codebtor relationship arises contractually or by law. *See* Planiol et Ripert, *op. cit.*, vol. VII, § 1092. It is probably equally suitable to view the latter case as one of legal representation, *see* Eth. Civ. Code Art. 2179. For our purposes here the exact nature of the action is immaterial, as Art. 2264(3) applies to unauthorized agency the same rule contained in Art. 2221(3).

20. Eth. Civ. Code Art. 2221(3) or 2264(3), in conjunction with Art. 1751.

a co-debtor's claim, the action is viewed as being in the nature of an agent's action, and bears interest from date of payment, without the necessity of a notice of default to the primary debtor.[21]

Subrogation, accorded under Arts. 1971 (a) and 1944, once more provides the payor with a second action. Which action the payor will prefer depends on the particular circumstances. In the example given, the guarantor will prefer the personal action, which will bear interest at the legal rate of 9% from the date of payment, while the creditor's action would at best bear interest at 9% from notice of default, and might be interpreted as entirely interest-free. Similarly, the payor might prefer the personal action for statute of limitions reasons: the limitatation period may already have run on the creditor's action, but not on the personal action, which only arose on the date of payment. But frequently the subrogated action will be preferable: it may bear interest at more than 9%, it may be furnished with real securities, or there may be other special advantage in action from the creditor's position.[22]

2. Payments by a person who is owner of a property or who enjoys the right of lien, mortagage or pledge.[23] If a payor who is himself *owner* of certain property, or *who enjoys a security interest* (right of lien, mortgage or pledge) in certain property, pays a creditor who enjoys a security interest in the same property, Art. 1971 (b) accords him subrogation to the paid creditor's rights to the extent of the amount paid. This is a particularly clear example of our previous statement that legal subrogation is allowed principally in those cases where the payor in question has a strong interest in extinction of the other person's debt. In many cases, the payment may be made to prevent the creditor from proceeding against the property, in which the payor also has an interest, after the debtor has defaulted.

Suppose, for instance, that B and B_2 are joint owners of a certain piece of land. Now suppose B, in order to obtain a loan, has mortgaged his share of the land to secure the loan.[24] Now he defaults on the loan. Execution on the mortgage by B's creditor may be very inconvenient to B_2, who wishes to continue to use the land as an undivided area, or it may result in a sale at an artificially low price. In other words, he may be seriously prejudiced by the creditor's action, although the debt secured is not his own. Accordingly, if he moves to pay the creditor, Art. 1971 (b) accords him, as a matter of law, subrogation against his joint owner to the extent of the amount paid, to secure his eventual recovery. Art. 1971 (b) is also given more specific application by special provisions of the Code. For example, consider a person who holds a "second mortgage," that is, a mortgage

21. *See* Planiol et Ripert, *op. cit.*, vol. XI, § 1540.

22. Suppose, for example, that there are codebtors, B_1 and B_2, and one of them, B_1 has been guaranteed by C. If C had guaranteed both B_1 and B_2, he would have personal recourse against both. But if he guaranteed only B_1, he also has personal recourse only against B_1 even though he may be required to pay the entire debt. By virtue of his subrogation to the *creditor's* right, however, he may proceed against *either* B_1 or B_2 (or both) for the full amount he has paid. The above is a statement of the French law, *see* Planiol et Ripert, *op. cit.*, vol. VII, §1092. The Ethiopian code does not specifically deal with the issue, but as it contains provisions identical to those of the French code from which the above result is derived, the result will likely be similar.

23. For a discussion of the French law, *see* Mazeaud et Mazeaud, *op. cit.*, §855; Planiol et Ripert, *op. cit.* §1230.

24. This is allowed by Eth. Civ. Code Art. 1260, although B_2's consent will be required, Eth. Civ. Code Art. 1266.

second in priority to another mortgage. To preserve his own mortgage, the second mortgagee may wish to pay off a first mortgagee who is about to proceed against the property.[25] Should he do so, he will, under Art. 1971 (b) and Art. 3083(2), be subrogated to the rights of the creditor he has paid.

Art. 3083 (2) deserves careful comparison with the general provision, Art. 1971 (b). Art. 3083 only subrogates a mortgagee making payments to creditors having priority. This is in accord with French Civil Code Art. 1251. But this is a restriction not contained in Art. 1971 (b). There is no reason that Art. 1971 (b) should not be applied to allow, for instance, a first mortgagee to remove a second mortgagee who is threatening foreclosure.[26] The limitation required by French Civil Code Art. 1251 al. 1, and incorporated in Eth. Civil Code Art. 3083, has been criticized in France;[27] it can and should be avoided in Ethiopian law by direct application of Art. 1971 (b).

In another respect both Art. 3083 and Art. 1971 (b) represent narrower rules than Art. 1251 al. 1 of the French Code. Art. 3083 grants subrogation in favor of mortgagees making payments, while Art. 1971 (b) grants subrogation is favor of owners or secured creditors making payments; Art. 1251 (1) of the French Code more broadly allows subrogation of any creditor (thus even an unsecured creditor) making payment to a creditor enjoying preference over him. A similar provision for legal subrogation cannot be found in Ethiopian law.[28]

3. Cases provided by law. — A third subsection of Art. 1971. simply provides that legal subrogation shall also occur "whenever the law so provides." The law might so "provide" either in the Codes, or by expansive interpretation extending the present Code provisions to cases where similar considerations exist, or in special legislation. To date, only the first of these three possibilities need be considered.

Article 1059 appears to introduce a limited version of the French principle of subrogation accompanying payment of the debts of a succession.[29] The Ethiopian provision accords subrogation only to a special legatee; payments by persons succeeding by universal title are apparently not afforded subrogation.

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25. At first it may seem strange that a second mortgagee would act in this manner, increasing the amount owed him by a doubtful debtor. But suppose a piece of land is subject to a $10,000 first mortgage, and a $5000 second mortgage. The second mortgagee estimates that under prevailing conditions, a forced sale of the land will bring just $10,000, leaving no surplus for him. Then he may choose to pay off the first mortgagee, and be subrogated to his rights, in the hopes of a later sale of the land at a more favorable price, or an improvement in the debtor's position.

26. Here also, one may at first wonder what interest the first mortgagee has in doing so: surely, if a second mortgagee is proceeding against the property, he is doing so in the expectation that the sale price will be sufficient to give him at least partial satisfaction. And this of course would mean that the first mortgagee could be paid in full. This objection is correct so far as it goes. But it neglects the fact that lenders are often closely entwined in their borrower's affairs and may therefore have extrinsic interests in seeing that those affairs are not disrupted.

27. *See* A. Weill, *Droit civil: les obligations* (Precis Dalloz, 1971), p. 942.

28. Also, despite the similarities between mortgage and pledge, there is no provision in the pledge sections of the Code dealing with payment with subrogation. Art. 1971(b) does of course apply. Art. 2848 in the pledge sections, "subrogation to property rights" does not concern payment with subrogation; it is an instance of real subrogation; *see* n. 1, *supra*. Further examples of the application of Art. 1971(b) are found in Arts. 3095 and 3097.

29. French Civil Code Art. 1251 al. 3.

A further instance of subrogation, and one of great importance, operates with respect to insurance against damages. Under Art. 683 of the Commercial Code, an insurer paying damage claims will be subrogated to actions against third parties liable for the damage.[30] Maritime Code Art. 323 embodies a similar principle where there may be claims against third parties under the special "general average" principles of marine insurance. Interestingly, Art. 690 of the Commercial Code *prohibits* subrogation clauses (let alone legal subrogation) in contracts insuring persons. There is no clear justification for such a prohibition in the case of accident or health insurance policies, where the subrogation of the insurer could substantially reduce premiums—a benefit which would encourage wider coverage and presumably has more social utility than conferring windfall cumulations of benefits.[31]

B. Contractual subrogation

Where the law does not accord subrogation to the payor, it may still occur as a matter of agreement between him and either the creditor or the debtor. In both instances, its utility is as a means of allowing the parties to "refinance" performance.

1. Subrogation by the creditor.—[32] Suppose that A has borrowed $ 5000 from B, which is to be repaid in full by December 31. This loan bears interest at 10% per annum, and is secured by a mortgage on A's land. Now suppose that B himself desires payment earlier, perhaps in September. He cannot require A to make this payment, and A may be unwilling to do so voluntarily if he still requires funds himself. But C, a third party, might be happy to make this payment to B, if he could in turn be assured of receiving the payment of principal and interest. Subrogation by the creditor allows this: the subrogated payor then "stands in the shoes" of the original creditor, and may exercise both the primary claim to the debt and the accessory security interest provided by the mortgage. B is benefited, because he is able to receive payment immediately, as he desired; C is provided the opportunity of lending at terms he considers advantageous; A, on the other hand, is not prejudiced: neither what he owes nor the time that it will be due has been changed. Only the person of the creditor is different.

Under Art. 1968, a creditor who is paid by someone other than the debtor is always free to subrogate the paying party to the creditor's rights against the debtor.[33]

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30. A distinction should be drawn between this legal subrogation and a "subrogation clause." Under earlier French law, legal subrogation was not accorded, and contractual subrogation clauses were held to effect an assignment, not subrogation. The insurer's recovery against a third party was therefore not limited to the extent of his payment to the insured. (A full discussion of the differences between subrogation and assignment appears *infra*, text at n. 52). French law now accords legal subrogation; moreover, this is a mandatory provision which is held to prohibit assignment. *See* Planiol et Ripert, *op. cit.*, vol. XI, §1347.

31. It is possible to argue that the insured "expects" a cumulation of benefits because he has "paid for them." Of course, if a rule allowing subrogation were adopted, premiums would be adjusted so that the insured would *not* pay for the right to cumulative benefits. In that case, while the "expectation" might still exist, it is unclear that it is one deserving the law's protection.
Similar questions may be raised concerning the apparent absence of subrogation provisions in the government's pension plans. See Public Servants' Pension Decree, Decree No. 46 (1961) as amended, Public Servants' Pensions Declaration, Proc. No. 209 (1963).

32. *See generally* Mazeaud et Mazeaud, *op. cit.*, vol. II, §§846-49; Planiol et Ripert, *op. cit.*, vol. VII, §§1221-23.

As this is a matter of agreement between the creditor and the payor, however, the creditor is likewise free to refuse subrogation.[34]

Art. 1968 (2) imposes two conditions upon subrogation by the creditor: it must be *express* and it must be *effected at the time of payment*. Both conditions parallel those of Art. 1250 al. 1 of the French Civil Code.

a. **"Express."**— The requirement that subrogation be express is meant to preclude the courts from inferring, simply from the circumstances surrounding a payment, that the creditor has subrogated the person who paid him to the original creditor's rights against the debtor.[35] Normally, a court is free to imply the intention of a contracting party from such circumstances: subrogation is one of several instances where the Code requires more direct proof.[36] In practice, in the area of subrogation, the result is to require unequivocal words.

If the words employed by the parties fail to establish intention to subrogate, the result may be to characterize the transaction as an assignment.[37] This makes the requirement that subrogation be express quite stringent, for there are few words which may be employed, other than "subrogate," which will indicate unambigously that subrogation rather than "assignment" is intended. This narrowness of terminology is already constricting in English and French; the wisdom and utility of the provision may be doubted when the further fact is considered that Amharic lacks at present words with the narrow technical meaning acquired over years by such words as subrogate in European languages. Application of the provision by the courts will therefore require delicate consideration for the forseeable future.

The requirement that subrogation be express should not be confused with a requirement that subrogation be effected in writing. No requirement of a writing is imposed.[38] Further, the two concepts are distinct and independent, so that the Code's requirement that the subrogation be "express" could be fulfilled by an oral, as well as a written agreement, and, conversely, a written agreement will only suffice when it shows the "express" intention to subrogate.

b. **"Effected at the time of payment"**— By its terms, the second requirement would only allow subrogation to occur simulataneously with payment.[39] In fact, however, the rationale of the requirement will be satisfied if it is only interpreted to preclude subrogation *after* payment, thus allowing subrogation to be agreed before, as well as at, the time of payment. Louisiana courts, interpreting Art. 2160

33. Eth. Civil Code Art. 1968:
    1. A creditor who is paid by a third party may subrogate him to his rights.
    2. Subrogation shall be express and effected at the time of payment.
34. While the creditor is free to do so, he is not likely to do so, since this will normally prevent his obtaining the immediate payment which has been offered.
35. For a discussion of *express* as opposed to *tacit*, see Planiol et Ripert, *op. cit.*, Vol. VII §105.
36. *See*, for other examples, Eth. Civ. Code Arts. 1685, 1740, 1827, 1922, 1977, 1981.
37. The differences which will result if an "assignment" rather than a "subrogation" is found to be present are discussed later, *see* text at n. 52 *infra*.
38. Nor does one exist in French law. *See* Planiol et Ripert, *op. cit.*, §1223.
39. At least one French writer seems to reach this conclusion: *see* A. Weill, *op. cit.*, p. 935. Other writers are ambiguous on this point, giving their attention only to the prohibition of subrogation *after* payment, and the rationale underlying it.

of the Louisiana Civil Code, also derived from and parallel to Art. 1250 of the French Code, have reached this result.[40]

This result is sound if the rationale of Art. 1968 and its precursors is considered. Normally, when payment is made, the obligation in question is extinguished thereby. Subrogation forms an exception to this rule, by allowing the debtor's obligation to continue to exist in favor of the subrogee, who takes the place of the original creditor. But conceptually, Continental lawyers could only allow this result if subrogation took place at the time of payment. Any later agreement would be ineffective, for how could B (the original creditor) and C (his subrogee) revive, by their agreement, an obligation on the part of A, whose original obligation had already been extinguished by C's payment? A prior agreement by B and C, however, that C will be subrogated to B's rights when, in the future, he makes payment, presents no such problem of "revival", and should suffice as a valid subrogation, even if there is no further mention of subrogation when payment is actually made.

It should be noted that the Code's requirement refers to when subrogation shall be *agreed*: according to most authors, it is possible to submit proof of a later date in support of the subrogation (as where, some days later, the parties reduce an oral agreement to writing), but naturally if a significant period of time elapses between the claimed date of subrogation and the date of the proof offered, the proof will be questionable.[41]

2. Subrogation by the debtor.[42] – Suborgation may also occur by agreement between the debtor and a third party who lends him money for the purpose of paying the debtor's creditor. Art. 1969.[43] This is an extraordinary institution by which the creditor's rights against the debtor are transferred to a third party, without the consent, or even against the will, of the creditor. Suppose B loans A $ 5000 at 10%, secured by a mortgage of A's land. Let us say that A is having difficulty meeting periodic payments to B, and B is unwilling to arrange more lenient terms. C, however, would be willing to lend money to B on more lenient terms, provided that he had security for its repayment. The only security A has to offer is his already mortgaged land. Under Art. 1969, if A borrows money from C and uses this money to pay his debt to B, he is entitled, by means of subrogation, to transfer B's rights, including above all the mortgage, to C, *without the consent of B.* As noted, this institution is extraordinary when viewed in terms of our normal concepts of consent: it is justified, however, by its extreme utility.[44]

40. John T. Hood, Jr. "Subrogation," in *Essays on the Civil Law of Obligations* (Dainow, ed., 1969), p. 179-80, and cases cited.

41. *See* Planiol et Ripert, *op. cit.*, Vol. VII, §1222.

42. *See generally* Mazeaud et Mazeaud, *op. cit.*, Vol. II, §§850-53; Planiol et Ripert, *op. cit.* Vol. VII, §§1224-26.

43. Eth. Civ. Code Art. 1969:
A debtor who borrows money or other tangible things to pay his debt may subrogate the lender to the rights to the creditor, even without the consent of the latter.

44. Note that its greatest utility comes from the fact that it allows not only a change in creditor but a change in terms of payment. For instance, a loan at 10% is paid off, and a new loan at 7% secured. Normally, a debt bearing interest is considered as an obligation where the term of payment benefit both debtor and creditor. Accordingly, in the absence of an express reservation on this point, prepayment would not be allowed without the consent of both parties. *See* Eth. Civil Code Arts. 2482, 1865-66. The creditor's consent is not likely to be forthcoming if, in the interim, the level of interest has been sinking. The great utility (to debtors) of subrogation by the debtor is thus to allow debtors to refinance their obligations taking advantage of the decline in interest rates. In capitalist terms, it may also be viewed as good because it stimulates competition among lenders.

If, in fact, the subrogation by the debtor takes place due to the debtor's use of borrowed funds to pay a creditor, as is envisaged by Art. 1969, there is no prejudice to other creditors of the debtor. Even though the subrogated lender may have priority over some of those creditors, this does not represent a new priority, but simply his substitution in the place of the original creditor who previously enjoyed a priority.

But subrogation by the debtor also poses a significant opportunity for fraud, and to avoid this danger, is submitted to rigorous formal conditions by Art. 1970.[45] Suppose in the previous case that A has actually already paid B, but now finds himself short of funds. Because he has already offered what real security he has to other creditors and lenders, he has little prospect of additional borrowings. Now, however, in conjunction with a potential lender, he agrees that in return for a loan, he will "subrogate" the lender to the rights of the creditor he has previously paid. By virtue of this "subrogation" the lender acquires the security of the previous creditor: more especially, he acquires the former's priority in time over other secured creditors who have since acquired claims. The agreement of subrogation between A and C is appropriately back-dated to the time of A's payment to B.

Fraud of this type is prevented, so long as it can be assured that the funds lent by C were in fact used by A to pay B, rather than representing borrowing for an unrelated purpose. And, in turn, this is achieved primarily by giving certain dates to the transactions in question. Accordingly, for subrogation to occur, the Code requires both the "instrument evidencing the loan" and the receipt for payment obtained from the creditor to have authenticated date.[46] The loan instrument must also include an express statement as to the intended use of the funds, and the receipt, as to the source of the funds. In distinction to subrogation by

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The institution defies our normal concepts of obligations, for it not only envisages the transfer by the debtor of the creditor's rights, but also alteration of the content of those rights through an agreement of the debtor and a third party. One may well wonder what group of debtors was powerful enough to achieve such distortions of normal principles in their favor: the answer—the French nobility of the early 17th century. Religious wars in Europe had driven interest rates up, and the nobility was heavily indebted. At the close of the wars, rates again fell. Henri IV, in a declaration of 1609, allowed the nobility to refinance their debts, and thus introduced this type of subrogation into French law. The formal requirements of Art. 1970 of the Ethiopian Code, and its precursor, Art. 1250 al. 2 of the French Code, both have their basis in a judgment of the Parlement de Paris on July 6, 1690 (Arrete des subrogations). *See* Mazeaud et Mazeaud, *op. cit.*, §851.
French writers stress the unusual fact that the debtor is allowed to transfer the creditor's right, without stressing independently the obvious fact that the object of the obligation is also altered. Historically, this is quite understandable, for the authorization to subrogate accompanied the authorization to prepay. However, the failure to distinguish clearly between the two authorizations has led to some lack of clarity.

45. Eth. Civ. Code Art. 1970:
(1) Subrogation by the debtor implies (sic) that the instrument evidencing the loan bears an authenticated date and that the use of the sum lent is expressly specified therein.
(2) The receipt for the loan shall bear an authenticated date and include an express statement that the payment was made by means of the borrowed money.
(3) The creditor may not refuse to include this statement in the receipt where the debtor so requires him.

46. The ways in which an instrument may acquire an authenticated date are determined by Art. 2015. In the case of subrogation, the normal manner will undoubtedly be "receipt" of the instrument by a "public officer," most likely a registrar in the court's notary office.

the creditor, an express statement that the debtor *subrogates* the lender to the creditor's rights is not required.[47] Such a statement is hardly necessary in view of the otherwise rigid formalities, which will hardly admit of another intention.

III. Effects

In the preceding discussion, many of the effects of subrogation have already been noted. It is only necessary to summarize them here, and to deal with a few special problems which arise.

Whatever the source of subrogation, the effects are the same. And all of these effects may be deduced from the fact that it is the creditor's right which the subrogee exercises, together with the liens, securities and other accessory rights attached to it.[48]

As a result, the subrogee will have a secured or unsecured right, depending on whether the original creditor had obtained securities; it will bear interest if it did in the hands of the creditor, and will not, if it did not. If the creditor was a merchant, and special rules of evidence were applicable to the debt in his hands, the same rules will apply to the debt in the subrogee's hands.[49] And the running of the statute of limitations will be in no way affected by the subrogation. From these consequences it can easily be seen that the subrogated right will often provide the subrogee with a better action than his personal action for reimbursement or indemnity; yet at the same time, particular circumstances, for instance, bar of the subrogated right by the statute of limitations, may make the personal action the more advantageous one.

A further result of the fact that it is the creditor's right which the subrogee exercises is that he may not exercise it "to the detriment of the creditor."[50] A partial payment therefore only entitles the subrogee to *pro tanto* subrogation; the creditor retains a full priority as to the unpaid balance.[51]

Article 1973 states the effects of both subrogation and assignment upon transfer of "liens, securities and accessory rights.". Since subrogation and assignment share this important effect, and since assignment, like subrogation by the creditor, occurs through the agreement of the original creditor and a third party, there has often been confusion about exactly what differences exist between the two concepts. In fact, there are numerous distinctions.[52]

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47. For commentary on the identical French provision, *see* Planiol et Ripert, *op. cit.*, §1225.
48. Eth. Civ. Code Art. 1973:
    (1) The subrogated creditor or the assignee of a right may exercise the liens, securities and other accessory rights attached to it.
    (2) He may not enter into possession of the thing received in pledge by the creditor without the consent of the pledger. (sic).
49. Correspondingly, the creditor has the duty to supply the subrogee with proof. Art. 1974.
50. Art. 1972 (1).
51. This specific result of the general language found in Art. 1972(1) follows French law, and is stated in Eth. Civ. Code Art. 1972(2). There is some feeling that a rule according the creditor full priority is excessive. *See* Aubry et Rau, *op. cit.*, vol. I, §321.
52. *See* Mazeaud et Mazeaud, *op. cit.*, Vol. II, §860; Planiol et Ripert, *op. cit.*, Vol. VII, §1245; De Page, *op. cit.*, vol. III, §554.

1. **Source.** – Assignment is essentially the sale or gift of a right by the original creditor to a third party, and as such requires the consent of the creditor. Subrogation, however, may occur in three ways, as noted, and always in connection with payment of the original debtor's obligation.

a. By the Consent of the creditor. – This is the case which most closely resembles assignment. But this type of subrogation must be *express* and *effected at the time of payment*. Assignment, on the contrary, can be inferred, and need not have any connection at all with payment (that is the discharge of the original debtor's obligation).

The requirement that subrogation be express means that in all doubtful cases, where the creditor's intention to transfer a right to a third party may be implied, or is even express, but there is no *express* declaration of *intention to subrogate*, the transfer must be treated as an assignment.

b. Legal subrogation. – This form may also sometimes resemble assignment, but the distinction will be clear if it is recalled that, in the cases specified by the Code, subrogation occurs *as a matter of law*, without any intention of the parties.

c. Subrogation by the debtor. – This form of subrogation, although consensual, resembles assignment the least. For here the consent of the debtor transfers the right of the creditor. This anomaly has already been commented upon, as have the strict formalities imposed.

2. **Effects.** – In addition to the differences in source and formal requirements for validity, there are also substantial differences in effect. Among these are:–

a. Rights transferred. – Frequently assignment is used as a mode of "discounting" obligations: that is, a credit with a face value of $100 may be transferred to an assignee in exchange for a $90 cash payment. For $10, the assignee assumes most of the risks of non-collectability, such as the debtor's insolvency. If he is able to obtain jurisdiction over the debtor, and the debtor is solvent, he will be able to obtain $100, notwithstanding that he paid only $90 for the credit.

Subrogation, however, operates differently: the subrogated person acquires a right to payment only to the extent that he has actually made payment. This principle, that a creditor may not "subrogate to his own detriment" (for instance, by transferring the whole credit in return for an only partial payment) is adopted by Art. 1972. As a consequence, the valuable economic function performed by the "discount assignment" may not also be served by means of subrogation: subrogation retains its primary character as a means of effectuating payment.

b. Priority - A second consequence of the same principle, stated explicity by Art. 1972(2), is that in the event of the debtor's insolvency, the original creditor has priority over his subrogee. For instance, consider a debt of $1000, $500 of which is paid by C, who takes in return a subrogation to B's rights against A. As a result of the first consequence above, C has only a right to $500, not a right to $1000. And as a result of the second consequence, this claim is subordinated to B's remaining claim for $500. Suppose that the debtor has become insolvent, and the debt is secured by a pledge of goods, worth, however, only $500. B will have the right to realize the pledge and receive $500 payment in full prior to C's being able to realize any amount from the pledge. Again, this result is at variance with the effect of a partial assignment, for in the latter case, both assignor and assignee compete on equal footing for available assets.

IV. Conclusion

Subrogation is one of the most useful doctrines of the law, and, as we have seen, is applicable in many different areas. It is also one of the most bewildering areas of the law when first confronted. Unfortunately, the subject's inherent complexities may even have been increased in Ethiopian law. This additional complexity results from two factors: one, the confusion existing between authorization to make payment and authorization to be subrogated; two, the close resemblence, but differences in result, between subrogation by the creditor and assignment. As to the first, it may perhaps be regreted that David did not simply choose to follow the French doctrine of French Civil Code Art. 1236, rather than formulating a new rule, the full consequences of which were difficult to foresee. It is unclear what has been gained by the alteration incorporated in Article 1740(2), and it is also unclear to what extent the draftsman held this alteration in mind as he fashioned other provisions. As to the second, since both subrogation by the creditor and assignment are consensual in nature, it is not clear why two separate institutions need be maintained by the law, at the expense of great complexity. One regime of suppletory rules would suffice, the parties naturally being free to fashion alterations. Considering the scope of the task before the draftsman in this area, however, these criticims may be classed as minor.